



Scottish Information  
Commissioner  
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# Decision Notice 270/2024

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## Report of a Public Local Inquiry relating to Sheriffhall Roundabout

Applicant: The Applicant.  
Authority: Scottish Ministers  
Case Ref: 202400726

### Summary

The Applicant asked the Authority for the report from the Public Local Inquiry (PLI) relating to Sheriffhall Roundabout. The Authority withheld the report on the basis it was an internal communication, and the public interest favoured withholding it. The Commissioner investigated and found that the Authority had complied with the EIRs in responding to the request.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a), (b) and (c) of the definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available), 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

### Background

1. On 15 April 2024, the Applicant made a request for information to the Authority. The Applicant asked for a copy of the “CPO-230-1 Sherrifhall report”, which he understood had been “sent to Ministers” on 10 October 2023.

2. By way of background, a PLI was set up to hear evidence relating to proposals for the Sheriffhall Roundabout. The PLI took place on 30 January to 3 February 2023 and 6 to 8 February 2023. The Reporter submitted her report to the Authority on 10 October 2023. It is this report that the Applicant requested.
3. The Authority responded on 7 May 2024. The Authority considered the request under the EIRs and withheld the report under the exception in regulation 10(4)(e), stating that the report was an internal communication and that the public interest favoured withholding it.
4. On 10 May 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision to apply the exception under regulation 10(4)(e) of the EIRs and that, if it did apply, the public interest favoured disclosure of the report.
5. The Authority notified the Applicant of the outcome of its review on 21 May 2024, which fully upheld its original without modification.
6. On 27 May 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not believe the report was an internal communication and, if it was, the public interest favoured disclosure. The Applicant's arguments on this, which are similar to those made in his requirement for review, are set out more fully later in this decision notice.

## **Investigation**

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 17 June 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions relating to its application of the exception in regulation 10(4)(e) of the EIRs.

## **Commissioner's analysis and findings**

10. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

### ***Is the requested information environmental information?***

11. The Commissioner notes that the Applicant has not disputed the Authority's decision to handle the request under the EIRs. Indeed, the Applicant acknowledged that the EIRs were the correct legislation.

12. Having considered the terms of the request and the withheld information, the Commissioner is satisfied that the information covered by the request is environmental information, as defined in regulation 2(1) of the EIRs (particularly paragraphs (a), (b) and (c)).

### ***Regulation 5(1) of the EIRs***

13. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
14. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

### ***Regulation 10(4)(e) – Internal communications***

15. Regulation 10(4)(e) allows authorities to refuse to disclose internal communications. This is a class-based exception, meaning that there is no need to consider whether disclosure of the communication would cause harm before applying the exception. For information to fall within the scope of the exception in regulation 10(4)(e) it need only be established that the information is an internal communication.
16. Regulation 10(4)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
17. As with all the exceptions in regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication.

### ***The Applicant's submissions***

18. The Applicant argued that the report was not an internal communication within the meaning of regulation 10(4)(e) of the EIRs, which should not apply to PLI reports completed by the DPEA (Planning and Environmental Appeals Division).
19. The Applicant acknowledged that DPEA Reporters are civil servants and thus part of the Scottish Government. However, the Applicant referred to [the Commissioner's guidance on regulation 10\(4\)\(e\) of the EIRs](https://www.foi.scot/sites/default/files/2023-03/EIRsGuidanceRegulation104eInternalCommunications.pdf)<sup>1</sup> which stated (at paragraph 9) that the following documents should not be treated as internal communications:
  - (i) Factual materials, even when they are still in preliminary or draft form;
  - (ii) Opinions or statements expressed by public authorities when acting as statutory consultees during a decision-making process;
  - (iii) Studies commissioned by public authorities from related, but independent, entities;
  - (iv) Information once it has been disclosed to a third party.

