



Scottish Information  
Commissioner  
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# Decision Notice 284/2024

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## Specified Compliance Plan

Authority: Scottish Ministers  
Case Ref: 202200813

### Summary

The Applicant asked the Authority to provide them with a specified Compliance Plan that they understood had been shared with Environmental Standards Scotland. The Authority withheld the information on the basis it was internal communications, and the public interest favoured withholding the information. The Commissioner investigated and found that the Authority had correctly withheld most of the information requested, but that certain information was wrongly withheld. He required the Authority to disclose the wrongly withheld information.

### 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 the definition of “environmental information”) (Interpretation); 5(1) and 5(2) (Duty to make environmental information available on request); 10(1), (2), (4)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the Continuity Act) sections 19 (Environmental Standards Scotland); 20(2)(h) (Functions); 23 (Co-operation duties of public authorities and Environmental Standards Scotland); 24(1) and 24(4)(a) (Power to require information); 25(1) and (2) (Failure to comply with an information notice); 40 (Confidentiality of proceedings)

## **Background**

1. On 1 March 2022, the Applicant made a request for information to the Authority. They asked the Authority to provide them with a specified Compliance Plan that they understood the Authority had now shared with Environmental Standards Scotland (ESS).
2. The Authority did not respond to the request.
3. On 6 April 2022, the Applicant wrote to the Authority requiring a review in respect of its failure to respond to its decision. The Applicant did not receive a response to their requirement for review.
4. The Applicant wrote to the Commissioner on 6 June 2022, stating that they were dissatisfied with the Authority's failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
5. The Authority subsequently notified the Applicant of the outcome of its review on 21 July 2022. The Authority withheld the information requested under the exemption in regulation 10(4)(e) of the EIRs.
6. On the same day, 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 that they were dissatisfied with the outcome of the Authority's review because:
  - they did not believe that regulation 10(4)(e) of the EIRs applied as the information requested had already been shared with a third party
  - they considered that the Authority had failed to properly apply the public interest test.

## **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 8 September 2022, in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing that the Applicant had made a valid application and invited its comments. The Authority was also asked to send the Commissioner the information withheld from the Applicant.
9. The case was subsequently allocated to an investigating officer.

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

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

### ***EIRs or FOISA?***

11. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
12. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs.
13. The Applicant has not disputed the Authority's decision to handle his request under the EIRs and the Commissioner is satisfied, in the circumstances, that the information requested falls within the definition of environmental information set out in regulation 2(1).

### ***Section 39(2) - Environmental information***

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
15. In this case, therefore, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that the information requested is properly considered to be environmental information.
16. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.
17. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
18. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

### ***Regulation 5(1) – Duty to make environmental information available***

19. Regulation 5(1) of the EIRs requires a Scottish public authority which holds the 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.
20. On receipt of a request for environmental information, 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 make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
21. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

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

22. 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.
23. For information to fall within the scope of the exception in regulation 10(4)(e) of the EIRs it need only be established that the information is an internal communication.

24. As with all exceptions in regulation 10 of the EIRs, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure.

*The Authority's submissions on regulation 10(4)(e)*

25. The Authority explained that the Compliance Plan was an internal working document. To the extent that parts of it had been shared with ESS as part of an investigation, the Authority submitted that this did not negate the internal status of the Compliance Plan because the information that was shared was forwarded under a statutory obligation.

26. In reaching this decision, the Authority stated that it had taken into account [the Commissioner's guidance on regulation 10\(4\)\(e\) of the EIRs](#)<sup>1</sup> together with [the UK Information Commissioner's \(UK ICO\) guidance on the equivalent regulation 12\(4\)\(e\) of the Environmental Regulations 2004](#)<sup>2</sup>:

- (i) Paragraph 10 of the Commissioner's guidance states:

"Very occasionally, communications between two separate public authorities or communications between an authority and an external adviser can be treated as "internal communications." However, the public authority must be able to demonstrate particular aspects of the administrative and legal relationship between the two bodies to show why communications between them should be considered to be internal. This will include consideration of matters such as the nature and context of the particular relationship and the nature of the communication itself."

- (ii) The UK ICO's guidance states:

"If you forward an internal communication to someone outside the public authority, that communication generally stops being classed as internal. There are exceptions, if:

- there has been an unauthorised leak;
- it was forwarded in error; or
- you are under a statutory obligation to forward it to a third party in confidence.

