

Decision Notice 042/2021

Ramsar Policy

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 201901847



Scottish Information
Commissioner

Summary

The Ministers were asked about the drafting of two paragraphs of the published Ramsar Policy.

The Ministers disclosed some information during the investigation, but withheld the remaining information on the basis that it comprised internal communications which, in this case, were excepted from disclosure.

The Commissioner agreed that the remaining information was excepted from disclosure, but found that the Ministers had not been entitled to withhold the information they disclosed during the investigation.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) definition of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 7 (Extension of time); 10(1), (2), (4)(e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices forms part of this decision.

Background

1. The Ramsar Convention on Wetlands of International Importance is an international treaty established in 1971 by UNESCO, for conservation and sustainable use of wetlands. Ramsar is not devolved and the Department for Environment, Food and Rural Affairs (DEFRA), is the government department responsible for managing Ramsar sites within the UK.
2. On 26 February 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). His request was made following what he considered to be a change to the Ministers' policy with regard to Ramsar sites on 22 January 2019. The information requested was for all records in relation to the drafting and publication of paragraphs 8 and 9 of the Ramsar Policy¹. (The request is set out in full in Appendix 2.)
3. The Ministers wrote to the Applicant on 26 March 2019, extending the timescale to respond under regulation 7(1) (Extension of time) of the EIRs.
4. On 26 April 2019, the Applicant wrote to the Ministers requesting a review of their decision on the basis that they had failed to respond to his request.
5. The Ministers notified the Applicant of the outcome of their review on 3 May 2019. The Ministers apologised for their failure to respond to his initial request on time and disclosed redacted copies of two emails and a series of weblinks where some of the information requested was already available in the public domain. The Ministers also withheld information under regulations 10(4)(d) (unfinished documents), 10(4)(e) (internal communications) and 11(2) (third party personal data) of the EIRs.
6. The Applicant wrote again to the Ministers on 3 June 2019, seeking clarification on some of the information that had been provided to him, highlighting what he considered to be

¹ <https://www.gov.scot/publications/implementation-of-scottish-government-policy-on-protecting-ramsar-sites/>

omissions and anomalies in the Ministers' response (including a date in a document, which seemed to indicate that it had been prepared a year ago). He also sought confirmation that the response included external correspondence, highlighting examples of external meetings regarding the Coul Links planning application (which considered the application of the Scottish Government's Ramsar Policy) and questioned the application of exceptions and the Ministers' consideration of the public interest test.

7. On 19 June 2019, the Ministers wrote to the Applicant, explaining that a date stated within a document was an administrative error, and confirmed the correct date. They also confirmed that they were seeking to rely on regulation 10(4)(a) (information not held) with respect to any external correspondence. The Ministers went on to handle other parts of the Applicant's correspondence as a new request and advised him of his rights of appeal to the Commissioner.
8. On 4 October 2019, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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.
9. The Applicant stated he was dissatisfied with the outcome of the Ministers' review. He disagreed with the Ministers' assertion that the changes to the document simply represented a restatement of existing policy. Specifically, he was dissatisfied with the response on the following grounds:
 - he disagreed with the exceptions applied;
 - due to the conflicting dates he had been provided with, he believed the Ministers potentially held earlier drafts of the Ramsar Policy document which had not been disclosed;
 - he believed that external correspondence existed and had not been disclosed; and
 - he considered the public interest test had been wrongly balanced.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
11. In discussion with the Applicant, he confirmed that he did not wish to challenge the redaction of personal data.
12. On 22 November 2019, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 19 February 2020, the Ministers were invited to comment on this application and to answer specific questions. These questions focussed on the searches conducted, information falling in scope of the request, reasons for applying the exceptions and the public interest in disclosure of (and in withholding) the information.

