



**Tribunals Service**  
Information Tribunal

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

**Heard at Field House, London, EC4** **Decision Promulgated**  
**On 5 November 2008 and subsequently on the 10 March 2009**  
**papers on various dates**

**BEFORE**

**CHAIRMAN**

**ROBIN CALLENDER SMITH**

**and**

**LAY MEMBERS**

**SUZANNE COSGRAVE**

**ROGER CREEDON**

**Between**

**THE SCOTLAND OFFICE (Stage 2)**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Subject matter:**

**Freedom of Information Act 2000**

Public Interest test s.2 (2) (b)

Qualified exemptions

- Relations within the United Kingdom s.28
- Formulation or development of government policy s. 35 (1) (a)
- Ministerial Communications s. 35 (1) (b)
- Inhibition of free and frank provision of advice s36 (2) (b) (i)
- Inhibition of free and frank provision of views for the purposes of deliberation s. 36 (2) (b)(ii)

**Cases:**

*Campaign Against the Arms Trade v The Information Commissioner* (EA/2006/0040)

*The Department for Business, Enterprise and Regulatory Reform v The Information Commissioner* (EA/2007/0072)

*The Department for Education and Skills v The Information Commissioner* (EA/2006/0006)

*Guardian Newspapers and Brooke v The Information Commissioner* (EA/2006/0011 and EA/2006/0013)

*HM Treasury v The Information Commissioner* (EA/2007/0054)

*Lord Baker v The Information Commissioner* (EA/2006/0043)

*McIntyre v The Information Commissioner* (EA/2007/0068)

*The Secretary of State for Work and Pensions v The Information Commissioner* (EA/2006/0040)

*R (Abbasi) v Secretary of State Foreign and Commonwealth Affairs* [2003] UKHRR 76

*Al Rawi v Secretary of State Foreign Affairs* [2006] EWHC Civ 1279

*FCO v ICO* (EA/2006/0065)

*Export Credit Guarantee Department v FoE* [2008] EWHC 638 (Admin)

*Office of Government Commerce v ICO* [2008] EWHC 774 (Admin)

*DTI v ICO* (EA/2006/0007)

*Guardian Newspapers v ICO* (EA/2006/0017)

**Other material**

*Hansard* (House of Lords, vol. 612, col. WA240)

**Representation:**

For the Appellant: Mr Jonathan Swift for the Scotland Office

For the Respondent: Mr Ben Hooper for the Information Commissioner

## **Decision**

The Tribunal allows the appeal on the newly discovered material – in part – and substitutes the following decision notice in place of the decision notice dated 28 June 2007 as carried forward in further assessments by the Information Commissioner in additional documents discovered and disclosed by the Scotland Office during the currency of this appeal.

Save as above the Tribunal upholds the decision notice dated 28 June 2007 and the Information Commissioner's decisions made subsequently – subject to decisions at Stage 1 – and dismisses the appeal.

Information Tribunal

Appeal Number: EA/2007/0070

**SUBSTITUTED DECISION NOTICE**

**Dated 15 February 2009**

**Public authority: The Scotland Office**

**Address of Public authority: Dover House**

**66 Whitehall  
London SW1A 2AU**

**Name of Complainant: The Scotland Office**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination at Annexe A, the decision notice as substituted by the decision of the Tribunal at Stage 1 is further to provide that Documents 73, 75, 89 and 90 are outside the scope of the original request and do not need to be disclosed.

**Action Required The Appellant is to release the documents listed in Annex B, save for the redactions to be agreed with the Commissioner.**

Dated 15 February 2009

Robin Callender Smith  
Deputy Chairman, Information Tribunal

## **Reasons for Decision**

### **Introduction:**

1. This is the Stage 2 resumption of an appeal by the Scotland Office against a Decision Notice issued by the Information Commissioner (IC) dated 28 June 2007 and originates from 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 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 1 July 1999. In June 2003 it became a distinct entity within, first, the Department for Constitutional Affairs and then later -- in May 2007 -- within the Ministry of Justice. It is not to 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 which is 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 IC accepts (as did the Information Tribunal in the earlier hearing of this appeal which was promulgated on 8 August 2008) 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.

