



Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2007/0070
Information Commissioner's Ref: FS 50091442

Freedom of Information Act 2000

Heard at Field House
on 10 & 11 January 2008,
and subsequently on the
papers on various dates

Decision Promulgated on: 8 August 2008

BEFORE

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN
Anisa Dhanji**

and

**LAY MEMBERS
Suzanne Cosgrave and Roger Creedon**

BETWEEN

THE SCOTLAND OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr Jonathan Swift, Counsel
For the Respondent: Mr Ben Hooper, Counsel

FREEDOM OF INFORMATION ACT 2000

SUBSTITUTED DECISION NOTICE

8 August 2008

Name of Public Authority: The Scotland Office

Name of Complainant: The Scotland Office

Nature of Complaint: That none of the information required to be disclosed by the Information Commissioner in the Decision Notice dated 28 June 2007 is liable to disclosure because the public interest in maintaining the exemption outweighs the public interest in disclosure.

Date of Decision Notice Substituted: 28 June 2007

Action Required: Within 20 working days from the date of promulgation of the Tribunal's determination, the Public Authority must communicate to Mr Lochhead:

- (1) the information set out in Annex B (subject to the redactions specified in Annex C); and
- (2) the information referred to in paragraph 95 of the Tribunal's determination.

Scope of Substituted Decision Notice: This Substituted Decision Notice relates to the information listed in Confidential Annex E to the Tribunal's determination. The hearing regarding the information referred to in paragraph 19 of the determination has been adjourned and is subject to directions made separately.

Signed

Date 8 August 2008

Anisa Dhanji

Deputy Chairman

REASONS FOR DECISION

Introduction

1. This is an appeal by the Scotland Office, against a Decision Notice issued by the Information Commissioner (“the Commissioner”), dated 28 June 2007. It relates to a request for information made by Mr. Richard Lochhead MSP, under the Freedom of Information Act 2000 (“FOIA”) in respect of the Scottish Adjacent Waters Boundaries Order (SI 1999/1126) (the “1999 Order”).
2. The 1999 Order determines those parts of the internal waters and territorial sea of the UK and of British Fishery limits which are to be treated as part of Scotland for the purposes of matters devolved to the Scottish Parliament.
3. The Scotland Office is part of the UK Government. It was created on 1st July 1999. In June 2003, it became a distinct entity, first within the Department for Constitutional Affairs, and later, in May 2007, within the Ministry of Justice. It should not be confused with the Scottish Office which was the UK Government Department with responsibility for administering Scottish affairs before devolution. The Scottish Office ceased to exist on 1 July 1999, and was effectively replaced by the Scottish Executive, i.e., the devolved administration in Scotland.
4. Although the Scotland Office is part of the Ministry of Justice for administrative purposes, it continues to report to the Secretary of State for Scotland. The Scotland Office has argued and the Commissioner now accepts, as we do, that since the Scotland Office has an identity distinct from the Ministry of Justice with specific responsibilities, it is properly to be regarded as a separate government department for the purposes of FOIA. The Commissioner also accepts that the Decision Notice should have been issued against the Scotland Office. In view of this, we accept as correct that the appeal against the Decision Notice has been brought by the Scotland Office, rather than the Ministry of Justice. The Scotland Office will be referred to hereafter as “the Appellant”.
5. The requester, Mr Lochhead was, at the time of request, and still is, a Member of the Scottish Parliament. He sits as a Scottish National Party MSP. Since May 2007, he has been a senior member of the devolved Scottish Government, as Cabinet Secretary for Rural Affairs and Environment.

The Request for Information

6. Mr Lochhead’s request, made on 9 March 2005, was on the following terms:

Scottish Adjacent Waters Boundaries Order (SI 1999/1126)

“Under the Freedom of Information Act, I would be grateful if you could send me copies of all the relevant government papers and correspondence between UK Ministers and also between the UK Government and both the Scottish Executive and former Scottish Office in connection with the above mentioned.”

I also request copies of any advice received by the UK Government in relation to this matter.

I would be grateful for all such communications from both prior to and following the decision to establish the boundary of the fisheries zone.”

7. The Appellant responded on 4 April 2005. It said it was withholding the information on the basis of the following FOIA exemptions:
- Section 35(1)(a): the formulation or development of government policy;
 - Section 35(1)(b): ministerial communications; and
 - Section 42(1): legal professional privilege,

It went on to say that it considered that in all the circumstances, the public interest in maintaining these exemptions outweighed the public interest in disclosure.

8. Mr Lochhead requested an internal review of the Appellant’s decision. On 16 May 2005, the Appellant informed him that the outcome of its internal review was that:
- It had complied with its responsibilities under FOI, including as regards timeliness and the duty to advise and assist;
 - The exemptions cited had been properly applied; and
 - Disclosure of the requested information remained against the public interest.

The Complaint to the Commissioner

9. On 27 September 2005, Mr. Lochhead complained to the Commissioner. The Commissioner undertook inquiries, during the course of which the Appellant accepted that its response to Mr. Lochhead, both initially and at the internal review stage, was not as comprehensive as it should have been. In correspondence between the Commissioner and the Scotland Office, a further exemption was raised, relating to information the Scotland Office considered was reasonably accessible to Mr Lochhead under section 21.
10. The Commissioner issued a Decision Notice dated 28 June 2007, setting out his findings as follows:
- a) insofar as the information requested comprised legal advice, it was exempt under section 42(1);
 - b) insofar as the information requested comprised correspondence between civil servants, it was exempt under section 35(1)(a);
 - c) insofar as the information requested comprised submissions and advice from civil servants to Ministers, section 35(1)(a) was engaged, but the information should be disclosed because the public interest in maintaining the exemption did not outweigh the public interest in disclosure; and

- d) insofar as the information requested comprised ministerial correspondence, section 35(1)(b) was engaged, but the information should be disclosed because the public interest in maintaining the exemption did not outweigh the public interest in disclosure.
11. The Commissioner identified 18 documents as containing information coming within the scope of paragraphs (c) and (d) above. It listed these in a letter to the Appellant, dated 28 June 2007 and identified which of these documents it considered came within the scope of section 35(1)(a) and which within 35(1)(b).
 12. The Commissioner also found that the Appellant was in breach of section 17 because it had not provided an adequate explanation for why the exemptions relied on applied. In particular, it had not informed Mr. Lochhead what information it considered section 21 (information accessible through other means) applied to.

The Scope of the Appeal to the Tribunal

13. The Appellant appealed to the Tribunal on the basis that none of the information was liable to disclosure because the public interest in maintaining the exemption outweighed the public interest in disclosure. There has been no cross-appeal by Mr Lochhead. Accordingly, the Commissioner's findings as set out in paragraphs 10(a) and (b) above, stand unchallenged, and this appeal only concerns the information which the Commissioner has required to be disclosed as set out in paragraphs 10(c) and (d) above.
14. The Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
15. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

The Scope of this Determination

(1) The two stage approach

16. A particular feature of this appeal has been the changing landscape as to precisely what information is in issue. This has been a function of several things: (1) the ongoing disclosure by the Appellant of additional documents coming within the scope of the request; (2) the Appellant having revised its position as regards which information it claims is exempt; and (3) the Appellant having revised its position about whether certain information comes within the scope of the request at all.
17. The first of these has proved to be the most problematic. It is now clear that the Appellant holds a far greater number of documents containing relevant information

than the ones it had identified when it responded to the request from Mr Lochhead. Some further documents were disclosed during the course of the Commissioner's investigations. Other documents were brought to the Appellant's attention by the Tribunal, at the hearing, because they had been provided by the Appellant in the evidence bundle. The majority of the further documents, however, were disclosed after the oral hearing and even then, in stages. This on-going disclosure has caused considerable difficulty, as well as wasted time and resources.

18. The Tribunal has decided, after hearing submissions from both parties on the matter, that this appeal should be determined in two stages. Stage 1, which is this determination, deals with the information which was addressed in the Decision Notice (in respect of which we heard evidence and submissions at the oral hearing), as well as the information in the additional documents which were dealt with by evidence and written submissions after the hearing, pursuant to Directions dated 6 February 2008. The documents containing the information covered by the Stage 1 determination are listed in Annex E. (Although Annex E is to remain confidential (see paragraph 43 below), for consistency, we will refer, in this determination and accompanying Annexes, to the documents in issue by reference to the same numbering as used in Annex E.)
19. Stage 2 will deal with all the other information identified by the Appellant subsequent to the above. As at the date of this determination, the indications are that some 91 further documents have been identified. Directions have been made to deal with the Stage 2 documents. It is anticipated that there will need to be a further hearing, to be followed by a further determination. It is hoped that the Tribunal's Stage 1 determination will be of assistance to the parties in resolving or narrowing the Stage 2 issues.
20. Having regard to the matters referred to in paragraphs 16, 17, 22 and 23, we have put the Appellant on notice that the Tribunal may want to consider awarding costs against it. However, that is an issue best addressed at Stage 2, when the full extent and impact of the late disclosures is known.