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<sup>1</sup> <https://www.foi.scot/sites/default/files/2023-03/EIRsGuidanceRegulation104eInternalCommunications.pdf>

20. The Applicant submitted that the report was a combination of factual materials and the opinions or statements of the Reporter, but the question was whether the Reporter was a public authority when acting as a statutory consultee during a decision-making process.
21. The Applicant explained that the PLI was required by [Schedule 4 of the Acquisition of Land \(Authorisation Procedure\) \(Scotland\) Act 1947](#)<sup>2</sup>, and the Reporter was appointed under those terms. The Applicant submitted that this was clearly part of a decision-making process – whether to confirm the draft orders to proceed with the Sheriffhall scheme. As the Reporter is a civil servant, the Applicant considered that if she was acting “ex-officio” then the exception in regulation 10(4)(e) should not apply.
22. In terms of (iii) in paragraph 19 above, the Applicant noted that the relevant legislation allows or requires the Minister to appoint a “person” to hold the PLI and that the [minute of appointment](#)<sup>3</sup> of the Reporter appointed her personally, not “the DPEA”. The Applicant also explained that Reporters enjoyed wide independence within guidance to conduct an objective inquiry into the matter at hand. Therefore, the Applicant submitted that the exception in regulation 10(4)(e) should not apply.
23. In terms of (iv) in paragraph 19 above, the Applicant described what he considered to be confusion over who had received the report. The Authority’s review stated that the Reporter submitted her report to “the Scottish Ministers” on 10 October 2023 and that it had not been sent to any other person. However, the Authority’s review also stated that the report had been sent to “Transport Scotland officials within the Scottish Government and no other party”. The Applicant explained that he therefore found it difficult to accept that the report had not been communicated to a third party.
24. The Applicant also referred to a [2017 decision from the Aarhus Convention Compliance Committee](#)<sup>4</sup>, which he considered further clarified the situation around the exemption in regulation 10(4)(e) of the EIRs. The Committee stated (at paragraph 71) that “the underlying purpose of such an exception is to give a public authority’s officials the possibility to exchange views freely.” The Applicant noted that the report has been intended from the outset to be published, so its disclosure earlier than the Authority might have wished could not be considered to affect how freely views were expressed in the report.

#### *The Authority’s submissions*

25. The Authority provided detailed submissions in support of its position that the report was an internal communication within the meaning of regulation 10(4)(e) of the EIRs. The Commissioner will not reproduce these submissions in full, but he has summarised what he considers to be the key points.
26. The Authority disagreed with the Applicant’s argument that Reporters, when holding a statutory inquiry, were a public authority acting as a statutory consultee during a decision-making process, and so effectively a separate body from the Authority, or that the PLI report was similar to a study commissioned by a public authority from a related, but independent, entity.
27. The Authority submitted that there was no contradiction in saying that the report had not been sent to any person other than the Authority while confirming that it had been sent to

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<sup>22</sup> <https://www.legislation.gov.uk/ukpga/Geo6/10-11/42/schedule/FOURTH>

<sup>3</sup> <https://www.dpea.scotland.gov.uk/Document.aspx?id=858323>

<sup>4</sup> <https://unece.org/DAM/env/pp/compliance/CC-58/ece.mp.pp.c.1.2017.16.e.pdf>

Transport Scotland. The Authority explained that Transport Scotland is part of the Scottish Ministers – they have no separate legal personality.

28. The Authority explained that when a Minister is required to hold a PLI into whether to confirm a compulsory purchase order or roads order, that is simply a statutory procedural aspect of the Minister's decision-making process. The Authority noted that there is "a formal, quasi-judicial character to the proceedings at the inquiry" when the Reporter hears the cases of parties for and against the scheme, but it stated that this was not equivalent to setting up another public authority.
29. The Authority submitted that a Reporter is not independent of the Authority when holding a PLI. For example, the Authority appoints the Reporter and can remove them at any time during a PLI. In this regard, the Authority argued that a Reporter's position was quite different from that of statutory consultees, such as the Scottish Environment Protection Agency (SEPA) or NatureScot. Those agencies were established by Parliament and have a formal role in being consulted upon decisions, whereas the sole purpose of the Reporter holding the inquiry is to assist the Authority in making its determination, not to promote or protect any other interest.
30. The Authority explained that Reporters hear parties *on the Authority's behalf* and compile a report setting out findings on parties' evidence and giving recommendations for the Authority's determination. While Reporters are planning specialists, their role at a PLI is to use their expertise to be the Authority's "eyes and ears" in that formal process – to ask the questions that the Authority would ask and, in reaching recommendations, to apply the Authority's policy (taking account of the public interest) and to consider whether there are reasons in the public interest that an exception should be made from policy in the case in question.
31. In summary, the Authority concluded that Reporters are not consultees and that they simply act on the behalf of the Authority at PLIs, not as a separate statutory entity.