5. The requestor, Mr Lochhead, was at the time of the 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.

6. Mr Lochhead's request was made on 9 March 2005 in 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 Scotland Office ("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

8. 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.

9. On 27 September 2005 Mr Lochhead complained to the IC. The IC subsequently 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.
10. The IC identified 18 documents as those 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 the documents it considered came within the scope of section 35 (1) (a) and which within section 35 (1) (b).
11. 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 was not and has not been a cross appeal by Mr Lochhead.
12. The original Information Tribunal that considered this appeal, chaired by Ms Anisa Dhanji, found itself forced to adopt a two stage approach to the matters before it because of what it described as "*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.*".
13. It became apparent at Stage 1 of the Tribunal that the Appellant held 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 IC'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. That ongoing disclosure caused considerable difficulty as well as wasted time and resources.

14. The Tribunal decided to determine the appeal in two stages. Stage 1 (promulgated 8 August 2008) dealt with the information addressed in the Decision Notice and a limited number of further documents.
15. This Stage - Stage 2 - deals with all the other information identified by the Appellant subsequent to the above. The Lay Members of the Information Tribunal who dealt with Stage 1 have remained the same in this appeal, allowing for a degree of continuity in the consideration of the issues. The chairman for Stage 2 has been Robin Callender Smith.
16. A brief explanation about the 1999 Order is appropriate at this stage because it sets the historical context of the appeal in both of its Stages.
  - (a) 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) together with most transport issues.
  - (b) 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....".



- (c) The reserved matters are defined in Schedule 5 of the 1998 Act. Part II of Schedule 5 reserves, among other things, the regulation of sea fishing "outside the Scottish zone".
- (d) 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.
- (e) "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.
- (f) 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."*
- (g) The relevant Order in Council is the 1999 Order. That 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).
- (h) 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. The stage 2 documents did not include advice to Ministers and Ministerial communications about the formulation of the 1999 Order. Having been agreed within Government the Order was laid on 8 March 1999. The oldest document subject to stage 2 is dated 24 May 1999.

- (i) 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 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.
- (j) 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.

#### Issues for Determination by the Tribunal at Stage 2

- 17. As at Stage 1, the Tribunal must address whether certain of the additional information comes within the ambit of Mr Lochhead's request at all.
- 18. Whereas information that might be exempt under s. 35 (1) (a) and/or s. 35 (1) (b) formed the substance of Stage 1 of this appeal, additional exemptions are engaged in Stage 2. These are s.36 (2) (b) and s. 28.
- 19. Where an individual makes a request under s. 1(1) of FOIA for information held by a public authority, the public authority is in general under a duty to communicate that information to the individual in question: see s. 1(1)(b).
- 20. Various exemptions to this duty are set out in Part II of FOIA (ss. 21-44). The effect of those exemptions is governed by s. 2(2) of FOIA, which provides:

“(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—  
(a) the information is exempt information by virtue of a provision conferring absolute exemption, or  
(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

21. Section 2(3) lists those provisions in Part II that are to be regarded as conferring absolute exemption for the purposes of s. 2. Those that are not listed (“qualified” exemptions) only confer an exemption from the s. 1(1)(b) duty where the public interest test in s. 2(2)(b) so requires.

22. Stage 2 of the present appeal is concerned with three qualified exemptions: s.28, s. 35(1)(b) and s. 36(2)(b).

23. Section 28 (entitled, “Relations within the United Kingdom”) provides in the relevant part:

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.

(2) In subsection (1) ‘administration in the United Kingdom’ means—  
(a) the government of the United Kingdom,  
(b) the Scottish Administration,...

24. By s. 126(6) and (7) of the 1998 Act, the reference in s. 28 of FOIA to the Scottish Administration is a reference to the “office-holders in the Scottish Administration” (which includes members of the Scottish Executive) and the “members of the staff of the Scottish Administration” (which includes the staff of members of the Scottish Executive).