(2) Information which is no longer the subject of this appeal

21. During the Commissioner's investigation, the Appellant identified some additional documents as being relevant to Mr. Lochhead's request which were already in the public domain and provided these to him. These documents are not, therefore, in issue in this appeal, although by not providing the information to the Appellant or invoking the exemption under section 21 within the required period, the Appellant is in breach of section 10 and/or 17.
22. Shortly before the oral hearing, the Appellant acknowledged that 4 of the 18 documents required by the Commissioner to be disclosed, are not in fact exempt. These documents are:
 - (3) a letter dated 17th February 1998 from the Secretary of State for Scotland to the Lord Chancellor;
 - (15) a briefing note dated some time in February 1999;
 - (16) a briefing provided for the Secretary of State for Scotland dated 18th March 1999; and

(18) a briefing provided for the Secretary of State for Scotland dated 23rd June 1999.

23. The Appellant has now provided Mr Lochhead with copies of these documents. Although no explanation has been provided as to why any exemption had been claimed in respect of these documents, these documents are no longer in issue in this appeal. Here too, however, the Appellant has been in breach of section 10.

Issues for Determination by the Tribunal

(1) Whether certain information comes within the scope of the request?

24. The first issue we must address is whether certain of the information comes within the ambit of Mr. Lochhead's request at all. At the hearing, the Appellant said that it was now of the view that 7 of the 18 documents which the Commissioner had required to be disclosed (and which we understand the Appellant had provided to the Commissioner as being relevant to the request), do not in fact contain information covered by the request. The Appellant could not say why it had previously considered that these documents did come within the scope of the request, but suggested that perhaps all the documents in certain files were thought to fall within the scope of the request, without individual documents being assessed. The Commissioner asserts that the information in these 7 documents does in fact come within the scope of the request. It falls to the Tribunal, therefore, to determine whether the information is covered by the request.

(2) The public interest test under section 35

25. The second and indeed the key issue before the Tribunal, is whether the information coming within the scope of the request is exempt under sections 35(1)(a) and/or 35(1)(b). These are the only exemptions being relied on. The Appellant has not invoked section 28 (relations within the United Kingdom), nor section 36 (prejudice to effective conduct of public affairs).

26. Both parties accept that sections 35(1)(a) and/or 35(1)(b) are engaged in each case. What they disagree on, and therefore what we must determine, is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (the "public interest test").

27. When refusing the requests, the Appellant did not identify which exemption as between sections 35(1)(a) and/or 35(1)(b), was being relied on in each case. We asked the Appellant to clarify this and it has said that it relies on both sub-sections, except for the information in document 17, in respect of which it relies only on section 35(1)(a). If and to the extent the test is different under section 35(1)(a) from 35(1)(b), when applying the public interest test, we will also need to determine whether the information comes within the scope of section 35(1)(a) or 35(1)(b), or indeed both.

The Evidence

(1) Witnesses

28. The Commissioner did not call any witnesses. The Appellant called three witnesses:

- Professor Jim Gallagher, Director General, Devolution, at the Ministry of Justice. He was appointed to that post in September 2007. He has served in a number of positions in the Scottish Office. He was Private Secretary to successive Secretaries of State for Scotland from 1989 to 1991. Between 1991 and 1996, he was Director of Human Resources in the Scottish Prison Service. From 1999 to 2000, he worked as Deputy Head in the Economic and Domestic Secretariat in the Cabinet Office and then as a member of the Prime Minister's Policy Unit. Between 2001 and 2005, he was Head of the Scottish Executive's Justice Department. He is also a Visiting Professor of Government in the Law School at Glasgow University where he specialises in the study and teaching of public policy;
- Mr. David Middleton, a civil servant who is the Head of the Scotland Office; and
- Mr. Simon Toole, a civil servant employed by the Department of Business, Enterprise and Regulatory Reform ("BERR") (formerly the Department of Trade and Industry) ("DTI") as their Director of Oil and Gas Licensing, Exploration and Development. He has had responsibility for oil and gas issues within BERR since 1997.

29. In accordance with directions made prior to the hearing, each witness had submitted one or more witness statements which he adopted at the oral hearing as his evidence in chief. A supplementary statement from Mr Middleton was served at the start of the hearing. The witnesses were cross-examined and re-examined and we also asked them a few questions. They gave evidence in open and/or closed sessions. Subsequent to the oral hearing, further witness statements were submitted from all three witnesses pursuant to Directions dated 6 February 2008 in respect of the additional documents submitted after that hearing.
30. We have not summarised here the evidence given by the witnesses, but have of course considered their evidence and will refer to it as appropriate when setting out our findings. We record here our appreciation for the assistance the witnesses have provided to the Tribunal. We also record for completeness, that in the interests of ensuring consideration of all the relevant evidence, we gave Mr Swift leave to ask a number of supplementary questions in chief of all three witnesses, even where this ventured into areas outside the scope of the witness statements. However, we drew the line on questioning of Mr Toole in re-examination in respect of certain additional notes Mr Toole appeared to have made, when it was apparent that although Mr Swift was aware that Mr Toole had made some notes, he did not know what the notes contained, nor their relevance to the issues in this appeal.

(2) The 1999 Order

31. It may be helpful if we set out, at this point, a brief explanation about the 1999 Order, to the extent relevant to this appeal.
32. The Scotland Act 1998 (the "1998 Act") made provision for devolution in Scotland by establishing a Scottish Parliament and Scottish Executive. The Scottish Executive which came into being on 1 July 1999, is responsible for all matters devolved to it under the 1998 Act, including health, education, justice, rural affairs

(encompassing fisheries, agriculture and the environment), and most transport issues.

33. By section 29(2) of the 1998 Act, an Act of the Scottish Parliament is outside its legislative competence if, among other things:

- “(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland, [or]
- (b) it relates to reserved matters...”

34. The reserved matters are defined in Schedule 5 to the 1998 Act. Part II of Schedule 5 reserves, among other things, the regulation of sea fishing “outside the Scottish zone”.

35. Thus, the term “Scotland” determines the extent of the devolved powers of the Scottish Parliament and Executive, and the term “Scottish zone” determines the extent of devolved powers to regulate sea fishing.

36. “Scotland” and “the Scottish zone” are defined in section 126(1) of the 1998 Act. “Scotland” is defined to include “so much of the internal waters and territorial sea of the United Kingdom as are adjacent to Scotland”. However, the 1998 Act does not itself define what is “adjacent to Scotland”. The “Scottish zone” is defined as “the sea within British fishery limits (that is, the limits set by or under section 1 of the Fishery Limits Act 1976) which is adjacent to Scotland”. However, here, again, the relevant boundary is not itself identified.

37. In other words, the maritime boundaries are not defined in the 1998 Act. Instead, section 126(2) of the 1998 Act, provides for Scotland’s maritime boundary to be determined (for certain purposes), by way of an Order in Council. Section 126(2) states as follows:

“(2) Her Majesty may by Order in Council determine, or make provision for determining, for the purposes of this Act any boundary between waters which are to be treated as internal waters or territorial sea of the United Kingdom, or sea within British fishery limits, adjacent to Scotland and those which are not.”

38. The relevant Order in Council is the 1999 Order. It establishes maritime boundaries for two purposes under the 1998 Act. It determines the boundaries between waters which are to be treated as internal waters or territorial sea of the UK adjacent to Scotland and those which are not (Article 3), and the boundaries between waters which are to be treated as sea within British fishery limits adjacent to Scotland and those which are not (Article 4).

39. Between the end of 1997 and the date it was laid before Parliament, there were various communications within Government outlining the proposed 1999 Order and eventually seeking agreement to it. This included both advice to Ministers and Ministerial communications. Certain of these communications constitute the disputed information in issue in this appeal.