#### *The Commissioner's view about the exception*

32. The Commissioner has carefully considered the submissions provided by both the Applicant and the Authority.
33. Having done so, the Commissioner is satisfied that the report in question is an internal communication for the following reasons:
  - it is a report communicated by the Reporter to the Authority, to inform its determination with respect to the relevant PLI
  - the Reporter is a civil servant employed within the Authority's DPEA and is thus not legally separate from the Authority
  - the report has not been disclosed to a third party or been made available publicly (he recognises that Transport Scotland is an executive agency of the Authority and that it cannot be regarded as a third party to the Authority or as a separate public authority)
  - while the report will be published (at which point it could no longer be considered to be an internal communication), the report remained internal at the date of the Authority's review outcome.

34. In their submissions, both Applicant and Authority referred to [Decision 115/2010](#)<sup>5</sup> of the Commissioner, which considered whether a report submitted to the Authority following a PLI regarding a proposed wind installation in Caithness was an internal communication within the meaning of regulation 10(4)(e) of the EIRs.
35. The Applicant and Authority made different points about Decision 115/2010. The Applicant argued that the circumstances were different and that he wished to advance arguments not discussed in that decision, while the Authority submitted that the circumstances were similar and supported its application of the exception in regulation 10(4)(e) to the report in question in this case.
36. In Decision 115/2010, the Commissioner found that (at paragraph 23):
- “...the information under consideration is an internal communication, being the conclusions and recommendations of a report that was communicated by an Inquiry Reporter to the Ministers, to inform their decision with respect to the relevant PLI. The Commissioner notes that the Reporter is a civil servant employed within the Scottish Government's Directorate for Planning and Environmental Appeals, and consequently that the communication of the report was internal to the Scottish Government.”
37. The Commissioner has considered this case on its own merits. However, he can see no reason in this case to depart from his finding in Decision 115/2010 that a report submitted by a Reporter to the Authority following a PLI is an internal communication within the meaning of regulation 10(4)(e) of the EIRs.
38. As he is satisfied that the report was properly excepted under regulation 10(4)(e) of the EIRs, the Commissioner must go on to consider whether, in all the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exception.

#### *Public interest test*

39. Regulation 10(4)(e) is subject to the public interest test contained in regulation 10(1)(b) of the EIRs, so the request might legitimately be refused only if, in all the circumstances, the public interest in making the information available was outweighed by that in maintaining the exception.

#### *The Applicant's submissions on the public interest*

40. The Applicant submitted that the Authority had improperly balanced the public interest because it had conflated discussions about the report with the report itself. The Applicant agreed that, if he had requested discussions of the Reporter's report, then that information should have been excepted from disclosure in the interests of good decision-making. However, he had requested the report itself and he considered that disclosure of the report would have no bearing on whether internal discussions around the Authority's determination could be conducted fully and frankly.
41. The Applicant noted that one of the parties to the PLI was Transport Scotland, to whom the report had already been disclosed. The Applicant submitted that giving one side privileged access to the report was “entirely counter to the public interest in high quality decision making as well as basic principles of fairness”.