25. Section 28 may be contrasted with s. 27 (the international relations exemption), which provides in relevant part:

“(1) Information is exempt information if its disclosure under this Act would, or

would be likely to, prejudice—

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

26. In particular, s. 28 contains no equivalent to s. 27(2)-(3).

27. Section 35 (entitled, “Formulation of government policy, etc”) provides in the relevant part:

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

....

(b) Ministerial communications,

....

(5) In this section—

....

‘Ministerial communications’ means any communications—

(a) between Ministers of the Crown,

....

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet...;

28. Section 36 (entitled, “Prejudice to effective conduct of public affairs”) provides in relevant part:

(1) This section applies to—

(a) information which is held by a government department...and is not exempt information by virtue of section 35,...

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

...

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation,...

....

(5) In subsections (2) and (3) 'qualified person'—

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown..."

29. Both the Appellant and the IC agree that 14 documents (or parts of documents) which the Appellant referred to in the Stage 2 submissions were not within the scope of the original request.

30. The IC disputes the Appellant's claim that part of document 95 - adopting the Appellant's numbering of the new documents - is exempt under section 35 (1) (b).

31. The IC agrees that five of the documents identified by the Appellant are exempt under section 36 (2) (b) but *disputes* that document 6, 11 (1), 12, 38 (2), 39, 40, 41 (2), 45 (pages 1 to 4 and 6 to 7), 51 (except for that part which is out of scope), 52 (except that part which is out of scope), 53, 54, 59, 61, 62, 73 (pages 2 to 3), 74 and 95 are exempt under s.36 (2) (b).

32. The IC agrees nine documents (or parts of documents) identified by the Appellant are exempt under s. 36 (2) (b) but disputes the documents 15 (1), 17 (save as regards the manuscript comment which the IC agrees is exempt), 18 (save as regards the second paragraph of the e-mail and the manuscript comment on page 3 of the draft letter of the document, which the IC agrees are exempt), 20 (1), 21 (save for Annexes A, B and D, and note F, which had been released), 22, 25, 26, 27, 28 (1), 84 (page 1), 89, 90 (except Annex A, which has been released) and 93 (page 2: the last three sentences only) are exempt under ss. 28 or 36 (2) (b).

33. The IC expressed no view on whether certain of the documents identified at Paragraph 29 above might also be exempt under s. 36 (2) (c) and agreed that parts of the four documents to which reference was made are exempt under s.40. The IC also expressed no view on whether certain of the documents identified at Paragraph 29 above might also be exempt under s.42.
34. The Tribunal was invited to find that where the IC and the Appellant agreed on matters then those documents (or parts of documents) at issue did not need to be disclosed.

### Evidence

35. The IC did not call any witnesses at Stage 2. The Appellant relied on evidence from Jillian Kay, the Deputy Director of the Scotland Office (by way of her affidavit dated 30 April 2008), and David Middleton the Head of the Scotland Office (who adopted his six witness statements, the last dated 22 October 2008, at the hearing on 5 November 2008).
36. Mr Middleton gave evidence at the hearing and was cross examined and re-examined and the Tribunal asked him a few questions.
37. Ms Kay's evidence related to the "complicated file storage arrangements following devolution" and the steps she had taken to ensure the Scotland Office held no further information within the scope of the request. While this evidence was produced in the form of a closed affidavit the Tribunal sees no reason why it should not be a public document. It helps to explain the considerable delay in the resolution of this appeal through its various stages because of problems with document storage and location and serves as a useful object lesson for the future of how problems may be avoided. It has, however, not been set out any length in this decision.
38. In terms of Mr Middleton's evidence (which ran to 26 pages with additional exhibits in the form of tables) it is not summarised here but was considered carefully by the Tribunal at Stage 2 and will be referred to as appropriate in terms of the Tribunal's findings.