14. On 26 February 2020 and 17 March 2020, the Ministers disclosed further information to the Applicant. Within their submissions of 18 March 2020, the Ministers withdrew their reliance on regulation 10(4)(d), but maintained that regulation 10(4)(e) applied to the remaining information. They also explained that they now considered that some information they had identified as falling within the scope of the request fell outwith the scope of the request as it did not relate to the drafting and publication of paragraphs 8 and 9 of the Ramsar Policy.
15. The Applicant was asked for, and provided, submissions as to why he considered it was in the public interest for the information to be disclosed.
16. Aspects of the Ministers' submissions were queried during the investigation. Following this, on 9 October 2020, the Ministers provided further documents they considered fell within scope of the request.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Information disclosed during the investigation

18. As noted above, some of the information which had previously been withheld in response to the request was disclosed during the investigation. With the exception of one document, the Ministers provided no submissions explaining why the information disclosed during the investigation was previously considered to be excepted from disclosure.
19. The one document where submissions were provided is considered below. In relation to the other information disclosed during the investigation, the Commissioner can only conclude that the information should have been disclosed at the time of asking. In failing to disclose the information, the Ministers failed to comply with regulation 5(1) of the EIRs.

Application of the EIRs

20. The Commissioner is satisfied that the information covered by this request (discussion of Ramsar Policy) is environmental information, as defined in regulation 2(1) of the EIRs. In reaching this conclusion, the Commissioner has considered the information in question, along with paragraphs (a) and (c) of the definition of environmental information (reproduced in Appendix 1), and he agrees with the Ministers in categorising the information as environmental.
21. The Applicant has not challenged the Ministers' decision to deal with the information as environmental information. The Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

22. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.

Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.

Background to request

23. The Applicant's request relates to the drafting and publication of two paragraphs of Scottish Government's guidance on the protection of Ramsar sites. The need for clarification was brought into focus by the Coul Links planning application which impacts upon a designated Ramsar site. In the face of an objection by a statutory consultee (SNH), the Coul Links application was called in by the Ministers for determination at national level. The application was called in on 24 August 2018.
24. Following a Pre-Examination Meeting (PEM) for the Coul Links in October 2018², it was decided that the Planning and Environmental Appeals Division (DPEA) would ask the Scottish Government to provide guidance on its established policy for the protection of Ramsar sites (paragraph 1 of published briefing note³). The advice was sought in December 2018.
25. The Scottish Government published its clarification of Ramsar site policy on 22 January 2019 (see: <https://www.gov.scot/publications/implementation-of-scottish-government-policy-on-protecting-ramsar-sites/>)
26. On 21 February 2020, the DPEA announced that the Coul Links planning application was being refused⁴.

Information held

27. The Applicant questioned whether the Ministers had identified and provided (to the Commissioner) all the information falling within scope of the request.
28. The Applicant, among other issues, sought confirmation that all correspondence with external stakeholders had been identified. During the investigation, the Applicant provided the Commissioner with information that had been obtained from SNH that, in the Applicant's view, suggested that further information was held.
29. The Commissioner must emphasise that this aspect of the investigation was considered in extensive detail and that the Ministers were asked wide-ranging questions about the searches conducted, information identified, and why they did not hold certain information. The Commissioner does not consider it necessary to document every aspect of this part of the investigation, but has included the key points, and is satisfied that this matter has been investigated thoroughly and carefully.

Searches

30. The Ministers were asked to confirm the searches conducted to identify the information falling within the scope of this request. They confirmed that searches had been completed of their document management system, using the search term "Ramsar".
31. The Ministers submitted that the person responsible for searching for the requested information has lead responsibility for the work undertaken in relation to the Ramsar guidance and therefore has a good knowledge of the information held by the Scottish Government.

