



Scottish Information  
Commissioner  
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# Decision Notice 056/2025

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## Legal advice: designation of bathing waters

Authority: Environmental Standards Scotland  
Case Ref: 202400512

### Summary

The Applicant asked the Authority for specific legal advice relating to the designation of bathing waters. The Authority responded in terms of both the EIRs and FOISA and withheld the information requested on the grounds it was an internal communication and legal advice, respectively, and that the public interest favoured withholding it. The Commissioner investigated and found that the Authority was entitled to withhold the information requested on the grounds it was an internal communication and that the public interest favoured withholding it.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality); 39(2) (Health, safety and the environment); 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 (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 30 November 2023, following correspondence relating to the criteria for the designation of bathing waters in Scotland, the Applicant made a request for information to the Authority. They asked for a copy of the advice the Authority received in relation to “case C-56/90” or to otherwise summarise the main points of that advice, to help them understand how the Authority had determined the numeric thresholds in relation to the number of bathers required for to be eligible for bathing water designation.
2. For background, case C-56/90 refers to the judgment of the European Union Court of Justice in [Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland](#)<sup>1</sup>. This case relates to Directive 76/160/EEC, which was subsequently repealed and replaced by Directive 2006/7/EC (the Bathing Water Directives).
3. The Authority initially responded to the request on 5 December 2023 on a “business as usual” basis. However, the Applicant wrote to the Authority on 7 December 2023 to confirm that they had submitted the request under FOI legislation.
4. The Authority responded on 12 December 2023. It responded in terms of FOISA and confirmed that it held the information requested, which it withheld under the exemption in section 36(1) of FOISA.
5. On 15 December 2023, the Applicant wrote to the Authority requesting a review of its decision. They stated that they were dissatisfied with the decision because the reasons provided for withholding the information were generic and they considered the public interest favoured disclosure.
6. The Authority notified the Applicant of the outcome of its review on 17 January 2024. It stated that it considered the information requested was environmental information in terms of the EIRs. However, in the interests of transparency, it explained that it had decided to deal with the request under both the EIRs and FOISA and not rely on the exemption in section 39(2) of FOISA. It continued to withhold the information requested under the exemption in section 36(1) of FOISA and stated that it was also withholding the information under the exception in regulation 10(4)(e) of the EIRs.
7. On 9 April 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 that they were dissatisfied with the outcome of the Authority’s review because they considered the public interest favoured disclosure of the information requested, as well as being of the view that the Authority’s arguments relating to the “chilling effect” that it claimed would result from disclosure were unclear, speculative and unfounded.

## Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 18 April 2024, the Authority was notified in writing that the Applicant had made a valid application.

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61990CJ0056>

10. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was subsequently allocated to an investigating officer.
11. 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, particularly relating to why it considered the public interest favoured withholding the information requested.

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

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

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

13. As stated above, the Authority dealt with the request in terms of both FOISA and the EIRs. However, the Commissioner is satisfied that the information covered by this request (legal advice on the designation of bathing waters) is environmental information, as defined in regulation 2(1) of the EIRs.
14. As set out in [Decision 218/2007](#)<sup>2</sup>, the Commissioner's view is that when a written request for information is received by a public authority, it comes under the scope of section 1 of FOISA whether or not it is for environmental information, given the wide definition of "information" contained in section 73 of FOISA, i.e. "information recorded in any form". The definition does not exclude environmental information.
15. However, if the information falls within the definition of environmental information, authorities have both an obligation and an option. They have the obligation of dealing with the request under the EIRs and they have the option of claiming the exemption at section 39(2) of FOISA, which means they do not, at the same time, have to respond to the request under FOISA.
16. In this case, the Authority chose not to claim the exemption at section 39(2) of FOISA and was therefore obliged to consider the request under both FOISA and the EIRs, which it has done.
17. As he is satisfied the information requested is environmental information, the Commissioner will first consider whether the Authority was entitled to withhold it under the exception in regulation 10(4)(e) of the EIRs.

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

18. 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.
19. 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) of the EIRs requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

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<sup>2</sup> <https://www.foi.scot/decision-2182007>

### ***Regulation 10(4)(e) of the EIRs – Internal communications***

20. 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.
21. 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.
22. As with all of the exceptions contained within regulation 10 of the EIRs, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
23. The Authority submitted that the withheld information was confidential legal advice, which had only been disseminated internally on a limited, “need to know” basis. It confirmed that the withheld information was not in the public domain (either in full or in summary) and that it had not been shared with third parties (other than providing it to the Commissioner for the purposes of his investigation). It stated that legal professional privilege had therefore not been waived and that the information remained confidential.
24. Having considered the information withheld under this exception, the Commissioner is satisfied that it comprises an internal communication and is therefore subject to the exception in regulation 10(4)(e) of the EIRs.
25. The Commissioner must, therefore, go on to consider whether, in all of the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