## Legal submissions and analysis

39. Mr Swift, for the Appellant, maintained there was a clear public interest for maintaining confidentiality in the information that was further disclosed but was not agreed with the IC prior to the resumed Stage 2 hearing. The fact that documents in dispute were draft documents and that the "final versions" were already in the public domain undermined what he described as "any principled argument in favour of disclosure in the public interest".
40. The devolution settlement contained in the Scotland Act identified certain matters where responsibility is reserved to the United Kingdom Parliament; all other matters are devolved to the Scottish Parliament. The existence of this mix of reserved and devolved responsibilities required the maintenance of a good working relationship between the respective administrations in the interests of the public. He characterised and contrasted the decision of the Scottish Information Commissioner in *Christine Grahame MSP v Scottish Executive* (21.9.06) with the approach in this appeal demonstrated by the Information Commissioner.
41. He maintained that the disclosure of information would adversely affect the operation of the Scottish Executive and damage the confidentiality of the civil servant/Minister relationship within the Scottish Executive for no good reason because all the documents in question were in draft.
42. He invited the Tribunal to accept the evidence given as to the general and particular reasons why confidentiality of the disputed information should be maintained as a matter that advanced the public interest rather than detracted from it. By applying s. 2 (2) (b) FOA the public interest in maintaining the exemption outweighed any public interest in the disclosure of the information and the balancing process plainly favoured maintaining the exemptions relied on by the Appellant.
43. Mr Hooper, for the IC, resisted those submissions and -- where relevant -- his points have been included at the appropriate stages of this determination in relation to specific decisions on documents.

## Conclusion and remedy

44. As with Stage 1, Stage 2 of the Appeal has been conducted so as not to disclose disputed information pending compliance with this determination or a successful appeal. For that reason this determination remains embargoed for the 28 day period allowed for appeal together with an additional 14 days to allow Counsel to advise as necessary.
45. Given the number of additional documents that came to light and had to be considered at Stage 2, those still at issue between the Appellant and the IC are listed in the Annexes for this Stage 2 determination. The Tribunal's decision in relation to them is set out in the relevant groupings.
46. **ANNEX A** contains the first grouping, those that fall outside the scope of the original request by Mr Lochhead or which – for other reasons – are exempt from disclosure. These will remain undisclosed and the Annex confidential.
47. **Annex B** contains the second grouping, namely those documents which the Tribunal has decided should be disclosed. This Annexe will remain confidential for the period detailed in Paragraph 44 (above).
48. The remainder of the documents are those which the Appellant and the IC agree are subject to the relevant exemptions and which the Tribunal, having considered them, agrees should remain undisclosed, endorsing the reasoning of both parties. These have not been listed in a further annexe because they are known to the parties and the Tribunal and will not become public.
49. For the avoidance of doubt the Tribunal at Stage 2 has considered and adopted all that is relevant from Stage 1 - and to avoid restating everything in that determination - the issues and analysis presented in that determination are to be read as forming part of this Stage 2 determination where relevant.
50. The Tribunal repeats what it stated at Stage 1 and has continued to apply at Stage 2:



*“ We find that.... there is a public interest in disclosure based on the good governance factors..... 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.”*

51. The Tribunal's approach to s.28 has been informed by the recent s.27 decision in *Campaign Against the Arms Trade v The Information Commissioner*. This related to a request for memoranda of understanding between the UK and the Kingdom of Saudi Arabia (KSA).