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<sup>6</sup> [https://www.foi.scot/sites/default/files/2023-07/PublicInterestTestEIRs\\_2023.pdf](https://www.foi.scot/sites/default/files/2023-07/PublicInterestTestEIRs_2023.pdf)

42. The Applicant highlighted that the Authority's review outcome reiterated the claim in its initial response that disclosure of the report prior to the Authority's determination would be "misleading". However, the Authority's review outcome also stated that it was not the report itself which would be misleading, but that the public would be unable to distinguish the conclusions of the Reporter's report from the Authority's determination. The Applicant noted that [the Commissioner's guidance on the public interest test](#)<sup>6</sup> stated (at paragraph 25) that public authorities can, if they are concerned that information might be misinterpreted, explain the information.
43. The Applicant also submitted that he did not consider that the Authority's review outcome seriously engaged with the effect of the passage of time on the public interest test. The Applicant noted that the Commissioner's guidance on the public interest test stated (at paragraph 30) that the length of time at which the public interest is overall in favour of disclosure may depend on the circumstances, but the Authority's review outcome made no attempt to judge how long this should be in this case.
44. The Applicant argued that the public interest in maintaining confidentiality was only served by allowing the Authority time to formulate any "initial reactions". The Applicant submitted that disclosure of the report would not prevent the Authority from considering it carefully – if it did not wish to comment further until it had made its determination, it could simply say so.
45. The Applicant recognised that it was "standard practice" to withhold the report until after the Authority's determination, but he was challenging this as he considered it "out of date with the evolution of freedom of information law".
46. The Applicant referred again to a 2017 decision from the Aarhus Convention Compliance Committee<sup>7</sup> and advanced the same arguments rehearsed in paragraph 24 of this decision notice.
47. The Applicant submitted that disclosure of the report would also contribute positively to public debate on transport policy, which, given the recent calling of the General Election (at the time of the request and review), was even more topical and should sway the balancing test further toward disclosure.
48. When providing his final comments in October 2024 to the Commissioner on the public interest, the Applicant stressed that the report had now been completed for a year. The Applicant submitted that this meant the public interest in disclosure was even stronger.

#### *The Authority's submissions on the public interest*

49. The Authority recognised that there was some public interest in disclosure of the report (at the date of the review outcome) as part of open, transparent and accountable government and to inform public debate. The Authority acknowledged the public interest in infrastructure improvements like the Sheriffhall roundabout, since it affected communities in the area and commuters.
50. However, the Authority submitted that there was a greater public interest in high quality policy and decision-making and in the properly considered implementation and development of policies and decisions. The Authority and its officials need to be able to consider all available options and to debate these options rigorously to fully understand their possible implications. Premature disclosure would seriously undermine internal debate on the options

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<sup>6</sup> [https://www.foi.scot/sites/default/files/2023-07/PublicInterestTestEIRs\\_2023.pdf](https://www.foi.scot/sites/default/files/2023-07/PublicInterestTestEIRs_2023.pdf)

<sup>7</sup> <https://unece.org/DAM/env/pp/compliance/CC-58/ece.mp.pp.c.1.2017.16.e.pdf>

available to ensure that decision making is robust and fair and that all options are properly considered. The Authority submitted that the public interest test lay in favour of upholding the exception in regulation 10(4)(e) of the EIRs, to protect spaces to have candid initial discussions to deliberate on whether the infrastructure project in question should go ahead.

51. Furthermore, disclosure of the report before the Authority was fully able to assess it would undermine any final decision on the proposals themselves, which would inevitably lead to confusion on the status of the report and the proposals themselves. The Authority submitted that would not be in the public interest to disclose information that may be “incorrect or incomplete”.
52. In respect of the passage of time argument advanced by the Applicant, the Authority emphasised that it was required to decide whether the report should be disclosed at the time of the request. The Authority noted that the report was submitted in October 2023 and that it issued its review outcome to the Applicant in May 2024. The Authority disagreed that it had not considered the effect of the passage of time but explained that it concluded that the time that had elapsed since the report was submitted was not in itself sufficient to disclose the report and that, given the complexity of the issues involved, the public interest did not favour disclosure.
53. The Authority again referred to Decision 115/2010 of the Commissioner, which set out that the PLI process allows interested parties to make representations and to have these taken into consideration by the Reporter in preparing their report. The Authority considered that this, and the further conclusions contained in Decision 115/2020, remained relevant to this case.
54. The Authority explained that the promoter of the orders, the parties affected by the orders and the public all have an opportunity to comment on the orders at the PLI, to the Reporter. The report is published with the Authority’s determination, so parties and the public do get an opportunity to review it – but only once the determination is ready. Parties have a remedy in the courts if the Reporter has made an error of fact, which the Authority founds its determination on.
55. The Authority submitted that disclosure of the report before the Authority’s determination would only provide an opportunity for disappointed parties to have a “second go” in respect of points they had not been successful on at the PLI. Disclosure of the report before the Authority’s determination would therefore slow the process of the Authority’s decision-making on matters of planning and compulsory purchase (with no addition to the fairness of the process). The Authority concluded that there is a clear public interest in efficient decision-making and that disclosure of the report before the Authority’s determination would not serve that interest.
56. The Authority noted that there was nothing to prevent parties, after the inquiry was over, but before the Authority had made its determination, from drawing new relevant matters of fact to the Authority’s attention. However, it submitted that was quite a different matter from giving parties an opportunity to review and comment on the Reporter’s report prior to the Authority’s determination.