40. On 8 March 1999, the 1999 Order was laid in draft before Parliament. It was approved by both Houses following a debate by MPs in a Commons Standing Committee on delegated legislation on the 23 March 1999, and in the House of Lords on the same day. It came into effect on 13 April 1999, following approval by the Privy Council. There had been no prior public consultation. However, a draft of the Order was published in 1998 and a press release was issued explaining the terms of the 1999 Order.
41. On 3 June 1999, following a campaign of opposition by the Scottish fishing industry, the 1999 Order was debated in the Scottish Parliament. The Scottish Parliament approved a “take note” motion after amending it to commit the Scottish Executive to improved consultation with the fishing industry. This had no legal effect on the 1999 Order. The Scottish Parliament returned to the issue in April 2000 when it debated its own Rural Affairs Committee report into the impact of the Order. Again this was simply a “take note” debate.

The Confidential Annexes

42. This appeal has been conducted so as not to disclose the disputed information pending either compliance with this determination or a successful appeal. For this reason, our findings in relation to the disputed information are set out in Confidential Annexes as follows:
- Annex A: whether certain information comes within the scope of the request;
 - Annex B: the information that we find is not exempt (subject in some cases to redactions as specified in Annex C);
 - Annex C: the redactions to be made; and
 - Annex D: the information that we find is exempt.

The documents containing the disputed information are listed in Annex E.

43. If there is no appeal or no successful appeal, it is intended that:
- Annexes A and B will be published; but
 - Annexes C, D and E will remain confidential.

Findings and Reasons

Whether certain information comes within the scope of the request

44. As already noted, there are 7 documents containing information which the Appellant now says do not fall within the scope of the request. These documents are described in Annex A, where we have also set out our findings, in each case, as to whether the information they contain comes within the scope of the request. For the reasons set out there, we find that all the information, except that contained in document (17), comes within the scope of the request.

The Public Interest Test

(1) The Legislative Framework

45. Under section 1 of FOIA, any person who has made a request for information to a public authority is entitled to be informed if that public authority holds that information, and if it does, to be provided with that information. Under section 2, the duty on a public authority to provide the information does not arise if the information is exempt under Part II. The exemptions are either qualified or absolute. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)). Information that is subject to an absolute exemption is exempt regardless of the public interest considerations.
46. The parties say, and we agree, that the appeal falls to be determined under FOIA, not the Environmental Information Regulations 2004.. The 1999 Order does not itself have an environmental impact; it simply establishes boundaries within which the Scottish Parliament has legislative competence for certain purposes.
47. The only exemptions invoked in this case are those contained in section 35(1)(a) and (b). Insofar as is relevant, section 35 provides as follows:

‘(1) Information held by a government department ... is exempt information if it relates to:

- a) the formulation or development of government policy,*
- b) Ministerial communications,*
- c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or*
- d) the operation of any Ministerial private office.’*

48. “Ministerial communications” is defined in section 35(5) (as amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007)), as meaning any communications:

- (a) between Ministers of the Crown,*
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or*
- (c) between members of the Welsh Assembly Government,*

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly and proceedings of the Cabinet or any committee of the Welsh Assembly Government .”

49. Section 35(1) is a qualified exemption and therefore, it is subject to the public interest test in section 2(2)(b). It is purely a class based exemption. It is not necessary, therefore, to show that any harm would arise from the disclosure.
50. The exemptions in section 35(1) apply where the information “relates to” the matters set out in the sub-sections, so information is exempt if it relates to the formulation or development of government policy in the case of sub-section (a), or relates to Ministerial communications, in the case of sub-section (b). This means, that the information in question does not have to be, for example, Ministerial communications; it comes within the scope of the exemption if it “relates to” Ministerial communications. We mention this for completeness; nothing turns on it for the purposes of this appeal, and in particular, the parties do not dispute that in the context of this case, communications between a Private Secretary writing on behalf of his/her Minister and another Minister, constitutes Ministerial communications for the purposes of section 35(1)(b).
51. As we have already indicated, the parties accept that the disputed information engages the exemptions in section 35(1)(a) and/or 35(1)(b). The key issue in this appeal is how the public interest test applies to the disputed information. This requires us to consider what the correct approach is to applying the public interest test in the context of sections 35(1)(a) and (b), and whether there is any material difference in how it applies between the two sub-sections, and then to apply the test or tests on the facts and circumstances of this case. These issues will be the focus of the remainder of this determination.

(2) The public interest considerations as put forward by the parties

52. We have summarised below the parties’ positions as to the particular public interest factors that arise in this case. Since it is for the Appellant to demonstrate that the exemption should be maintained, we shall first examine its arguments against disclosure.

Ministerial Advice

53. The Appellant says, *inter alia*, that:
- There is a strong public interest in ensuring that Ministers receive full and frank advice. For practicality, clarity and quality, and the provision of a proper record, such advice will normally be in writing. If Officials think that their advice will be disclosed, written submissions will become bland and empty documents, and Ministers will be forced to seek oral advice which will undermine the decision-making process and will lead, inevitably, to a loss of rigour and precision. Written advice will then not be available to inform future deliberations or historical consideration.
 - Inappropriate disclosures of advice of civil servants to Ministers would undermine the convention of individual ministerial accountability. Officials must be confident that they can give candid advice to Ministers, while leaving accountable decision-making to the Minister.

- Inappropriate disclosure of advice would also undermine the impartiality of the civil service. Civil servants would become publicly associated with unpopular or controversial Ministerial policies with the result that they would no longer be seen as politically neutral and may not be able to command the confidence of future Ministers.
- In addition, inappropriate disclosure would also inhibit Officials who need to be confident that the advice they have given to one Administration will not prejudice their standing with successor Administrations. The established convention that Ministers of a current Administration may not generally see the documents of a former Administration of a different political party, helps to achieve this. As regards the disputed information specifically, the advice that was given to Ministers was, in many cases, drafted by or copied to Officials in divisions of the then Scottish Office. The policy areas and relevant Officials have been devolved to the Scottish Executive. Therefore, Officials who worked for a Labour Administration in the United Kingdom Government will now work for a Scottish National Party led Administration in Edinburgh. The Labour Party and the SNP are electoral rivals. However the Officials who work for the United Kingdom Government and those who work for the Scottish Executive are all members of the United Kingdom Civil Service and are all bound by the Civil Service Code. They are obliged to work for and give candid advice to the party in power, regardless of the fact that they worked in the past for Ministers of a different party. In the future they may have to advise Administrations led by other parties.
- At the time of the request, the documents relating to the 1999 Order were still relevant to other policy deliberations then underway.

54. The Commissioner says, *inter alia*, that in addition to the strong public interest in knowing that policy decision-making is based upon the best advice available, and full consideration of all the possible options, the following factors in this case favour the public interest in its release:

- The 1999 Order is of clear public importance given its function in determining the scope of the devolved powers under the 1998 Act.
- The information consists largely of advice based on the outcomes of intra-departmental discussions put to Ministers for approval or information, rather than details of those discussions themselves.
- The information is more formal in presentation and content than the communications between Officials (which the Commissioner held was exempt).
- The information is less sensitive in nature than the communications between Officials.
- The information does not contain the personal opinions of Officials, nor does it contain internal differences of views.

- The information provides the evidence upon which Ministers defended/justified the 1999 Order.
- Disclosure of the advice would assist the public's understanding of the rationale behind the policy and enhance public participation and debate on policy issues.

Ministerial Communications

55. The Appellant says *inter alia* that:

- Disclosure would undermine the convention of collective Cabinet responsibility (the Appellant's arguments in this regard are set out in more detail at paragraph 81 below).
- Inappropriate disclosures would also narrow the circle of persons involved in policy decisions and would likely result in more informal and inadequately documented decision-making processes. This danger is particularly evident when one looks at the impact of leaks on government policy. Leaks narrow those involved in decision making, and undermine Cabinet government. The obvious danger is that decisions may no longer be taken through the proper formal processes of government. For instance, over a period of 18 months starting in 2004, over 50 documents comprising minutes and correspondence of Cabinet Committees were leaked to the Sunday Times. Ministers were extremely concerned about the impact of those leaks. The immediate result was that Cabinet Committee papers and correspondence were withheld from colleagues, or shared with only a very small group to minimise the risk of further leaks.

56. The Commissioner says the public interest favours disclosure for, *inter alia*, the following reasons:

- Ministers are accountable for the decisions they make and the disputed information would increase the public's understanding of Ministers' views that underpin their decision-making.
- In light of the time that has elapsed since it was produced, the disclosure of the communications in issue would not undermine the policy-making process, collective Cabinet responsibility, or inhibit the candour of future discussions of policy discussions across government.
- These communications were not of an intrinsically sensitive nature, even at the time they were first created. Also, sensitivity of information reduces with the passage of time.
- The review of the 1999 Order which was taking place at the time of the request in order to inform policy formulation by another government

department, does not influence the assessment of the sensitivity of these communications.