52. There the Information Tribunal stated:

*“80. As a matter of approach the test of what would or would be likely to prejudice relations or interests would require consideration of what is probable as opposed to possible or speculative. Prejudice is not defined, but we accept that the import is something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be real, actual or of substance, as described in Hogan.*

*81. However, we would make it clear that in our judgement prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction,*

*notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk. Similar considerations would apply to the effect on relations between the United Kingdom and KSA...".*

53. The Tribunal at Stage 2 prefers this approach to that advanced by the Appellant by analogy with the case of *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76 and *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 289. The Tribunal agrees with the IC that it is not engaged in a judicial review and has the jurisdiction to consider the merits of any claim to an exemption and to make its own findings of fact.
54. In terms of s. 36 (2) (b) the Tribunal has adopted the approach set out in *McIntyre v The Information Commissioner* in terms of what is required of the opinion of the "qualified person". That is that the opinion must be both "reasonable in substance" and "reasonably arrived at".
55. The Tribunal has formed its view "on the severity, extent and frequency" with which inhibition of the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation will or may occur. In respect of the relevant documents the Tribunal has sought to articulate that in the relevant confidential Annexes.
56. The public interest is clearly served by maintaining close cooperation and high levels of trust between officials and Ministers within the UK government and between officials and Ministers within the Scottish Executive. While it may serve the public interest for those two administrations to work closely together on various matters (for instance counter-terrorism) the Tribunal accepts that Scottish devolution necessarily brought with it the possibility that the two administrations may be under the control of different political parties. Parliament -- in passing the Scotland Act 1998 -- clearly considered there to be a potential public interest in Scottish interests being defended and pursued by an administration that might not be aligned politically with the UK Government.

There is therefore a strong public interest in the public in both England and Scotland - and in devolved entities elsewhere in the United Kingdom - receiving information about how the two administrations are (or are not) cooperating in practice.

57. The Tribunal has considered carefully the issues of costs under Paragraph 29 of the Information Tribunal (Enforcement Appeals) Rules 2005. This issue was flagged up at Stage 1 of the appeal as an issue for consideration at Stage 2. The parties were invited to address the Tribunal on this issue on 5 November 2008 and the Tribunal has considered what was said by both parties.

58. Those most affected by the Scotland Office's inadequate filing systems and methods of dealing with requests such as Mr Lochhead's are the Information Commissioner and the Information Tribunal. All parties are funded - albeit through different income streams - by the Government. This is not a situation where a private individual has been put to additional expense and been prejudiced by the administrative inefficiency but only because Mr Lochhead chose to take no part in any of the appeal proceedings.

59. For that reason *and for that reason only* the Tribunal is not taking further the award of costs in this appeal.

60. Our decision is unanimous.

Robin Callender Smith

Deputy Chairman

Date 25 February 2009

## ANNEXE B

**Documents within the scope of the request which ss. 28, 35 (1) (b) and/or 36 (2) (b) of the Freedom of Information Act 2000 do not exempt and which, as a result, are disclosable**

**The Tribunal leaves it to the Scotland Office and the Information Commissioner to agree the appropriate redactions required in relation to these documents given the decisions which follow below. In addition the parties had previously agreed to other redactions, with which the Tribunal agrees.**

These are:

- (1) **Document 6**, a briefing note on a 10 Minute Rule Bill together with a draft letter from the Secretary of State for Scotland to the President of the Council. The Appellant claimed this was exempt under s. 36 (2) (b). The Tribunal disagrees and, in terms of balancing the public interest issues in respect of this document, is satisfied that its publication reveals more about good governance in its disclosure than any interest that might prevail in not disclosing it, subject to appropriate redactions in relation to identification of personal information in relation to the Parliamentary Clerk and the two individuals below that name and the two names/initials identified opposite in manuscript.
- (2) **Document 11(1)**, a minute to the Scottish Executive requesting advice together with a draft reply to Hamish Morrison's letter of 28 June 1999 (from the Scottish Fishermen's Federation). The Appellant argues that this is exempt under s. 36 (2) (b). The Tribunal considers that it should be disclosed because such correspondence between civil servants is unlikely to be inhibited in the future, it is unlikely to prejudice the effective conduct of public affairs and its nature is historic.
- (3) **Document 12**, is the briefing note and draft reply in respect of Hamish Morrison's letter of 28 June 1999 (see above) which the Appellant argues is exempt under s. 36 (2) (b) but which the Tribunal also considered in relation to s. 35 (1) (b). Under both sections the Tribunal has concluded that it is in the public interest that this matter be disclosed for reasons given (above) in relation to Document 11(1) and also in terms of the consistency of the material in this document and Document 11(1).
- (4) **Document 15(1)**, is a minute with a briefing note attached in relation to the Royal Navy's Fisheries Protection duties which the Appellant argues is