### ***The public interest test***

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

26. The Applicant explained that they believed the public interest favoured disclosure of the information requested for four reasons. (For background, the Applicant’s request relates to a representation they made to the Authority regarding “unlawful criteria applied by the Scottish Ministers when designating bathing waters”).
27. First, the Authority is a public body with specific statutory functions – the information requested is fundamental to establish whether the Authority is carrying out these functions properly. These functions include taking steps to secure that public authorities comply with environmental laws. As the Authority primarily functions as a “watchdog” of environmental laws, there is a strong public interest in favour of disclosing information which assists the public to understand why the Authority made a decision contrary to EU caselaw and at odds with its functions.
28. Second, the advice at the centre of the appeal affects a large number of people. Bathing waters designation criteria are significant to a large portion of the population as they are important in ensuring the protection of the environment and, consequently, the protection of public health at various designated bathing waters across Scotland. Water quality at designated bathing water sites in Scotland is monitored by the Scottish Environmental Protection Agency during the bathing season, with each site classified annually based on water quality measurements.

29. The classification is likely to be very influential on decisions taken by members of the public on whether to bathe in a specific body of water. Bodies of water which have not been designated are not subject to regular water testing, therefore levels of harmful bacteria are not monitored. However, these bodies of water may still be used for bathing by members of the public, which may endanger their health. The criteria for designation are therefore of significant public interest as it affects the ability of a large number of the population to make informed choices about where and when to bathe.
30. Third, keeping the legal advice secret actively harms accountability and scrutiny of the Authority. Disclosure of the advice would significantly enhance public debate on this issue, as per paragraph 41 of [Decision 048/2022](#)<sup>3</sup> of the Commissioner. Considering the position that the Authority occupies within the Scottish environmental governance landscape, the refusal to disclose the legal advice harms accountability considering the Authority's functions. Moreover, refusing disclosure of the advice hinders public scrutiny of a decision, contrary to legal precedent, of a public body tasked with ensuring compliance with the law.
31. Fourth, disclosure could help to ensure fairness in relation to applications for the designation of bathing waters. At present, applications for the designation of bathing waters must demonstrate that they are regularly used by at least 150 bathers per day. As stated above, the Applicant considered this numeric threshold to be unlawful. Disclosure of the advice could help challenge the threshold, and removal of the threshold would ensure fairness in applications for the designation of bathing waters.
32. While the Applicant accepted that there is a public interest in maintaining legal professional privilege between public authorities and their legal advisers, it noted that the exception in regulation 10(4)(e) of the EIRs is not inalienable and that there are several circumstances where disclosure of such information may be appropriate.
33. The Applicant disagreed that disclosure of the information requested would, as the Authority stated in its review outcome, "create a 'chilling effect' in terms of future legal advice for [the Authority] being requested and received, which could also extend to other public authorities seeking and receiving legal advice". They described this argument as "unclear, speculative and devoid of supporting evidence".
34. The Applicant explained that the appeal in this case concerned the disclosure of a discrete piece of advice concerning a matter on which the Authority had adopted a position contrary to established caselaw. If this appeal were to succeed, there would be no expectation that the Authority should expect to have to disclose its legal advice as normal practice. The opposite is true – the circumstances giving rise to this appeal should occur very infrequently (if ever) and therefore there is little risk that disclosure in this case would have any wider impact on the Authority or any other public body.

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

35. The Authority acknowledged the public interest in relation to transparency of decision-making and that the EIRs provide a mechanism for individuals to seek information to understand the work of a public authority, including the exercise of public functions in relation to the environment. In addition, it recognised the public interest in seeking to obtain accountability for decisions including criteria applicable to designation of bathing waters.

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<sup>3</sup> <https://www.foi.scot/decision-0482022>