In these cases, you did not choose to send the communication externally. It would therefore be inappropriate to consider that the communication had lost all protection..."

27. In terms of the relationship between the Authority and ESS, the Authority explained that ESS is a public sector body established as a non-ministerial office by section 19 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the Continuity Act). The Authority noted that ESS was set up to replace EU scrutiny and enforcement in relation to environmental rules and that ESS described its role as being "to scrutinise, investigate and secure improvements in public authorities' compliance with environmental law, the effectiveness of environmental law, and the way it is being implemented and applied in Scotland"<sup>3</sup>.
28. The Authority further explained that ESS is a regulator independent of the Scottish Government and that it is accountable to the Scottish Parliament. Chapter 2 of the

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<sup>1</sup> [EIRsGuidanceRegulation104eInternalCommunications.pdf](#)

<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/what-are-internal-communications/>

<sup>3</sup> <https://environmentalstandards.scot/about-us/>

Continuity Act sets out functions and powers of ESS acting as a regulator. In exercising its functions, ESS may “request information from public authorities about the exercise of their functions under environmental law” (as per section 20(2)(h) of the Continuity Act).

29. The Authority stated that section 23(1) of the Continuity Act places an obligation upon public authorities to co-operate with ESS and give it such reasonable assistance as it requests (including the provision of information) in connection with the exercise of its functions.
30. The Authority explained that section 24(1) of the Continuity Act gives ESS the power to require information by issuing a notice in writing (an information notice) requiring “a public authority to provide information which ESS reasonably requires for the purpose of exercising any of its functions”. For these purposes, “information” includes “any document or a copy of, or extract from, any document” (as per section 24(4)(a) of the Continuity Act).
31. The Authority stated that section 25(1) of the Continuity Act further provides that “where a public authority fails, without reasonable excuse, to comply with an information notice issued to it under section 24(1), ESS may report the matter to the Court of Session”. The Court of Session is also given enforcement powers in this regard, including to make an order for enforcement (section 25(2) of the Continuity Act).
32. The Authority explained that, by letter dated 20 December 2021, ESS advised the Authority that it had received a representation concerning the Authority’s implementation of the [Conservation \(Natural Habitats, &c.\) Regulations 1994](#)<sup>4</sup> (the “Habitats Regulations”) in relation to the application of the European Protected Species (EPS) licensing process to the use of acoustic deterrent devices (ADDs) at Scottish fish farms.
33. In this letter, ESS requested reasonable assistance in accordance with the Authority’s co-operation duties under section 23(1) of the Continuity Act. On that basis, ESS requested a copy of the EPS enforcement plan (i.e. the Compliance Plan requested by the Applicant). As part of its investigation, ESS was considering the Authority’s implementation of the EPS licensing process in relation to ADD use at Scottish fish farms and the sufficiency of the steps taken by the Authority to ensure compliance with the Habitats Regulations. The Authority submitted that it was, therefore, reasonable for ESS to request the Compliance Plan to carry out its investigatory functions and to establish what steps the Authority had taken to ensure compliance with the Habitats Regulations in relation to ADD use by Scottish fish farms.
34. Due to its legal obligation to cooperate with ESS, the Authority provided the information to ESS in the form of a partially redacted version of the Compliance Plan to satisfy its statutory obligation under section 23(1) of the Continuity Act. The Authority confirmed that it did not otherwise voluntarily choose to share any aspects of the Compliance Plan with ESS and that it was shared in confidence and in mandatory compliance with its statutory obligations (with ESS acting as a regulator who reasonably required the information for the purposes of carrying out its functions). The Authority also confirmed that it specified to ESS that it was relying on section 40(1) of the Continuity Act, which prohibits ESS from further disclosing the information, and that the information was not (and is not) otherwise in the public domain.
35. The Authority acknowledged that ESS is an external body, and it recognised and agreed that information shared by it with external bodies will normally lose the status of being an internal communication. However, considering all the circumstances, including the nature and context of the relationship of regulator and public authority and the related statutory

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<sup>4</sup> [The Conservation \(Natural Habitats, &c.\) Regulations 1994](#)

obligation to share information in relation to investigations, the Authority concluded that the information that it shared with ESS could still be treated as an internal communication for the purposes of applying the exemption from disclosure under regulation 10(4) of EIRs.

