



# Decision Notice 097/2023

---

## Fishing rights around the island of Rockall

**Authority:** Scottish Ministers

**Case Ref:** 202100921

### Summary

The Applicant asked the Authority for information on interactions between the Scottish and Irish governments on fishing rights around the island of Rockall, and on the use or availability of Royal Navy vessels on fishery patrols in Scottish waters. The Authority disclosed some information, and withheld the remainder (variously) under a number of exceptions in the EIRs. The Commissioner investigated and found that the Authority had correctly withheld some information, but that the remainder was wrongly withheld. He required the Authority to disclose this information.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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”, “the Commissioner” and paragraphs (a) and (c) of “environmental information”) and (2)(a) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 9(1) (Duty to provide advice and assistance); 10(1), (2), (4)(e), (5)(a), (b) and (f) (Exceptions from duty to make environmental information available); 13(b) and (c) (Refusal to make information available); 16(4) Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

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

## Background

1. On 7 January 2021, the Applicant made a request for information under FOISA and the EIRs to the Authority seeking the release of documents and information about contacts between the Scottish and Irish governments on the question of fishing rights around Rockall. He asked for the following information:
  - (i) All letters, emails and documents exchanged between the Scottish and Irish governments relating to fishing rights for EU (European Union) trawlers around the island of Rockall, dating from 1 January 2019 to the date of the request.
  - (ii) All briefing documents prepared in advance of meetings or telephone conversations between Scottish and Irish Ministers, and minutes taken during any meetings or telephone conversations between Scottish and Irish Ministers, which related to or included discussion of EU fishing rights around the island of Rockall, dating from 1 January 2019 to the date of the request.
  - (iii) With reference to a report by [Irish broadcaster RTE on 28 June 2019](#)<sup>1</sup> that the Scottish and Irish governments agreed that month to *"an intensive process between Ministers to try to come to a solution on the issue, he said. A report is due to be completed at the end of July and the issue will be assessed from there."*:
    - (a) a copy of that report.
    - (b) all internal Scottish Government briefing papers prepared pursuant to that process and all documents, including memos and emails, exchanged as part of that process between the Irish and Scottish governments.
  - (iv) Copies of all documented interactions, including but not exclusively emails, letters and memos, between the Scottish and UK (United Kingdom) governments regarding the use or availability of Royal Navy vessels on fishery patrols in Scottish waters, sent or received by the Scottish Government, from 1 January 2020 to the date of the request.
  - (v) The names and job titles of participants, the dates, times and minutes of all telephone or video conferencing meetings between Scottish and UK Ministers regarding the use or availability of Royal Navy vessels on fishery patrols in Scottish waters, which took place from 1 January 2020 to the date of the request.
2. The Authority responded on 5 February 2021 and disclosed some information.
3. For parts (i) to (iii) of the request, the Authority withheld some information, variously, under the exemptions in sections 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs), 32(1)(a) (International relations), 36(1) (Confidentiality) and 38(1)(b) (Personal information) of FOISA. The Authority explained why it considered these exemptions applied and set out its consideration of the public interest test, where this was required.
4. For parts (iv) and (v) of the request, the Authority stated, in terms of section 17(1) (Notice that information is not held) of FOISA, that it did not hold the information requested. This, the Authority explained, was due to being unable to locate any documented interactions between the Scottish and UK governments, or any documented meetings between Scottish and

---

<sup>1</sup> <https://www.rte.ie/news/politics/2019/0628/1059066-rockall/>

UK Ministers, regarding the use or availability of Royal Navy vessels on fishery patrols in Scottish waters for the time period stated.

5. On 22 February 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision:

- (i) The Authority had ignored his wish to have the request considered under the EIRs: he asked for a full re-assessment of his request under that regime.
- (ii) In parallel, he wished a fresh and full appraisal of the judgement that it was in the public interest to withhold key documents under the exemptions in sections 30(b)(i) and (ii), 32(1)(a) and 36(1), both under FOISA and (separately) under the EIRs.
- (iii) He also asked for a review of whether the Authority held (or previously held) any information regarding the apparent communications between the Justice Secretary (and/or his officials) and UK Ministers (and/or their officials) regarding the question of policing Scottish waters, as specified in his request. In support of this, he referred to a tweet by the Justice Secretary in December 2020: *“Gunboat diplomacy will not be welcome in Scottish waters ... Police Scot & Marine Scot will protect fisheries if necessary, Chief Constable has primacy. UK Govt has confirmed with me Royal Navy will not be deployed unless Chief Constable requests.”*. The Authority’s response, he argued, implied that there was no evidence that the Justice Secretary did seek or was given the assurances given by the UK Government, as claimed, or alternatively the Civil Service allowed conversations on such a sensitive matter to take place without any official record or Civil Service input.