- The communications are interdepartmental, providing an insight into the views of departments as a whole, as opposed to debates between officials within departments.
- The communications are more formal in presentation and status than the correspondence between Officials and are less candid than the correspondence between Officials.
- The communications are more external facing than the correspondence between Officials and intended for a wider audience across government, as demonstrated by their circulation / distribution lists.
- Disclosure of the communications would aid debate and public understanding of the issues relating to water boundaries and the 1999 Order.
- The convention of collective Cabinet responsibility would not be significantly eroded by the disclosure of this information; the passage of time since the information was produced means that the desirability and need for collective responsibility reduces when balanced against the desirability of transparency and accountability. Also, there is an expectation of increased scrutiny of how government policy is formulated in practice, which FOIA is clearly designed to facilitate.

57. In response, the Appellant says, *inter alia*, (in respect of both Ministerial advice and Ministerial communications), that:

- The fact that advice to Ministers provides evidence upon which Ministers defended and justified the 1999 Order is not a factor in favour of disclosure. The justification and rationale for the Order, and the policy to which it gave effect, is contained in the explanation that Ministers gave to Parliament when the statutory instrument was debated. Advice and evidence presented to Ministers may be accepted in its entirety, accepted in part, or wholly rejected by them. The accountability of Ministers does not depend on the extent to which they did or did not accept the advice that particular Officials gave them.
- The fact that Ministerial Communications may be more "external facing" than the Officials' correspondence as demonstrated by the circulation and distribution lists for the ministerial correspondence, is also not a factor in favour of disclosure. Ministerial correspondence is written so that Ministers can reach agreement amongst themselves, prior to making, explaining, and being held to account for their decisions. The circulation and distribution lists are part of the process through which Ministers participate in collective decision making internal to Government. Officials facilitate that process. They do not demonstrate

that such correspondence is less confidential than communications between Officials (which the Commissioner found is exempt).

- The Commissioner took into account, in favour of disclosure, that Ministerial correspondence is more formal than correspondence between Officials. However, formality in tone and precision in expression do not mean that the correspondence is necessarily less candid, or is written for others outside of Government.
- The Commissioner considered that the passage of time in this case had significantly eroded the importance of protecting collective Cabinet responsibility. However, Parliament determined that information falling within the scope of the section 35 exemption is, potentially, exempt from disclosure for 30 years. Also, the communications in question were written during the lifetime of the current Administration.
- There is no factual basis for finding that disclosure of the disputed information would assist the public's understanding of the rationale behind the policy in respect of the 1999 Order. Also, accountability and transparency are not ends in themselves, and disclosure of information under FOIA is not the only means of realising those values.

(3) The Correct Approach to the Public Interest Test under Sections 35(1)(a) and 35(1)(b)

58. Before we seek to apply the public interest test to the disputed information, we will set out our views as to the correct approach to applying the public interest test in the context of sections 35(1)(a) and 35(1)(b).

Section 35(1)(a)

59. There are now a number of Tribunal decisions dealing with the application of the public interest test in relation to different qualified exemptions. ***DFES v The Information Commissioner and the Evening Standard (EA/2006/0006)*** ("DFES") was the first case specifically to consider the application of section 35(1)(a). This was followed very soon afterwards, by ***The Secretary of State for Works and Pensions v The Information Commissioner (EA/2006/0040)*** ("DWP"), also on section 35(1)(a). In both cases, differently constituted Tribunals offered guidance of general application to cases of qualified exemptions and section 35(1)(a) in particular. Neither decision was appealed.

60. Although each case must be decided on its own facts and we are not bound by other decisions of this Tribunal, we have found the guidance in these cases to be very helpful. We note that the High Court's decisions in ***Office of Government Commerce v the Information Commissioner [2008] EWCH 737 (Admin)*** ("OGC") and ***Export Credits Guarantee Department v Friends of the Earth [2008] EWCH 638 (Admin)*** ("Export Credits"), which of course are binding on us, approved the approach taken in both the DFES and DWP cases. Neither party to the present appeal invited us to find that these cases were wrongly decided or distinguishable from the present case. It is worth stressing, however, that these

cases do not lay down or purport to lay down a comprehensive set of rules for all section 35(1)(a) cases.

61. A number of the arguments advanced by the Appellant in the present case are the same or very similar to the arguments made by the public authority in the DFES case, in particular. For that reason, we will refer to the findings in the DFES case in some detail.
62. The request in that case was for certain Minutes of senior management meetings at DFES coming within the scope of section 35(1)(a). The public authority argued that the very fact that the information came within the scope of that exemption meant that there was inevitable damage to the public interest if that information was disclosed. The Tribunal entirely rejected that argument. The status of the Minutes and the fact they recorded meetings of the most senior Officials discussing a certain policy issue of public importance, was not in and of itself, a factor which supported non-disclosure. In the Tribunal's view, that would be tantamount to inventing, within section 35(1), a class of absolutely exempt information. The Tribunal emphasised that section 2(2)(b) requires a balancing exercise to be undertaken in every case.
63. Looking at the Minutes themselves, the Tribunal had no doubts that disclosure would cause little or no damage to current or future work, including to formulation of policy of the DFES. Also, the identification of individual civil servants in those Minutes would not prejudice them or their future role.
64. However, the Tribunal accepted that the introductory words in section 2(2)(b) "*in all the circumstances of the case*", required it to consider the indirect consequences of disclosure - here, the wider impact of disclosure of this kind of information on the conduct of government. The arguments advanced by the public authority in this regard had to do, *inter alia*, with (1) the importance of preserving confidentiality of policy discussions in the interests of good government (the "*safe space*" argument); (2) the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause (the "*chilling effect*" argument); and (3) the risk to the role and integrity of the civil service by, *inter alia*, identifying Officials with policies which were no longer in favour, thus alienating them from new political masters. These would all be grave consequences, undermining important constitutional safeguards and significantly altering the way in which the executive conducted its business. It would also impact record keeping. These are, of course, essentially the same arguments advanced by the Appellant in the present case.
65. In the DFES case, the Tribunal took the view that although frank debate, fearless advice, impartial officials, full record-keeping, and ministerial accountability, were all objectives clearly worth preserving, the real issue was whether and to what extent these objectives would be imperilled by disclosure in this case. The Tribunal found that in all the circumstances, the arguments in favour of maintaining the exemptions were tenuous at best. Disclosure would not damage the public interest to any measurable degree. To accept the evidence put forward by DFES would be to ignore the distinction between absolute and qualified exemptions and would exclude from public access, information as to how policy was agreed and developed, even where that policy had long since been discarded. On the other hand, although the information in issue was unlikely to be of major importance to any public debate on the subject matter of the Minutes in issue, the subject matter

was one of public concern, and there is always a general public interest in transparency and a better understanding of how Government tackles important policy problems.

66. In reaching its findings, the Tribunal set out a number of principles to guide decisions as to disclosure in these types of cases. We have set out, below, some of those principles which are of particular relevance to the present case.
67. As regards the argument that disclosure would make civil servants less likely to be open and frank in their advice or at least less likely to communicate such advice in writing, the Tribunal had this to say:

“In judging the likely consequences of disclosure on officials’ future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants..... These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department’s position, whether or not it is their own.”

The Tribunal accepted, however, that there may be good reason, in some cases, for withholding the names of more junior civil servants who would never expect their roles to be exposed to public gaze, but stressed that that was a question to be decided on the particular facts of a case, not by a blanket policy.

68. The Tribunal also expressly recognised the importance of maintaining the constitutional position that Ministers, not civil servants, are answerable to Parliament and the public for the actions of their departments, and that officials should be able to have robust and honest discussions with their Ministers without fear of adverse consequences for their careers. However, it considered that:

“... we are entitled to expect of our politicians, when they assume power in a government department, a substantial measure of political sophistication and, of course, fair-mindedness. To reject or remove a senior official because he or she is identified, thanks to FOIA or for any other reason, with a policy which has now lost favour, whether through a change of administration or simply of minister, would plainly betray a serious misunderstanding of the way the executive should work.....We should proceed on the assumption that ministers will behave reasonably and fairly towards officials who promoted – or are believed to have promoted policies which the new incumbent rejects.”

69. Where the exemption is to be maintained, the purpose of confidentiality is the protection from compromise or unjust public opprobrium of civil servants, not Ministers. The Tribunal put it thus:

“There is no unfairness in exposing an elected politician, after the event, to challenge for having rejected a possible policy option in favour of a policy which is alleged to have failed.”