36. The Authority noted the Applicant's position (set out below) that the lack of explicit reference in sections 23 and 40 of the Continuity Act to the EIRs meant that the EIRs, specifically regulation 10(4)(e), cannot apply in relation to information passed to ESS. However, the Authority disagreed with this argument. The Authority submitted that the EIRs are a comprehensive legislative scheme – where legislation is silent on their application, the EIRs apply in their entirety (including regulation 10(4)(e)) per the rules of statutory interpretation.

*The Applicant's submissions on regulation 10(4)(e)*

37. The Applicant submitted that it was "settled" that the exception in regulation 10(4)(e) of the EIRs cannot apply to information already shared with a third party.
38. The Applicant noted that the Authority stated that the cooperation obligation under section 23(1) of the Continuity Act meant that it considered the Compliance Plan remained an internal communication. However, the Applicant argued that ESS is not an executive body of the Scottish Government but is a "public sector body, set up as a non-ministerial office, independent of Scottish Government, and accountable to the Scottish Parliament"<sup>5</sup>. The Applicant therefore submitted that the exchange of information to ESS from the Authority could not be considered internal (unlike [Decision 033/2015](#)<sup>6</sup> of the Commissioner, which found that Historic Scotland is an executive agency of the Scottish Government).
39. By invoking section 23(1) of the Continuity Act, the Applicant argued that the Authority impliedly acknowledged that it is separate to ESS and that any flow of information between the Authority and ESS cannot be internal. The Applicant noted that section 23 of the Continuity Act is silent on any purported effect of supplying information to ESS on the exceptions under the EIRs (including regulation 10(4)(e)).
40. The Applicant also noted that section 40 of the Continuity Act, while requiring ESS not to disclose information obtained under section 23, is also silent on any effect on regulation 10(4)(e) of the EIRs. The Applicant submitted that section 40 of the Continuity Act showed that the Scottish Parliament had considered the issue of confidentiality of information provided to ESS, but expressly did not make any provision in the Act to alter the effect of regulation 10(4)(e) of the ERs.

*The Commissioner's view on regulation 10(4)(e)*

41. The Commissioner has carefully considered the submissions of the Applicant and the Authority together with the withheld information.
42. The Commissioner recognises that parts of the Compliance Plan have been shared with a third party, the ESS. In almost all cases, information that has been shared with a third party cannot be excepted from disclosure under regulation 10(4)(e) of the EIRs.
43. However, in the circumstances, the Commissioner is satisfied that the Compliance Plan remains an internal communication for the purposes of regulation 10(4)(e) because it was only shared with ESS to the extent that that the Authority was required to do so, in order to satisfy its statutory obligation under section 23(1) of the Continuity Act.

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<sup>5</sup> <https://www.environmentalstandards.scot/about-us/who-we-are/>

<sup>6</sup> <https://www.foi.scot/decision-0332015>

44. In all the circumstances, the Commissioner is satisfied that the Compliance Plan remains an internal communication and is, therefore, subject to the exception in regulation 10(4)(e) of the EIRs.
45. The Commissioner must, therefore, go on to consider whether, in all of the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exception.

*The Authority's submissions on the public interest*

46. The Authority recognised that there is a public interest in the disclosure of information related to the EPS licensing process for ADDs at Scottish fish farms as part of an open and transparent government and in helping to inform public debate regarding ensuring compliance with EPS licensing.
47. Taking this into account, and in accordance with the principles of the Aarhus Convention, the Authority stated that it publishes a wide range of detailed information concerning the EPS licensing process and in relation to ADD use at fish farms to enhance public knowledge and participation, to ensure a transparent process and to encourage and facilitate compliance.
48. The Authority explained that the Compliance Plan was a highly sensitive internal working document containing various operational and strategic aspects, internal policy positions and guidance on the internal application of enforcement procedures. The Authority further explained that the Compliance Plan is a dynamic document, kept updated in light of evolving strategic and practical developments that may impact on the Authority's compliance and enforcement operations. As a result, the Authority considered that disclosure of the Compliance Plan would provide specific information which would enable evasion of the Authority's enforcement measures which would restrict its ability to take appropriate compliance and enforcement actions.
49. In considering the public interest in disclosure of the Compliance Plan, therefore, the Authority considered that the public interest in safeguarding the environment and ensuring effective operational enforcement activities, to ensure compliance with the Habitats Regulations and the Code, outweighed that in disclosure of the Compliance Plan.