6. The Authority notified the Applicant of the outcome of its review on 23 March 2021, substituting its original decision with a different decision. Having concluded that the information requested was environmental, the Authority applied section 39(2) of FOISA and considered the request under the EIRs.

7. For parts (i) to (iii) of the request, the Authority partially disclosed some newly identified information, subject to exceptions being applied to the remainder of it. It confirmed it had reconsidered the information previously disclosed, and concluded that some of this fell outwith the scope of the request (as it did not relate to fishing around Rockall). It also assessed that some other information was excepted from disclosure under (variously) the exceptions in regulation 10(4)(e) (Internal communications) (including legal advice), regulation 10(5)(a) (International relations), and regulation 11(2) (Personal data) of the EIRs. The Authority explained why it considered these exceptions applied along with consideration of the public interest test (where required).

8. For part (iv) of the request, the Authority confirmed it had identified one document falling within scope which it partially disclosed, with the following additional context:

*Policing and fisheries protection are fully devolved and this has not changed as a result of EU Exit. Even where matters such as maritime security and safety are reserved, it is important that the Scottish Government is involved in discussions so we can understand the potential risks and responses in the Scottish zone. Marine Scotland is responsible for fisheries protection out to 200 nautical miles, while the Chief Constable/Police Scotland lead on policing.*

*Fisheries Protection is fully devolved and delivered by Marine Scotland Compliance. Whilst the RN in theory has powers to act in Scottish waters, in practice they deliver fisheries*

*protection only in English waters and that has been the case for many years. In criminal matters it is in most cases for either Police Scotland (within 12 miles) or the Flag State of the vessel committing the offence. The Royal Navy do not have constabulary powers in Scottish waters and so could only act to support Police Scotland.*

9. For part (v) of the request, the Authority confirmed that the use or availability of Royal Navy vessels on fishery patrols in Scottish waters was briefly discussed by Scottish and UK Ministers at a meeting on “3 December”. It identified a small amount of additional information falling within scope which it considered to be excepted from disclosure under regulation 10(5)(f) (Third party interests) of the EIRs. The Authority explained why it considered this exception applied along with consideration of the public interest test.
10. On 28 July 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated he was dissatisfied with the outcome of the Authority’s review because, in his view:
  - (i) it had failed to carry out a proper search for the information requested and he believed further information may be held.
  - (ii) it had misapplied the necessary public interest tests in refusing to disclose the information sought.
  - (iii) the information requested should be disclosed in full.

## **Investigation**

11. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
12. On 6 August 2021, the Authority was notified in writing that the Applicant had made a valid application and 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.
13. 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. These focussed on its justification for withholding some of the information requested under the exceptions claimed, the searches undertaken to identify the information requested, and whether any further in-scope information might be held. The Authority was also asked to explain why it had not provided a separate response to each part of the request (including identifying which part of the request the information disclosed related to), and why it had not made clear which exception(s) applied to each redaction in the information disclosed.
14. On 26 April 2022, the Authority provided submissions to the Commissioner. In doing so, it confirmed that further information had been identified, and that it wished to change its position in relation to the exceptions being claimed. In addition to continuing to rely on the exceptions in regulations 10(4)(e) and 10(5)(a) for certain information, the Authority informed the Commissioner that it now wished to also rely on regulation 10(5)(b) (Course of justice) for some information which comprised legal advice, disclosure of which would breach legal

professional privilege. The Authority also withdrew reliance on regulation 10(5)(f) as it considered the information previously withheld under this exception was not held by it, on the basis that the information was provided, in confidence, by the Cabinet Office. The Authority therefore wished to retrospectively rely on regulation 2(2) of the EIRs for that information.

15. The Authority confirmed it had issued a further response to the Applicant that same day, setting out its change of position.
16. In light of the Authority's change of position, and in the interests of natural justice, the Applicant was invited to comment on this, and on the public interest in disclosure of the information being withheld.
17. The Applicant provided submissions to the Commissioner on 2 June 2022.

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

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

### ***Handling in terms of EIRs***

19. At review stage, the Authority changed its position and 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.
20. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
21. The Authority submitted that the information requested by the Applicant related to the sustainable management of the Rockall fishery, which is an environmental resource, and to activities undertaken to protect biological diversity in relation to fishing and fisheries enforcement matters around the islet of Rockall. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a) and (c) of that definition.

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

22. 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. In this case, the Commissioner accepts that the Authority was entitled to apply the exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
23. 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. 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.

24. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA, and consider the Applicant's information request under the EIRs.

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

25. 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.

26. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information a requester believes the authority should hold.

27. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

28. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies, but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

***Whether the Authority held any further relevant information***

29. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

***The Applicant's submissions on the information held***

30. The Commissioner has taken account of the arguments in both the Applicant's application and his further submissions to the Commissioner, in which he provides reasons as to why he considers the Authority might hold further information falling within the scope of his request.