² http://tainfieldclub.org.uk/PublicNotices/2018-10-31_NoteOfCoulPreEnquiryMeeting.pdf

³ <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2019/05/foi-19-00577-review/documents/foi-review-19-00577-information-released-2/foi-review-19-00577-information-released-2/govscot%3Adocument/FoI-19-00577%2B-%2BDocument%2B2.pdf>

⁴ <https://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=119883>

32. The individuals who searched their records were identified, by the Ministers, as the only people who would have any involvement in information covered by the scope of the request and included officials in Natural Resources Division (which leads on policy for the protection of Ramsar sites), Planning and Architecture Division (which leads on planning policy), Legal Directorate and the Environment and Forestry Directorate and the Director General for Economy.
33. The Ministers provided a copy of the email to relevant individuals requesting searches to be completed. The Ministers submitted that these searches would have encompassed email accounts, enterprise vault (email archive) and electronic document folders and would have encompassed the time period from 23 June 2014 to the date of the request.
34. A list of all Government officials considered relevant to the subject of this request, and asked to search their records, was provided to the Commissioner alongside a confirmation that a comprehensive search was also undertaken of the Ministers' electronic records and data management system.
35. The Ministers confirmed that a considerable quantity of information was gathered as a result of the search exercise, the processing of which was the principal reason for requiring an extension of time under regulation 7 of the EIRs.
36. The Ministers were asked to address the lack of information identified falling into the following categories: information pre-dating 5 December 2018, post-dating 22 January 2019 and external correspondence.

Information pre-dating 5 December 2018

37. The Ministers explained that the need to clarify the established policy was initiated by the Scottish Government's Planning and Environmental Appeals Division in December 2018 following a pre-examination meeting associated with the Coul Links golf course planning application identifying a need for clarification of its established policy for protection of Ramsar sites. Consequently, no information falling within the scope of the request was held pre-dating this point.

Information post-dating 22 January 2019

38. The Ministers explained that the Ramsar Policy was published on 22 January 2019 which represented the conclusion of policy officials' consideration of this issue.

External correspondence

39. The Ministers explained that policy on this issue is devolved to the Scottish Government and there was no need for external correspondence within the scope of this request (drafting of paragraphs 8 and 9). The Ministers confirmed that they held some limited contact with the UK Government following a general enquiry received from the Ramsar Secretariat, but this did not fall within the scope of the request as it had no connection with drafting and publication of paragraphs 8 and 9.
40. The Applicant also queried the date documented in a version of a briefing paper disclosed to him [page 6]⁵. It was documented as 18 January 2019. The published document included the date 18 December 2018, suggesting to the Applicant that there could be further drafts

⁵ <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2019/05/foi-19-00577--review/documents/foi-review-19-00577-information-released-2/foi-review-19-00577-information-released-2/govscot%3Adocument/FoI-19-00577%2B-%2BDocument%2B2.pdf>

held that had not been identified. The Ministers stated that the 2018 date was a typographical error and the correct date was 18 January 2019. The Ministers confirmed this by referring to the date of the enclosing email that attached the document in question.

Information falling outwith the scope of the request

41. The Ministers' submissions included commentary on the information in the documents, and whether the information was considered to fall outwith the scope of the request.