*The Applicant's submissions on the public interest*

50. The Applicant did not consider that the Authority had properly applied the public interest test as it had made no attempt to properly balance the factors in favour of disclosure with those against.
51. The Applicant submitted that it was accepted practice that there should be the fullest possible public knowledge of a public authority's plans to secure compliance, including its enforcement intentions, relating to any environmental regulation of any type.
52. As an example, the Applicant noted that the Scottish Environmental Protection Agency publishes detailed information on its regulatory strategy, on enforcement and on the assessment of compliance.
53. In refusing to disclose the Compliance Plan, the Applicant submitted that the Authority failed to consider, as part of the balancing exercise for the public interest test, that doing so would likely deter any potential future offending in relation to ADDs. The Applicant considered that disclosure would therefore be in the public interest.



54. The Applicant submitted that there was a very strong interest in the public being able to develop confidence in the regulatory framework for ADDs and referred to the following extract from the [Aarhus Convention: An Implementation Guide](#)<sup>7</sup> (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived):

“Public participation in decision-making is the second “pillar” of the Convention. Public participation cannot be effective without access to information as provided under the first pillar... In its ideal form, public participation involves the activity of members of the public in partnership with public authorities to reach an optimal result in decision-making and policymaking.”

*The Commissioner’s view on the public interest*

55. Regulation 10(2)(b) of the EIRs builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed.
56. The starting position is, therefore, that there is a public interest in disclosure of environmental information (as expressed in the EIRs and associated EU Directive) and that only if there is a stronger competing public interest in withholding the information should exceptions be applied.
57. The Commissioner has carefully considered the submissions of the Applicant and the Authority together with the withheld information (which he has accepted comprises an internal communication for the purposes of the exception in regulation 10(4)(e) of the EIRs).
58. The Commissioner recognises that there is a clear public interest in the disclosure of information relating to EPS licensing process for ADDs as Scottish fish farms. While the Authority has already published a range of information relating to this, he recognises that disclosure of the Compliance Plan would further inform public debate regarding ensuring compliance with EPS licensing and increase public knowledge of the Authority’s plans to secure compliance, including its enforcement intentions.
59. However, the Commissioner accepts that the Compliance Plan is a sensitive document which contains various operational and strategic information and internal enforcement instructions. He considers that disclosing some of the information in the Compliance Plan would enable evasion of the Authority’s enforcement measures, which would restrict its ability to take appropriate compliance and enforcement actions. This would not be in the public interest.
60. The Commissioner has considered the Applicant’s point that disclosing the information requested would, in fact, be likely to deter any potential future offending in relation to ADDs. He can envisage instances where that might be the case. However, he considers it is more probable that the information would be used to inform further attempts to evade the Authority’s enforcement work.
61. However, the Commissioner is not satisfied, on the basis of the evidence before him, that disclosing *all* of the withheld information in this case would result in such harm.
62. Parts of the Compliance Plan consist of factual and background information and other parts of do not appear to have any particular sensitivity in relation to enforcement measures (or

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<sup>7</sup> [Aarhus Implementation Guide interactive eng.pdf](#)



otherwise). Given this, the Commissioner does not accept that disclosure of this information would result in the harm claimed by the Authority.

63. The Commissioner is therefore satisfied, in all the circumstances, that the public interest in making this factual and background information available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. He requires the Authority to disclose this information to the Applicant. (He will write to the Authority to specify the information to be disclosed.)
64. The Commissioner is satisfied that the public interest in making the remainder of the information available is outweighed by that in maintaining the exception, given the adverse effect disclosure could have on the Authority's ability to take appropriate compliance and enforcement action. Accordingly, the Commissioner accepts that the Authority correctly withheld this information under regulation 10(4)(e) of the EIRs.

## **Decision**

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

The Commissioner finds that the Authority correctly withheld some information under the exception in regulation 10(4)(e) of the EIRs, and so complied with the EIRs in that respect.

However, the Commissioner also finds that the Authority wrongly withheld some information under the exception in regulation 10(4)(e) of the EIRs, and so failed to comply with regulation 5(1) of the EIRs in that respect.

The Commissioner therefore requires the Authority to disclose to the Applicant the information that it wrongly withheld under the exception in regulation 10(4)(e) of the EIRs, by 23 January 2025.

## **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.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

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

**9 December 2024**