70. The Tribunal also stressed that the timing of a request is of particular importance. Disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within Government. As a general rule, the public interest in maintaining an exemption diminishes over time.
71. The Tribunal considered that it should not be deflected from ordering disclosure on the basis that Minutes might become less informative if those responsible for maintaining records were concerned about possible disclosure. Good practice would prevail over traditional sensitivity as we move into an era of greater transparency.
72. In the DWP case, a differently constituted Tribunal also ordered disclosure of information (subject to the redaction of junior civil servants' names), where the public authority had sought to rely on section 35(1)(a). The information requested in that case was in relation to a feasibility study concerning the introduction of identity cards.
73. DWP's arguments were largely similar to those advanced by the public authority in the DFES case. It asserted, *inter alia*, that where the section 35(1)(a) exemption is engaged, the need for and importance of a "safe space" for policy deliberations, justifies greater weight being attached to the public interest in favour of maintaining the exemption. Like the Tribunal in DFES, the Tribunal in DWP rejected the argument and stressed that whether disclosure is harmful must be considered on the circumstances of each case. It also noted that section 35(1)(a) covers a broad spectrum of information with varying degrees of harm that might flow from disclosure. In the case under consideration, the Tribunal found that the information was towards the bottom end of that scale. On the other hand, the information would have been very relevant to informing the public's understanding of the Government's thinking as to the benefits of an identity card scheme.
74. The OGC case dealt with appeals against two decisions of the Tribunal relating to gateway reviews of the Government's identity card programme. For present purposes, the facts of the case are less important. The case is significant, however, because this was the first occasion the Court had been required to consider the qualified exemption provisions in FOIA, and its decision provides helpful guidance on the proper approach to be taken in such cases.
75. Two exemptions were in issue in OGC, namely, sections 33 and 35. The grounds of appeal included an assertion that the Tribunal had failed to take, as its starting point, that on a proper construction of FOIA, disclosure of information falling within an exemption such as section 35 is to be regarded as harmful to the public interest.
76. The Court found that it is both implicit and explicit in FOIA that in the absence of a public interest in preserving confidentiality, there is a public interest in disclosure. It cited with approval the passage in DWP to the effect that there is an assumption built into FOIA that disclosure of information by public authorities on request is itself of value. As regards section 35 specifically, the Court considered that it does not create a presumption of a public interest in non-disclosure. It also noted that section 35 is in very wide terms and must cover information that cannot possibly be confidential.

77. Before moving on to consider section 35(1)(b), we would mention that aside from setting out helpful principles in relation to section 35(1)(a) specifically, the DFES and DWP cases also articulate some principles applicable to qualified exemptions cases generally which we have found helpful to keep in mind, in particular:

The starting point

- The public authority's assessment of the public interest in maintaining the exemption should focus on the public interest factors specifically associated with that particular exemption, rather than on a more general consideration of the public interest in withholding the information. (DWP)
- Although there is no express presumption in favour of disclosure, there is an assumption built into FOIA that the disclosure of information by public authorities on request is itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. What this means is that there is always likely to be some public interest in favour of the disclosure of information under FOIA. (DWP)

The "default setting"

- "The "default setting" in FOIA is in favour of disclosure; information held by public authorities must be disclosed on request unless the Act permits it to be withheld. (DWP)
- The weighing exercise begins with both pans empty. If the scales are level, the information must be disclosed (DFES)

Relevance of the date of the request and availability in the public domain

- The competing public interest should be assessed by reference to when the request was made. (DWP)
- If the information requested is not in the public domain, publication of other information relating to the same topic for consultation, information or other purposes is not a significant factor in a decision as to disclosure. ("DFES")

Section 35(1)(b)

78. As already noted, the Appellant says that all items of disputed information (except document (17) (which we have found does not in any event come within the scope of the request), come within the ambit of both sections 35(1)(a) and 35(1)(b). These two sub-sections are of course not mutually exclusive. As also noted, neither party has taken issue with the principles as articulated in the DFES and DWP cases regarding section 35(1)(a). Therefore, in relation to section 35(1)(a), the approach to the balancing of the public interest test is not in issue.
79. We turn now to consider what the correct approach is to balancing the public interest in relation to section 35(1)(b), and whether it is the same as for section 35(1)(a), albeit that there may be different public interests associated with section 35(1)(a) and 35(1)(b). As at the date of the oral hearing and written submissions

from the parties, there were, to our knowledge, no Tribunal cases dealing specifically with section 35(1)(b). We are aware that there are now two other decisions which have just been or are just about to be promulgated. We have not treated them as guidance because the parties had not addressed us on them, and also, we are mindful that the periods within which the decisions can be appealed have not yet expired.

80. The Commissioner asserts that the approach for section 35(1)(b) should be essentially the same as for section 35(1)(a). He points out that the drafting of FOIA suggests that Parliament considered that the exemptions in sections 35(1)(a) and (b) were closely related because, *inter alia*, both are found in the same section of FOIA, both are expressed in similar terms, both are class-based exemptions, and both are restricted to information held by Government departments. Had Parliament intended the 35(1)(b) exemption to operate in a different manner from the 35(1)(a) exemption or subject to a higher threshold, this would have made clear in the drafting of FOIA. The Commissioner also points out that in many cases, as indeed in this one, there will be much overlap between information falling under 35(1)(a) and 35(1)(b). For instance, advice given to a Minister which falls under 35(1)(a) may then form the subject of communications between Ministers and thus fall under section 35(1)(b) as well. In the Commissioner's view, this too weighs in favour of taking the same approach to both exemptions.
81. The Appellant's position, however, is that different considerations arise in relation to section 35(1)(b). It says that disclosure of Ministerial communications risks undermining the convention of collective Cabinet responsibility and that this principle is of such great constitutional importance that Ministerial communications should not be disclosed "unless a compelling public interest in disclosure is found to exist". The disclosure of individual and divergent Ministerial views would mean that the Government would be unable, convincingly, to put forward a united front. Disclosure of communications showing a Minister had been against a decision would place that Minister in a very difficult position when defending a decision in public, or if his department had to implement it. Disagreements between Ministers would be exploited by the media as examples of divisions or rifts within the Government. Ministers would be reluctant to put forward openly and candidly dissenting views rather than expressing their views with an eye to eventual publication. This, in turn, would undermine the quality of decision making.
82. We note that collective Cabinet responsibility is the long-standing convention that Ministers are collectively accountable for the decisions of the Cabinet, and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet, is not disclosed.
83. The Appellant has referred us to a number of texts explaining the convention and its history, and underlining its constitutional importance in government decision making and more broadly, its significance in our system of parliamentary democracy. We fully accept the importance of the convention, and we also accept that detriment

can arise to the public interest from disclosure of information concerning the formulation of Government policy at Cabinet level.

84. However, the Appellant's submissions and evidence has, at times, come close to suggesting that the threshold to be met before such information can be disclosed should be so high as to amount, almost, to an absolute exemption. There is nothing in the wordings of section 35, or in the case law, to support such an interpretation.
85. To the extent that the Appellant is suggesting that because of the importance of the convention, there is some form of presumption against disclosure of such information implicit in that exemption, or that the public interest in maintaining the exemption under section 35(1)(b) is inherently weighty, we must disagree. The notion that there is a public interest against disclosure inherent in section 35(1)(a) because of the status of any such information, was rejected in both the DFES and DWP cases. It was also rejected by the High Court in OGC (which we note was not limited to section 35(1)(a)), and we see no justification for a different finding in relation to section 35(1)(b). Furthermore, not all information coming within the scope of section 35(1)(b) will bring the convention of collective Cabinet responsibility into play. Some communication may be completely anodyne or may deal with process rather than policy issues. Communications may also be purely for information purposes, such as when reports are circulated. The very fact that certain information constitutes Ministerial communication does not, therefore, mean that there is a public interest in non-disclosure, and indeed we note that the Appellant has itself taken the view that certain Ministerial communication (for example, document (3) is not exempt (see paragraph 22 above)).
86. Even where Ministerial communication engages the collective responsibility of Ministers (where, for example, it reveals actual deliberations and exchanges of views), that itself does not mean that the public interest against disclosure will inevitably be weighty. The maintenance of the convention of collective Cabinet responsibility is a public interest like any other, in the sense that the weight to be accorded to it must depend on the particular circumstances of the case. This is by no means to undervalue the importance of the convention or the consequences that could flow from disclosure, nor to ignore the public interest in maintaining the confidentiality of communications that may result in a government decision or policy. We accept that where collective responsibility of Ministers is engaged, there will nearly always be a public interest in maintaining the exemption. However, the Tribunal is required, by the wording of section 2(2)(b), to consider the information in issue in the context of all the circumstances, to accord the different factors the weight that is appropriate in the circumstances of that particular case, and then to see where the public interest balance lies.
87. Where Ministerial communication does engage the convention of collective responsibility, it is necessary, in particular, to assess whether and to what extent, the collective responsibility of Ministers would be undermined by disclosure. Factors such as the content of the information, whether it deals with issues that are still "live", the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context, are all matters that are likely to have bearing on the assessment of the public interest balance.