#### *The Commissioner’s view on the public interest*

57. The Commissioner has fully considered the public interest submissions of both the Applicant and the Authority.



58. The Commissioner recognises that there is a substantial public interest in disclosure of the report. After the Authority makes its determination, the report will be published – which will satisfy that public interest. In this case, the Commissioner must decide whether the public interest in maintaining the exception outweighs the public interest in disclosing the report prior to the Authority making its determination on it.
59. While the Applicant has provided submissions on the effect of the passage of time, the Commissioner must decide whether the public interest identified by the Applicant outweighed that in maintaining the exception **as at the date of the Authority’s review outcome** (i.e. on 21 May 2024).
60. The Commissioner accepts that there is some public interest in disclosure of the report prior to the Authority’s determination. However, as rehearsed earlier, the PLI process provides a forum in which all interested parties have an opportunity to make representations. The Reporter considers all the evidence from the various parties at the inquiry and compiles a report based on their findings. The Authority may then either accept or reject the recommendations made by the Reporter. Any party who is aggrieved by the Authority’s decision has a right of appeal to the Court of Session.
61. Given the role of the Authority in determining PLIs, and the nature of the process followed, the Commissioner agrees that there is strong public interest in allowing the Authority to consider and reach a determination on the report, prior to that report being disclosed into the public domain.
62. In other words, the Commissioner considers that there is a strong public interest in protecting the PLI process itself, which facilitates the making of important public planning and infrastructure matters, and his view is that disclosure of the report into the public domain prior to the Authority reaching its determination would undermine that process.
63. While he recognises that the Applicant does not believe that disclosure of the report prior to the Authority’s determination would undermine the PLI process, the Commissioner agrees with the Authority that such a disclosure would simply provide dissatisfied parties with an additional opportunity to provide further arguments, when the PLI process had already provided a suitable opportunity to provide such arguments (and when new relevant matters of fact may be brought to the Authority’s attention prior to its determination).
64. The Commissioner is not persuaded by all of the Authority’s public interest submissions. He does not, for example, believe that the potential for disclosure of the report to be “misleading” carries any weight. To the extent that there is any likelihood of confusion (which he considers remote) resulting, or likely to result, from disclosure of the report prior to the Authority’s determination, the Authority could provide an explanation. He also does not agree that disclosure of the report prior to the Authority’s determination would amount to disclosure of “incorrect or “incomplete” information.
65. However, in all the circumstances of the case, the Commissioner has concluded that there would only be limited public benefit in disclosure of the report prior to the Authority’s determination given that the public interest will be fully satisfied when the report is published and that parties who are aggrieved with the Authority’s determination have a right of appeal to the Court of Session.
66. Having balanced the public interest both for and against disclosure in this case, the Commissioner is satisfied, in all the circumstances of the case, that the public interest in disclosure of the report at the time it was requested was outweighed by the public interest in

maintaining the exception in regulation 10(4)(e) of the EIRs. Consequently, he finds that the Authority was entitled to withhold the report under the exception in regulation 10(4)(e).

## **Decision**

The Commissioner finds that the Authority complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

## **Appeal**

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Euan McCulloch**  
**Head of Enforcement**

**25 November 2024**