exempt under ss. 28 and 36 (2) (b). The Tribunal has concluded that, subject to the redaction of the names of junior civil servants, the balance favours disclosure. The material is relevant to the request and the content is noncontroversial. The Attachment has already been released. The request itself was made about six years after the document was created and it is difficult to see why its release now should prejudice relationships or have an inhibiting effect in the future.

- (5) **Document 17**, is a minute with attached submission and draft letter for the Deputy Minister for Rural Affairs to send to the Rural Affairs Committee on the subject of the Scottish Adjacent Waters Boundaries Border 1999 which the Appellant argues is exempt under ss. 28 and 36 (2) (b). The Tribunal disagrees and believes it is in the public interest that this document should be disclosed, subject to the obvious redaction of the manuscript information containing the names of junior civil servants in the lower half of the minute and the names on the attachments.
- (6) **Document 18**, is a submission with the revised version of the letter for the Rural Affairs Committee and -- for the reasons set out in relation to Document 17 (above) - should be disclosed.
- (7) **Document 19 (1)**, is a document described by Mr Middleton in his evidence as one drafted "in measured terms and containing sensitive information". The advice covers matters between the United Kingdom Government and the Scottish Executive and Mr Middleton argued that relationships in the future would not be helped by seeing those views "exposed". It was put to him in cross examination that the release of this document would inform public debate. He was not prepared to concede that and in re-examination expressed his view that this showed clearly a degree of tension between the two administrations which he felt should not be the subject of public scrutiny. The Tribunal has concluded that this document does usefully inform public debate and that it is in the public interest for it to be disclosed to understand better the process being followed in the early days of Devolution, given its relevance to the debate on boundaries.
- (8) **Document 21**, is an 18-page briefing pack for the Minister's appearance before the Scottish Parliament's Rural Affairs Committee. The general questions and answers in annex D of this document have already been released and the Tribunal is of the opinion that the whole of this document is disclosable in terms of the public interest in particular because of the historical interest in terms of the annotations.

- (9) **Document 22**, is a five-page minute containing a submission and speaking notes for the Minister's attendance at the Rural Affairs Committee. Subject to redactions being agreed between the Scotland Office and the IC -- in terms of personal information contained within this document -- the Tribunal has concluded that it is in the public interest that this document be disclosed for reasons already set out above.
- (10) **Document 25**, is a minute indicating strong support for the Secretary of State's comments. The Tribunal observes that there is no dissent in this document from the line being taken -- in fact it is being supported -- and, in terms of s. 28 (which was also being claimed along with s. 36 (2) (b) by the Appellant) it is difficult to see what is being prejudiced in terms of relations between any administration in the United Kingdom. The Tribunal has concluded that the balance of the public interest test is in favour of its disclosure.
- (11) **Document 26**, this minute is a report of the meeting between the Secretary of State and the First Minister and, for all the reasons given above, should be disclosed subject to redaction of the names of junior civil servants within the document.
- (12) **Document 27**, this minute is in relation to the Rural Affairs Committee's deliberations which the Appellant argues is exempt under ss. 28 and 36 (2) (b). The Tribunal disagrees and feels that the public interest, particularly in terms of the relevance to the debate during the early days of Devolution, merits disclosure of this document.
- (13) **Document 28 (1)**, is a briefing on the Rural Affairs Committee report (the Press Release mentioned in the briefing was in fact issued on 9 December 1999). The Appellant argues this is exempt under ss. 28 and 36 (2) (b) but the Tribunal takes the view that the document should be disclosed in the public interest and the arguments in relation to potential prejudice being created are not made out.
- (14) **Document 38 (2)**, is a draft letter for John Reid as Secretary of State to send to the President of the Council in respect of Archy Kirkwood MP's Private Members Bill "to amend the Scottish Adjacent Waters Boundaries Order 1999 insofar as it relates to the East Coast border between England and Scotland; and for connected purposes....". The briefing note on the front of this draft was released on 12 June 2008 with the names of the officials redacted. The Tribunal is satisfied that it is in the public interest that this document is released having considered the claimed exemption under s. 36 (2) (b).