88. Also, as with formulation of government policy under section 35(1)(a), timing is likely to be of paramount importance. Where the Ministerial communication is in relation to an issue that was “live” when the request was made, the public interest in preserving a “safe space” for Ministers to have a full and open debate, and the public interest in the Government being able to come together successfully to determine what may, in reality, have been a contentious policy issue, may weigh the balance in favour of maintaining the exemption. However, that does not detract from the need to assess each case on its own circumstances.

Our Findings on Other Arguments Made by the Parties

89. The arguments that have been made by the parties that are specific to the disputed information are set out in the Confidential Annexes. However, many of the arguments made by the parties have been generic in nature. The comments below are in respect of those generic points:

The Appellant’s Arguments

- A number of the arguments the Appellant has made relate to indirect consequences of disclosure and are the same as those put forward by the public authorities in the DFES and DWP cases. To that extent we adopt the views expressed by the Tribunal in those cases, with the additional comments set out below.
- Key amongst the Appellant’s arguments is the contention that disclosure would lead to a loss of candour, thus undermining the proper functioning of Government (whether in terms of advice by Officials, decision-making by Ministers, or otherwise). Mr Gallagher’s evidence was quite clear, particularly as regards Ministerial communications, that his concern was not about the disclosure of the disputed information itself, but about the prospective harm that would arise from disclosure of that type of information. This is of course the “chilling effect” argument made by the public authority in the DFES case. It is important to keep in mind that Parliament could have chosen to make section 35(1)(b) an absolute exemption, but did not do so. This means that Ministers cannot expect that their communications will be protected from disclosure on any blanket basis. However, FOIA does not contemplate routine disclosure of information within the scope of sections 35(1)(a) or (b), nor indeed any other qualified exemption. Disclosure is to be made only if, in all the circumstances of the case, the public interest in maintaining the exemption is equalled or outweighed by the public interest in disclosing the information. The safeguard, therefore, is not that information coming within the scope of these exemptions will not be disclosed, but that it will only be disclosed following a careful assessment, not only of the public interest in disclosure, but equally, of the public interest in maintaining the exemption.
- Also, Ministers will, of course, have been aware, since some time before FOIA came into force, that their communications could be subject to disclosure. The new law and its implications were widely debated. No

evidence has been put before us to show that because of the potential for disclosure under FOIA, Ministers have changed the way in which they communicate, or have taken less robust positions in debate or have become less candid in expressing their views in writing. In other words, there is no evidence that the “*chilling effect*” feared has actually materialised. This is, of course, as it should be. In line with the views expressed by the Tribunal in DFES, we consider that we are entitled to expect of our Ministers, as elected politicians, a degree of robustness and for them not to shy away, in Cabinet discussions, from taking positions and expressing those positions candidly, for fear that their views may, in certain circumstances, become public.

- The consequences that were outlined to us in Mr Gallagher’s evidence arising from leaked information do not have parallels with the consequences of information being required to be disclosed by law under FOIA. Leaks are a betrayal of trust and it is to be expected that it would give rise to a more limited sharing of information and a narrower circle of persons being involved in policy decisions. It does not follow that the same consequences would follow from lawful disclosure under FOIA.

The Commissioner’s Arguments

- Many of the factors the Commissioner has put forward as supporting disclosure are generic in nature, though no less worthy of weight because of that. There is a clear and legitimate public interest in disclosing information which shows how Government has formulated certain policies or reached certain decisions, and which considerations it took into account in doing so and which it did not. Such information helps the public’s understanding of Government’s decisions and policies, and encourages debate and participation in the democratic process. As a differently constituted Tribunal stated in **Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC (EA/2006/0011 and EA/2006/0013)**:

“While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.”

We will refer to these considerations as the “good governance factors”.

- The weight to be given to good governance factors will, of course, vary from case to case. In assessing that weight, one of the factors that may be relevant is the extent to which the information will add to the public’s understanding of the issues. If the information does not add much, it is likely to merit less weight.

- We do not agree that the formality in presentation or content of the information has any real bearing on the public interest, one way or the other. If, by making that argument, the Commissioner was intending to indicate that more informal communications are likely to contain matters that the parties to the communication expected would remain confidential and might have expressed themselves accordingly, we accept that that may be so. However, the converse does not follow. Formality may simply be a matter of practice and convention, as we understand is often the case in communications between Ministers. That does not mean that the communication is any less sensitive for the purposes of the public interest balance.

Applying the Public Interest Test to the Disputed Information

90. The particular public interest considerations in relation to the documents comprising the disputed information, together with our findings, are set out in Annexes B and D. For the reasons set out there, we find that the public interest in maintaining the exemption does not outweigh the public interest in disclosure in respect of the information listed in Annex B (subject however to certain redactions being made as set out in Annex C). Accordingly, that information must be communicated to Mr Lochhead.
91. Annex D lists the information in respect of which we consider that the public interest in maintaining the exemption does outweigh the public interest in disclosure. That information, therefore, is exempt from disclosure.
92. We are limited in what we can say about our reasons, in this open part of the determination, without inadvertently disclosing the content of the disputed information. We would simply, therefore, make the following brief remarks:
- We do not find that any of the disputed information is exempt under section 35(1)(a). The policy-making process that the exemption was intended to protect ended with the making of the 1999 Order, so that the disputed information was historical by the time the request for information was made. We do not consider that disclosure could prejudice the formulation of policy on any of these issues in the future. To the extent that the 1999 Order and the considerations that informed it were referred to in later policy formulations which may have been under consideration at the time of the request, that does not, on the evidence before us, give rise to anything more than a tenuous public interest in maintaining the exemption. The public interest in disclosure relates both to good governance factors, as well as in matters concerning devolution, and the competence of the Scottish Parliament. We do not find that these factors are outweighed by any specific or generic factors against disclosure.
 - Where we have found any of the disputed information to be exempt, it has been under section 35(1)(b) where the information in issue engages the convention of collective Cabinet responsibility and where, in all the circumstances of this case, the weight to be accorded to the public interest in maintaining the convention, taking into account the factors described at paragraph 87 above, exceeds the public interest considerations favouring

disclosure, particularly where the information would not add materially to the public's understanding of the issues.

- We have ordered disclosure of some Ministerial communications on a redacted basis, as set out in Annex C. We do not consider that in general, a line-by-line review of each document is an appropriate way to approach the disclosure obligations under FOIA. However, where, taken as a whole, the public interest balance favours disclosure of the information contained in a document, save for limited information that can be dealt with by a simple redaction which does not materially compromise the quality of the remaining information (from the point of view of the public interest in that information), in our view, it is more appropriate that the information be disclosed in redacted form, rather than entirely withheld. We should say, for completeness, that we have not acceded to the Appellant's request that information contained in any of the documents, to the extent not relevant to the request, should be redacted. It will often be the case that a document containing information coming within the scope of a request will also contain information that does not. However the dividing line is often unclear, and unless the public authority can show a good reason why such information should be redacted, a line by line analysis is an unnecessarily laborious exercise offering little practical benefit.

Sections 10 and 17

93. We agree with the Commissioner that the Appellant is in breach of the obligations under section 17.
94. As already noted, we consider that the Appellant is also in breach of section 10.
95. As explained at paragraph 17 above, the Appellant holds a far greater number of documents containing relevant information than the ones it had identified when it responded to the Appellant's request. To the extent it has not already done so, the Appellant must provide to Mr Lochhead, within 20 days of the date of this determination, all such additional information coming within the scope of his request, except for any information in respect of which the Appellant is claiming an exemption (which may be the subject of the Stage 2 determination).

Other Observations

96. In the Decision Notice, the Commissioner found that information which engaged sections 35(1)(a) and 35(1)(b) was not exempt and should be disclosed. However, the Commissioner went on to list the particular documents to be disclosed. The Appellant has documents (some of which it may have provided to the Commissioner), containing information falling within these exemptions which were not listed and which, therefore, the Appellant considered it was not required to disclose. The Appellant did not seek clarification from the Commissioner. Whether the Appellant should have done so is something the Tribunal may wish to consider when addressing the issue of costs mentioned in paragraph 20 above. What this does highlight, however, is that it may be more prudent for the Commissioner not to require disclosure by reference to a list if there is a possibility that the list may not be exhaustive.