The Commissioner's conclusions

42. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out. He will also consider, where appropriate any reason offered by the public authority to explain why it does not hold the information.
43. The Commissioner has considered in detail all of the information falling within the scope of the request, including that disclosed and withheld. He has considered the information identified in light of the scope of the request (drafting and publication of paragraphs 8 and 9) and the explanations offered by the Ministers as to why some information expected by the Applicant is not held.
44. Having considered all the relevant submissions, the Commissioner is satisfied that the Ministers have taken adequate and proportionate steps to establish the information they held that fell within the scope of the Applicant's request.
45. The Commissioner is satisfied, having considered the withheld information in detail, that the Ministers correctly identified information falling outwith the scope of the request as it does not relate to the drafting and publication of paragraphs 8 and 9 of Ramsar Policy.
46. It is the Applicant's position that the changes to paragraphs 8 and 9 represented a substantive change in Scottish Government's policy on the protection of Ramsar sites; the Ministers submit it that it was simply a clarification of established policy. The Commissioner recognises that the Applicant would hold reasonable expectations that further information should be held, given his view on the substantive impact of this change. However, the Commissioner's remit is limited to determining what information is held at the time of the request and is unable to comment on what the changes to the published policy represent.
47. As noted above, during the investigation, the Applicant provided the Commissioner with information he had obtained from SNH. He submitted that the information suggested that there were exchanges between SNH and the Ministers about the intended Ramsar guidance document, prior to its publication on 22 January 2019, which had not been provided to him.
48. The Commissioner has reviewed the extracts supplied by the Applicant from SNH. The extracts do not appear to suggest that SNH was involved in the drafting and publication of paragraphs 8 and 9, but reflects that the wording of the policy in the published statement required clarification before SNH could make a detailed submission in relation to the planning application.
49. The Commissioner has considered the submissions and information identified in detail. Taking a reasonable interpretation of the request, he notes that the information identified is detailed and comprehensive and, when viewed in light of the explanations and descriptions of searches provided, he is satisfied that the Ministers, by the end of the investigation, had

conducted adequate and proportionate steps to identify all of the information held, falling within the scope of this request.

50. The Commissioner concluded that, when the correspondence is organised into date order, it identifies a clear structure to the discussion about the changes to the published Ramsar Policy, from the date when the DPEA asked the Scottish Government for guidance, to the date when the published policy was amended.
51. With respect to the anomaly in dates, the Commissioner has not been presented with any evidence which would suggest that the date of the document was anything other than a typographical error.

Regulation 10(4)(e) of the EIRs (internal communications)

52. The Ministers confirmed that they were only seeking to withhold information (with the exception of personal data which is not being considered in this decision) on the basis of regulation 10(4)(e). Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
53. However, as with all of the exceptions in regulation 10, regulation 10(4)(e) must be interpreted in a restrictive way (regulation 10(2)(a)) and a presumption in favour of disclosure must be applied (regulation 10(2)(b)). The exception is also subject to the public interest test in regulation 10(1)(b) of the EIRs.
54. Having considered the information withheld by the Ministers under this exception, the Commissioner is satisfied that all of the information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). He must, therefore, go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The public interest

55. Although the information has been found to be excepted from disclosure, it must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintain the exception (regulation 10(1)).
56. In reaching a finding on the public interest, it is not correct simply to consider what is of interest to the Applicant. In applying this test, it is necessary to consider what is in the interests of the public as a whole.
57. Regulation 10(2)(b) 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.

The Applicant's public interest submissions

58. The Applicant made extensive public interest submissions during the course of the investigation. He submitted that disclosure would enhance scrutiny of the policy-making and guidance preparation processed, thereby improving accountability and participation. He noted that the Ministers assert that their policy on Ramsar site protection did not change, but in his view this was contrary to evidence from the public local inquiry, which suggested that the Ministers should have consulted before making a change to policy.

59. The Applicant argued that disclosure would promote fairness in relation to planning applications, arguing that there was a public interest in determining whether the guidance had been, to any extent, influenced by the planning application.
60. He also submitted that disclosure could facilitate the reconciliation of competing policy statements, highlighting that the changes made were inconsistent with the Ministers' previous policy statements and promote transparency in the process, highlighting any undue external influences.
61. In general, the Applicant submitted that disclosure would contribute to further debate on a matter of public interest, namely the Ministers' compliance with international agreements including those (e.g. the Ramsar Convention) to which the UK Government is a signatory.