- (15) **Documents 39 and 40**, further comments and amendments on that draft letter, should be released for the same reason. Although s 36 (2) (b) was claimed, these documents related to minor changes and drafting nuances.
- (16) **Document 41 (2)**, the content of this document is identical save for some minor updating [see last paragraph on first page] to Document 38 (2) and the Tribunal's reasons that it should be released are similarly identical to those expressed above.
- (17) **Document 45** (pages 1 - 4 and 6- 7) for the reasons given at (14) and (15) above -- because this material relates to the letter to the President of the Council -- this material should be disclosed. We note that a minute from a senior civil servant to the Secretary of State for Scotland giving handling advice on Mr Kirkwood's Private Members Bill (page 5 of the document) has already been disclosed.
- (18) **Documents 51 and 52**, save for the identical marked portions of Paragraph 2 on page two of both documents 51 and 52, together with **Documents 53 and 54**, the latter two documents which show close co-operation post devolution.
- (19) **Documents 59, 61, 62, and 65**, are minutes and various iterations of a draft letter from John Reid (as Secretary of State) about the Rural Affairs Committee's fifth report and the impact of the Scottish Adjacent Waters Boundaries Order 1999 that was sent to Mr Lochhead on 10 February 2000. The Appellant argues that these are exempt under s. 36 (2) (b). – However, the Tribunal disagrees in terms of the public interest in disclosing the actual drafts of the letter because those various iterations show the development of Government thinking.
- (20) **Document 74**, is a fax of draft answers to Parliamentary Questions tabled by Malcolm Moss MP asking the Minister of Agriculture, Fisheries and Food about the boundaries between the English fishing zones in both Scotland and Wales and two other linked issues. The Appellant argues that these are exempt under s. 36 (2) (b). The Tribunal disagrees, considers that this is within the scope of the request and also that it is in the public interest that it is disclosed.
- (21) **Document 84(1)**, is an annotated e-mail which is apparently a Scotland Office note of a telephone conversation with a Scottish Executive official. There are obvious redactions in terms of personal information but, other than those, the Tribunal is satisfied -- despite the Appellant arguing exemption under ss. 28 and 36 (2) (b) -- that the balance of public interest favours disclosure.

(22) **Document 93**, is an e-mail and attached "Lines to Take" in terms of media enquiries. Subject to redactions in the e-mail relating to personal information this is document that was released on 15 September 2008 except the final three sentences for which the Appellant claims exemption under ss. 28 and 36 (2) (b). The Tribunal does not accept that the disclosure of these sentences would or would be likely to prejudice relations or have an inhibiting effect and considers that it is in the public interest in this document to be released in full.

(23) **Document 95**, is a draft reply to a House of Lords written question from The Lord Selkirk of Douglas which, despite the Appellant's claim for exemption under s36(2)(b), the Tribunal does not accept that disclosure would or would be likely to have an inhibiting effect. It also claimed that the sentence in the background note containing the names of the Ministers is exempt under s35 (1) (b). Again we reject this. No views are attributed to particular Ministers, simply that they corresponded. Knowledge that such exchanges took place is in the public interest

(24) **FRQ (1), FRQ (2) and FRQ (3)** are documents relating to Parliamentary Questions tabled by Archy Kirkwood MP which the Tribunal believes should be disclosed despite the claimed exemptions under ss. 28 and 36 (2) (b) because there is no obvious sensitivity in their contents and the information relating to the generation of the responses is in the public interest to be disclosed as they inform the public on the operation of the administrations in the early days of devolution.