97. We are also of the view that when assessing whether or not the disputed information is exempt, the Commissioner should have considered the documents and the information they contain, individually, rather than simply by the category within which they fall. Section 2(2)(b) of FOIA requires no less.
98. Our decision as set out in this determination is unanimous.

Signed

Date 8 August 2008

Anisa Dhanji

Deputy Chairman

IN THE INFORMATION TRIBUNAL

BETWEEN:

THE SCOTLAND OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

CONFIDENTIAL ANNEX A

On Whether Certain Information Comes
Within the Scope of the Request

1. The Appellant asserts that 7 of the documents which were included in the Commissioner's list of documents to be disclosed, together with a further document subsequently produced by the Appellant, are not relevant to Mr Lochhead's request. The documents in issue are listed below.
 - (4) Draft Briefing from I W Gordon to the Secretary of State for Scotland and Lord Sewel, dated 18 February 1998.
 - (5) Draft Briefing from I W Gordon to the Secretary of State for Scotland and Lord Sewel, dated 18 February 1998 with track changes.
 - (6) Briefing from I W Gordon to the Secretary of State for Scotland and Lord Sewel, dated 19 February 1998.
 - (9) Letter dated 10 March 1998.
 - (10) Briefing from I W Gordon to the Secretary of State for Scotland, dated 13 July 1998.
 - (11) Letter from the Secretary of State for Scotland to the Lord Chancellor, dated 13 July 1998.
 - (17) Briefing dated 8 April 1999.

(19) Letter from the Secretary of State for Scotland to the Lord Chancellor, dated 26 February 1998.

2. Most of these documents relate to the Sea Fisheries (Adaptation of Ministerial Functions) Order (the “Fisheries Order”) in draft form.
3. The relationship between the Fisheries Order and the 1999 Order is helpfully summarised at paragraph 8 of the Appellant’s Closed Submissions as follows:

“At the end of 1997 general consideration was given to the possibility of identifying a maritime boundary between Scotland and the other parts of the United Kingdom for the purposes of the (then) Scotland Bill. By the early part of 1998 a specified proposal existed relating to the maritime boundary within territorial waters (i.e. the 12 mile limit), and a separate proposal existed in relation to the maritime boundary beyond the 12 mile limit as far as the British Fishery Limits. The former was identified as the Scottish Adjacent Boundaries Order [i.e. the 1999 Order]; the latter was the Sea Fisheries (Adaptation of Ministerial Functions) Order.”

4. The Fisheries Order was not ultimately made. Instead, the 1999 Order was redrafted so as to include maritime boundaries both up to the 12 mile limit (Article 3), and beyond that limit to the British Fishery Limits (Article 4).
5. The Appellant says that these documents fall outside the scope of Mr Lochhead’s request because the request was framed in terms of papers and correspondence “in connection with” the 1999 Order. The Appellant says that these documents are not “in connection with” the 1999 Order; rather, they came into existence in connection with the draft Fisheries Order.
6. In our view, the draft Fisheries Order dealt with a matter of substance relevant to the 1999 Order, namely, how the boundary for the purposes of “the Scottish zone” should be defined. That point that was eventually dealt with in Article 4 of the 1999 Order. In other words, these documents contain information on a subject matter that was then incorporated in the 1999 Order.
7. The Appellant says that documents (9) –(11), in particular, are not relevant because they concern the issue of whether the approach based on two different Orders should be pursued and therefore do not relate to the substance of the 1999 Order. In our view, however, discussions relevant to what should or should not be included in the 1999 Order are “in connection with” the 1999 Order, and therefore do come within the scope of the request. In any event, we note that the third paragraph of the

- request relates more broadly to “the decision to establish the boundary of the fisheries zone”.
8. We also consider that the Appellant has placed an unduly strict interpretation on the reference, in Mr Lochhead’s request, to the words “in connection with”. As the Tribunal has emphasised in **Keely v The Information Commissioner (EA/2007/0113)**, a request must be approached in a commonsense manner, with a *bona fide* intention to assess what the person making the request wished to know, rather than being construed as a formal legal document. If a public authority is in doubt as to what a requester is seeking, it is of course open to the public authority to seek clarification from the requester under sections 1(3) and/or 16 of FOIA. That was not done in this case.
 9. We find that document (17) does not come within the scope of the request. Its substance does not concern boundary issues, nor the substance of the 1999 Order.
 10. For all these reasons, we are satisfied that all the documents, except (17), come within the scope of the request.

Notes:

We have not described document (9) or (17) more fully in this Annex because document (17) does not come within the scope of the request, and as set out in confidential Annex D, we have found that (9) is exempt.

IN THE INFORMATION TRIBUNAL

BETWEEN:

THE SCOTLAND OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

CONFIDENTIAL ANNEX B

**On Information which the Tribunal finds is
not exempt**

1. The documents comprising the disputed information are listed in confidential Annex E. Of these, the documents containing information which we find is exempt are listed in confidential Annex D.
2. We find that the information contained in all the other documents (as listed below), are not exempt. These documents are therefore required to be disclosed, but subject to the redactions set out in confidential Annex C.
3. We find that for all the information, there is a public interest in disclosure based on the good governance factors referred to in paragraph 89 of the determination. There is also a public interest in disclosure in the broader issues of Scottish devolution and the extent of the devolved powers. Although we agree with the Appellant that the substantive boundary issue addressed in these documents is not itself a live issue, the devolution issues are, by the Appellant's own evidence, a matter of continuing interest to the public. Also, even though some of the proposals addressed in the documents were never implemented, they show the Ministers' thinking on issues relevant to devolution and are, therefore, still of public interest.
4. Having found that there is a public interest in disclosure, we must then identify what the public interest is against disclosure and then to weigh up the two sides. Although in some cases we do not find the public interest in

favour of disclosure to be especially strong, on the evidence before us, we find that the public interest against disclosure (even taking into account the indirect or generic consequences of disclosure as described in the determination), is even less so in the case of these documents.

5. **Documents 2, 7 and 13**

- (2) **Letter from the President of the Board of Trade to the Secretary of State for Scotland, dated 5 December 1997**
- (7) **Letter from the President of the Board of Trade to the Chief Secretary to the Treasury to the Secretary of State for Scotland, dated 24 February 1998**
- (13) **Letter from Secretary of State for Trade and Industry to the Secretary of State for Scotland, dated 7 August 1998**

These three letters were sent by the DTI (as it then was) Secretaries of State to the late Donald Dewar, MP, who was the Secretary of State for Scotland. The letters deal with proposals for defining maritime boundaries in what became the 1999 Order which had been circulated to members of the relevant Cabinet Committee for comment. The three letters set out the DTI's position on the draft. Mr Toole sets out, in his Closed Witness Statement dated 3 December 2007, the following reasons why he considers that the public interest is against disclosure:

- The purpose of these letters was to obtain assurances that the boundaries proposed for the draft Order would not create a precedent for other matters, such as oil and gas. At the time the letters were written, the Government's policy on Scottish devolution was being developed and there was public speculation and considerable sensitivity over which administration should have responsibility for oil and gas (in the event this was eventually reserved to Westminster in Schedule 5 to the 1998 Act, this legislation only receiving Royal Assent on 19 November 1998).
- Political sensitivities over Scotland's claim to oil and gas reserves and revenues remain to this day and the issue is very much live. Mr Toole attached to his Witness Statement copies of three articles which he said explained the Scottish National Party's current thinking on the subject. He says that although these documents are several years old, they are, nevertheless, relevant to that debate.
- The letters can be interpreted as suggesting that the possibility of delimiting a separate boundary for oil and gas had not then been ruled

out, and this demonstrates that there was an active policy debate under way, rather than just a settled matter as described in the Decision Notice.

- More generally, it is inappropriate for letters from one Secretary of State to another routinely to be made public. Ministers and the Officials who advise them are entitled to have space in which to formulate their views on particular subjects and to be able to express those views in a full and frank way, without the possibility of their internal deliberations being routinely subject to public scrutiny. When the advice was given to Mrs Beckett and Mr Mandelson in the letters, it was not contemplated that the letters might one day be published (at least until the 30 year rule applies). Had it been known that this was a possibility, the issues dealt with in the letters would have been expressed in a less full and frank way.
- To allow the letters to be disclosed could undermine the convention of collective Ministerial responsibility. If Ministers feel inhibited from being frank and candid with one another because of the risk of subsequent disclosure, the quality of debate lying behind the collective decision will be diminished. The fact that the DTI Secretary of State felt it necessary to tell the Secretary of State for Scotland that the maritime boundary proposed in the Order should not necessarily apply to oil and gas indicates that there was scope for a difference of opinion between their respective departments.