The Ministers' public interest submissions

62. The Ministers submitted that the information reflects exchanges between Scottish Government policy officials and legal advisers for the purposes of formulating advice to Ministers on a complex issue relation to the interpretation of Scottish Government policy for the protection of Ramsar sites.
63. The Ministers considered the withheld information to be subject to legal professional privilege as directly conveying legal advice or reflecting further discussions about that advice. The Ministers explained that the information reflected exchanges with legal advisers, including points requiring consideration, the extent of their legal advisers' comments and issues being flagged up for further consideration. The Ministers submitted that a claim for confidentiality could be maintained in legal proceedings as the correspondence in question was only shared between the Scottish Government and its legal advisers.
64. The release of this information, the Ministers argued, prepared while the policy guidance was in the formulation stage, would significantly inhibit the ability of officials to consider issues, develop robust guidance, request advice and respond, develop thinking or undertake policy analysis with regard to protecting Ramsar sites.
65. The Ministers recognised that there is a strong public interest in the release of this information as part of an open, transparent and accountable government, especially the protection of Ramsar sites in Scotland is a sensitive issue. The Ministers submitted that the public interest in this case had been met, at least in part, by the release of a redacted version of the final submission made to the Cabinet Secretary for Environment, Climate Change and Land Reform and in the publication of the final version of the Ramsar guidance.
66. The Ministers also highlighted a very strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal adviser and client. The Ministers stated that, in areas such as this, which are emotive and the subject of political debate, an expectation that legal advice would be released would inevitably lead to the legal advice being much more circumspect and therefore less effective.
67. The Ministers argued that there was a strong public interest in protecting the confidentiality of this information in order to ensure that they are able to consider legal advice privately and then ensure that a fully considered position is provided that is consistent with that advice.
68. On balance, the Ministers considers that the public interest in this case lies in favour of maintaining the exception.

The Commissioner's view

69. The Commissioner is satisfied that the information which has been withheld is subject to 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.
70. As noted in previous decisions involving 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.
71. 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 48⁶ and in the *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)⁷. The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
72. The Commissioner agrees with the Applicant there is a strong public interest in ensuring scrutiny of the decision-making process, particularly where there is dubiety over the impact of changes to the published guidance.
73. He also recognises the importance of transparency in the planning application process. To that end, he notes that the handling of the Coul Links planning application is linked to the changes made to this policy. Both parties recognised that the clarified policy on Ramsar site protection would have an impact on the handling of this planning application.
74. On the other hand, the Commissioner recognises the strong public interest in ensuring that the Ministers (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.
75. The Commissioner recognises 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 may be then disclosed. If, for this reason, the Ministers were unable to obtain impartial, full and objective legal advice in respect of its actions, this would not be in the public interest.
76. Equally, he recognises the strong public interest in allowing officials to discuss, comment and act on advice provided.
77. When balancing the public interest, the Commissioner must take into account the circumstances at the time of the information request (or, where relevant, at the review stage). Just as the application of an exception may change with the passage of time, the balance of the public interest will also shift with the passage of time, usually in favour of disclosing the information.
78. The Applicant's request was submitted on 26 February 2019, just over a month from the date of publication of the Ramsar Policy, but still while the Coul Links planning application was under consideration and still very much part of public debate.