36. However, the Authority also acknowledged the public interest in preserving private space for internal communications on sensitive matters, to allow it (and all public authorities) to discuss issues and options and to support sound decision-making.
37. As the withheld information comprises internal legal advice, the Authority submitted that there is a strong public interest for it to have a right to request and receive confidential legal advice. The right of any client to receive confidential and privileged legal advice is one which the courts and the Commissioner have long recognised as being in the interests of justice and the wider public interest.
38. In the absence of an overwhelming public interest in favour of disclosure, the Authority considered there to be a likelihood of a “chilling effect” in terms of future legal advice communicated internally if the internal communication in the form of in-house legal advice were disclosed. In other words, if legal advice privilege was not maintained this might lead to the advice being much more circumspect and therefore less effective in future (thereby damaging the quality of the advice and associated decision-making), which itself would not be in the public interest.
39. On balance, the Authority therefore considered that the public interest in disclosing the information, particularly given the internal communication in this case was legal advice, and the strength of argument regarding the public interest in preserving legal professional privilege, was outweighed by the public interest in maintaining the exception in regulation 10(4)(e) of the EIRs.
40. The Commissioner asked the Authority to respond to the four specific public interest arguments (set out above) made by the Applicant. It responded as follows.
41. First, the Authority noted there appeared to be difference in the interpretation of the caselaw – the Applicant had their interpretation, and the Authority had its own. It submitted that it did not inevitably follow that, simply because the Authority’s position does not appear to accord with the Applicant’s position, that this means the Authority’s position is inconsistent with caselaw or contrary to legal precedent.
42. While the Authority recognised a public interest in ensuring clarity and transparency of decision-making, it explained that it had provided an explanation, as part of previous correspondence with the Applicant, of its position regarding case C-56/90 in July 2023.
43. The Authority submitted that the EIRs are not intended to be a mechanism to require public bodies to engage in points of technical legal debate simply because an organisation does not agree. When considering whether there is a public interest in disclosing information, the test is whether there is serious concern and benefit to the public, not merely something of “individual organisational interest”.
44. Second, the Authority noted the Applicant’s concern that the bathing waters designation form appeared to require evidence of at least 150 bathers using the body of water for the water to be eligible for bathing water designation. During the Authority’s involvement in this case, the Scottish Government agreed to make changes to the relevant form and guidance to address this concern – it is now clear that the reference to 150 bathers is indicative, and the Scottish Government can apply discretion when user counts are below this number.
45. While the Authority accepted that the subject matter of bathing water designations may affect “some number of people”, it argued that the narrow issue within the legal advice did not affect a large number of people.

46. Third, the Authority recognised the public interest in seeking to obtain accountability for decisions, including criteria applicable to designation of bathing waters. However, it considered it had provided an explanation of its position regarding C-56/90 as far as it was able to do so, while also subsequently preserving its right to assert legal privilege in respect of specific legal advice.
47. Fourth, the Authority noted (as set out above) that during its involvement in this case, the Scottish Government agreed to make changes to the application form to address some of the concerns raised by the applicant. One such change was that it has now been made clear that the Scottish Government can apply discretion when user counts of a body of water are under 150.

*The Commissioner's view on the public interest*

48. The Commissioner has considered all the submissions carefully, alongside 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).
49. The Authority has argued that the public interest favoured maintaining legal privilege. The Commissioner must consider any information which is the subject of legal professional privilege in the light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client.
50. As noted in previous decisions involving both FOISA and the EIRs, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48<sup>4</sup> and in the Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB)<sup>5</sup>.
51. In his decisions, the Commissioner has affirmed the inherent public interest in maintaining the right to confidentiality of communications between legal advisers and their clients and observed that the release of such communications is only likely to be ordered in "highly compelling cases". More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
52. The Commissioner acknowledges that disclosure of the advice would help to some extent to fulfil a public interest in understanding the Authority's regulatory functions in relation to the marine environment and provide clarity on how it discharges those regulatory functions. He acknowledges the public interest in the subject of environmental matters such as bathing waters and related environmental elements. There is a clear and strong public interest in understanding how the Authority interprets court precedent and judgments which relate to its work and area of regulatory oversight.
53. The Commissioner finds that the Applicant has provided public interest arguments of genuine substance, and he agrees that there is significant public interest in examining whether the Authority's decision-making is based in law and in ensuring effective oversight of whether the Authority is properly carrying out its statutory functions. He finds this to be a case where the public interest is finely balanced (although he would also note that the withheld information

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<sup>4</sup> <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

<sup>5</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

would not inform consideration of all of the Applicants concerns, at least not to a significant extent).

54. However, the Commissioner recognises the strong public interest in ensuring that the Authority (as any Scottish public authority) can give and receive legal advice in confidence, to facilitate the discharge of their functions as thoroughly and effectively as possible.
55. The Commissioner accepts that the disclosure of such advice could discourage staff in a Scottish public authority from seeking internal legal advice or would deter frankness and openness by parties involved when seeking advice if there was knowledge that the advice might be then disclosed. If, for this reason, the Authority were unable to obtain impartial, full and objective legal advice in respect of its actions, its ability to come to fully informed decisions would be restricted. This would not be in the public interest.
56. While the Commissioner acknowledges that there are occasions where factors exist which may outweigh the public interest in withholding legal advice, such factors must be compelling, and he is not persuaded that this is the case here.
57. On balance, having examined the withheld information, the Commissioner is not satisfied that the public interest arguments in favour of disclosure presented by the Applicant are so strong as to outweigh the public interest arguments in maintaining the exception. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in disclosure and accepts that the information was properly withheld under regulation 10(4)(e) of the EIRs.
58. As the Commissioner is satisfied that the withheld information was properly excepted from disclosure under regulation 10(4)(e) of the EIRs, he will not go on to consider if that information was also exempt from disclosure under section 36(1) of FOISA.

## **Decision**

The Commissioner finds that the Authority complied with the Freedom of Information (Scotland) Act 2002 and 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**

**3 March 2025**