In our view, the thrust of these 3 letters is simply to seek and receive an assurance that the boundaries to be established by the 1999 Order would not set a precedent for other purposes. The letters indicate no disagreement, nor any reluctance by Mr Dewar to give the assurance sought. The assurance was in fact given and the press releases issued at the time made it clear that the boundaries in the 1999 Order were “without prejudice to any future boundaries which may require definition at sea, for the purposes of reserved functions such as oil and gas matters”.

As regards Mr Toole’s assertion that the letters are relevant to the current political debate over Scotland’s claim to oil and gas reserves and revenues, there is no evidence before us that the boundaries in the 1999 Order are considered by any party to the debate to be relevant for oil and gas purposes. In any event, the letters simply show unanimity that the boundaries in the 1999 Order should not set a precedent for other purposes, and as this has been stated in press releases and other documents in the public domain, we see no public interest of any significance in non-disclosure.

On the other hand, the 1999 Order establishes the extent of Scottish powers for certain purposes, and since Scottish devolution and the extent of the devolved powers are, by the Appellant's own evidence, a matter of continuing public interest, there is a more obvious interest in their disclosure.

The public interest arguments relating to the convention of collective Cabinet responsibility are not, in our view, a particularly relevant factor in relation to these documents since the letters contain no discussion of the substantive policy proposal and the point raised by the DTI was announced as the government position

In Mr Toole's last 2 points, he appears to be suggesting that the letters should not be disclosed simply because they constitute Ministerial communications. This ignores the fact that FOIA does not provide an absolute exemption for such information.

6. **Documents 4, 5, 6, and 19**

- (4) Draft Briefing from I W Gordon to the Secretary of State for Scotland and Lord Sewel, dated 18 February 1998**
- (5) Draft Briefing from I W Gordon to the Secretary of State for Scotland and Lord Sewel, dated 18 February 1998 with track changes**
- (6) Briefing from I W Gordon to the Secretary of State for Scotland and Lord Sewel, dated 19 February 1998**
- (19) Letter from the Secretary of State for Scotland to the Lord Chancellor, dated 26 February 1998**

These documents relate to the Sea Fisheries (Adaptation of Ministerial Functions) Order (the "Fisheries Order") in draft form. As noted in Annex A, the relationship between the Fisheries Order and the 1999 Order is summarised at paragraph 8 of the Appellant's Closed Submissions as follows:

"At the end of 1997 general consideration was given to the possibility of identifying a maritime boundary between Scotland and the other parts of the United Kingdom for the purposes of the (then) Scotland Bill. By the early part of 1998 a specified proposal existed relating to the maritime boundary within territorial waters (i.e. the 12 mile limit), and a separate proposal existed in relation to the maritime boundary beyond the 12 mile limit as far as the British Fishery Limits. The former was identified as the Scottish Adjacent

Boundaries Order [i.e. the 1999 Order]; the latter was the Sea Fisheries (Adaptation of Ministerial Functions) Order.”

The Fisheries Order was not ultimately made. Instead, the 1999 Order was redrafted so as to include maritime boundaries both up to the 12 mile limit (Article 3), and beyond that limit to the British Fishery Limits (Article 4).

Document (6) is a submission in which Mr Gordon, the then Fisheries Secretary, seeks the Secretary of State’s approval to the draft Fisheries Order. It explains the purpose of and background to the Order, and the considerations that informed its contents, including how the proposed boundary was defined. The evidence is that a communication of that nature is entirely usual. Also, as is usual, the submission was copied to a number of other people within the department.

Documents (4) and (5) are drafts of document (6). The Annex to Documents (4), (5) and (6) (which the Appellant says are also exempt), are drafts of a covering letter to the draft Order. It seeks the agreement of members of the relevant Cabinet Committee to the release of the draft Order and explains the background. Document (19) is the final form of that letter. It has not been suggested by the Appellant, and nor do we consider, that any different considerations apply to the drafts as to the final versions.

The Appellant says that the Minister’s statement that a different boundary could have been identified could give rise to political or party political point-scoring and discloses different options as to the basis that could be used to identify the boundary. However, there is no evidence that where the boundary line could have been drawn is still a matter of public debate. In these circumstances, we do not find that the consequences suggested by the Appellant would arise. Even if they did so, we do not consider that that would outweigh the public interest in knowing that options were considered, particularly since there was no public consultation on the proposals.

However, as set out in Annex C, we consider that certain information should be redacted from documents (4), (5), (6) and (19).

7. **Documents 10 and 11**

(10) Briefing from I W Gordon to the Secretary of State for Scotland, dated 13 July 1998

(11) Letter from the Secretary of State for Scotland to the Lord Chancellor, dated 13 July 1998

Document (10) proposes that the Secretary of State should write to the Lord Chancellor regarding the competence of Parliament and the Scottish Executive in relation to sea fisheries. The attachment to Document (10) (which the Appellant claims is also exempt) is a draft of Document (11). In Document (11), the then Secretary of State responds to the concerns expressed in Document (10).

An explanation of the relationship between the Fisheries Order and the 1999 Order is set out in paragraph 6 above. These letters concern an approach based on the two separate Orders. As already noted, that approach was not pursued, and these letters, therefore, are simply of historical interest to the public and an aid to their understanding of how the government came to make the decision it did and the considerations it took into account. We consider that there is no material public interest against disclosure.

As set out in Annex C, we consider, however, that certain information should be redacted from these two documents.

8. Documents 8 and 12

- (8) Letter from the Lord Chancellor to the Secretary of State for Scotland, dated 6 March 1998**

- (12) Letter from the Secretary of State for Scotland to the Lord Chancellor, dated 28 July 1998**

Document (8) is a response to Document (3) (which has been disclosed). It simply gives the Cabinet Committee's approval to the draft Order, subject to the assurance sought (see paragraph 5 above).

Document (12) is a response to Document (8). The Secretary of State reaffirms the assurance sought by the DTI and seeks agreement to release the 1999 Order on short notice. (The Appellant does not claim that the attached draft order is exempt.)

Mr Middleton's evidence is that at the time of the request, the Renewable Energy Zone (Designation of Area) (Scottish Ministers Order 2005 (the "2005 Order") was being developed and that the boundaries for this purpose were based on the 1999 Order boundaries. He says that the papers relating to the 1999 Order were reviewed to help inform policy formulation in relation to the 2005 Order and therefore, that disclosure would have prejudiced the decision-making process in relation to the 2005 Order. We accept that the papers were reviewed, but we do not see how

disclosure would have prejudiced the formulation of any policy or decision-making process in relation to the 2005 Order. There is no evidence before us to show how such prejudice would have arisen, and no basis, therefore, to support a finding that the public interest considerations against disclosure outweigh those in favour.

9. Other Documents

(14) Briefing from Derek Feeley to the Secretary of State for Scotland, dated 23 February 1999.

This seeks the Secretary of State's agreement to the laying of the 1999 Order and to issuing the associated press release. It summarises the contents of the 1999 Order and observes that the concerns expressed by Ministers that the boundary should be without prejudice to any possible discussion on future boundary matters had been taken on board. It also notes that the Lords' consideration of the Scotland Bill did not show any significant interest in it. (The Appellant does not claim that the attached draft order or attached draft press release are exempt.)

Mr Middleton says this document, too, would have prejudiced the decision-making process in relation to the 2005 Order. Again, as set out above, we do not see how disclosure would have prejudiced the 2005 Order. In our view, any public interest against disclosure is tenuous at best.

(A) Letter from the Secretary of State for Scotland to the Minister for Agriculture, Fisheries and Food, dated 13 November 1997

We accept that this document engages the convention of collective Cabinet responsibility in that it shows that there were different options being considered by the Cabinet. However, while this document provides information on the options being considered, it does not disclose any dispute or disagreement or divergent views between members of the Cabinet. The public interest against disclosure is further diminished by the fact that the author of the letter is now deceased, the internal debate initiated by the letter is over, and the policy has been announced and implemented. For all these reasons, we find that the considerations against disclosure do not outweigh the factors referred to in paragraph 3 above, favouring disclosure.