⁶ <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

⁷ <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

79. The Applicant's request was focussed on the drafting of paragraphs 8 and 9 of the Ramsar Policy. However, as noted above, the interpretation of Ramsar Policy was part of the information that was included in the DPEA paper on the planning application for the Coul Links. The final decision on this planning application was issued on 21 February 2020.
80. The Commissioner notes that the DPEA requested this clarification of policy prior to its conclusion on the Coul Links application. He acknowledges that disclosure of the exchanges related to the clarification of this policy would, in light of the ongoing consideration of the planning application, be detrimental to the public interest. Authorities should be allowed to reach informed decisions, without concerns that requested advice and interpretation of policies would be published before the decision is issued.
81. The Commissioner has considered the effects of the passage of time in the decisions has issued many times. His briefing on the public interest test in the EIRs⁸ states at paragraph 29:
- The need to consider the public interest "in all the circumstances of the case" means that the factors weighing in favour of disclosure or maintaining an exception, or their relative weight in the balancing exercise, is likely to change over time. It is important that the balancing exercise takes into account the circumstances at the time of the information request (or, where relevant, at the review stage). Just as the application of an exception may change with the passage of time, the balance of the public interest will also shift with the passage of time, usually in favour of disclosing the information.*
82. The Commissioner recognises the benefits in granting a period of time for public authorities to discuss and agree their position. This ensures that all options and views can be explored, without concern that this process may be exposed to public discussion. This is especially important in the period before a public authority reaches a settled view and makes its view known as a matter of published policy. In some cases, the Commissioner accepts that the need for this "private space" extends beyond the point at which the public authority has made known its final view.
83. In this case, the Applicant's request was made very soon after internal discussions were completed and the policy published. This is relevant in assessing the ongoing sensitivity of the withheld information, and the likely effect of its disclosure in response to the Applicant's request.
84. The Commissioner accepts that disclosure of the correspondence associated with the drafting of the Ramsar Policy, so soon after its publication and so soon after the drafting process was completed, is not in the public interest. Disclosure so soon after such a policy is published would have far reaching and inhibitive effects on such work in the future.
85. The Commissioner considers that the Ministers should be permitted to have their discussions about the interpretation of Ramsar Policy without the concern that such discussions would be disclosed so shortly after they had completed.
86. On balance, the Commissioner is not satisfied that the public interest arguments in favour of making the information available are sufficiently strong to outweigh the public interest arguments in maintaining the exception. Consequently, he finds that the public interest in

⁸ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx>

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.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) 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 Ministers identified and provided the information falling in scope of the request. He finds that the information withheld by the Ministers was excepted from disclosure under regulation 10(4)(e) of the EIRs, and the public interest did not favour making the information available.

However, he also finds that the Ministers were not entitled to rely on the exception in regulation 10(4)(e) for withholding information it subsequently made available during the investigation (with the exception of one document). The Commissioner finds that the Ministers failed to comply with regulation 5(1) of the EIRs in this respect. The Commissioner does not require the Ministers to take any action in respect of this failure.

Appeal

Should either the Applicant or the Ministers 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.

Margaret Keyse
Head of Enforcement

22 March 2021

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

7 Extension of time

(1) The period of 20 working days referred to in-

- (a) regulation 5(2)(a);
- (b) regulation 6(2)(a); and
- (c) regulation 13(a),

may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.

- (2) Where paragraph (1) applies the Scottish public authority shall notify the applicant accordingly as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information.
- (3) Notification under paragraph (2) shall-
 - (a) be in writing;
 - (b) give the authority's reasons for considering the information to be voluminous and complex; and
 - (c) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - ...
 - (e) the request involves making available internal communications.
 - ...

Appendix 2: The information request

“Please provide any and all records held by the [Scottish Government] (including letters, emails, minutes and notes of meetings and telephone conversations, all since and including 23 June 2014) of the process (including any consideration of an invitational and/or public consultation process) leading to the drafting and publication of paragraphs 8 and 9 of Attachment 5.* In addition to internal [Scottish Government] records, please provide specifically any correspondence in this connection between the [Scottish Government] and

1. the UK Government,
2. Scottish Natural Heritage, and/or
3. any other persons or organisations external to the [Scottish Government],

irrespective of whether such parties may or may not have sought to influence the drafting of paragraphs 8 and 9 of Attachment 5.”

* Note

“Attachment 5” is the document entitled, “Implementation of Scottish Government policy on protecting Ramsar sites”. It can be viewed here:

<https://www.gov.scot/publications/implementation-of-scottish-government-policy-on-protecting-ramsar-sites/>.

Paragraphs 8 and 9 read as follows:

8. Where Ramsar interests coincide with Natura qualifying interests protected under an SPA or an SAC, as the case may be, the interests are thereby given the same level of (legal) protection as Natura sites.
9. Where Ramsar interests are not the same as Natura qualifying interests but instead match SSSI features, these receive protection under the SSSI regime.

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