31. In his application to the Commissioner, the Applicant contended that the Authority had failed to carry out a proper search in response to questions about exchanges between Scottish and UK Ministers about policing the conflict. He could not be certain that the Authority had disclosed information relating to all meetings or discussions.

***The Authority's submissions on the information held***

32. The Authority explained the searches and enquiries it had undertaken to identify the information requested, with explanations of why it considered these adequate in the circumstances, as follows:

- Scottish Government officials conducted a search of the European Engagement: Ireland: Advice and Policy: 2017-2022 file held on the Authority's electronic management system using the keyword 'Rockall', covering the time period set out in

the request. The documents identified were individually reviewed and the majority were found to fall within the scope of the request.

- Colleagues within the Directorates for External Relations (DEXA) and Marine Scotland were asked to undertake a search of their mailbox and personal storage areas, as these were the areas considered to be the most likely to hold any relevant information. This included a search across the whole of DEXA. The returns were individually sifted to identify the specific information relevant to the request, most of which was held by the Deputy Director, European Relations which, given his work in this area, was consistent with his role.
- For completeness, a search was undertaken of all records held by the Scottish Government Legal Directorate (SGLD). This identified one additional document not previously located.

#### *The Commissioner's view on the information held*

33. The Commissioner has considered all relevant submissions and the terms of the request, including the searches undertaken by the Authority to establish whether it held any further information that was relevant to the request. Having done so, he is satisfied that, by the end of the investigation, the Authority had taken adequate, proportionate steps to establish the extent of information held that was relevant to the request.
34. However, it is evident that the information referred to in paragraph 32 (i.e. the additional information identified as being held by the SGLD) should clearly have been identified as falling within scope by the close of the Authority's review (i.e. its response of 23 March 2021) at the latest. In failing to do so, the Commissioner finds that the Authority failed to deal with the request fully in accordance with regulation 5(1) of the EIRs.
35. As the Authority is withholding this information under an exception in the EIRs, the Commissioner will go on to consider this later in this Decision Notice.

#### ***Information no longer being withheld***

36. During the investigation, the Authority informed the Commissioner that it was no longer withholding certain information which had not been disclosed with its initial response.
37. In the absence of any further explanation from the Authority on this point, the Commissioner must find that, by failing to disclose this particular information to the Applicant, the Authority failed to comply with regulation 5(1) of the EIRs. He requires the Authority to disclose this information to the Applicant.

#### ***Background information provided by the Authority***

38. In its submissions to the Commissioner, the Authority provided the following background information and explained the strategic background of the relationship against which the matter of Rockall was considered:
  - Rockall is an uninhabited granite islet in the North Atlantic some 300 km from St Kilda in Scotland and 420 km from Torry Island in Ireland. Rockall forms part of the UK and, more specifically, part of Scotland (in accordance with the Island of Rockall Act 1972 as amended). Sea fisheries management and enforcement in Scottish waters is devolved to the Scottish Government.

- Scotland seeks to maximise its diplomatic influence by working in a collaborative manner with other nations and in multilateral forums to achieve its domestic and shared international objectives. In doing so, Scotland values and is respectful of its international partners, and officials and Ministers alike strive to maintain open, honest dialogue based on mutual understanding and trust. This is especially true of the Republic of Ireland.
- The evolving international context for the relationship between the UK and Ireland, following the UK's exit from the EU, has reinforced the importance of strong links between Scotland and the Irish Republic. Bilateral relations have been built between the Irish and Scottish governments, and co-operation through the work sectors of the British-Irish Council. In recent years, frequent visits by Irish and Scottish Ministers reflect a broad and diverse exchange of policy ideas and initiatives.
- In 2019, this context informed the decision of both governments to undertake a joint strategic review to strengthen that relationship, which made a number of recommendations in a range of areas including the economy, trade, research and innovation. The review also highlighted the benefits of a collaborative approach on the blue economy, that is the sustainable use of ocean resources for economic growth, livelihoods and jobs, while at the same time preserving the health of ocean ecosystems.

***The Applicant's comments on the public interest in making available the information withheld under the exceptions in the EIRs applied by the Authority***

39. In his application and in his subsequent submissions to the Commissioner, the Applicant provided the following comments on the balance between competing interests and what is in the public interest.
40. The Applicant argued that the Authority had misapplied the necessary public interest tests in refusing to release the information sought. In his view, international disputes over access to fisheries and over the status of territories and territorial waters were of great public and policy significance, and affected multi-million pound industries. He argued that there was a keen distinction between private and diplomatic messages or dialogue, and official government position and briefing papers, the latter of which, he believed, could and should be released.
41. The Applicant submitted that, with regard to Rockall, the question of its ownership and the exploitation of its resources was of overriding public interest. He argued that these were disputed waters: the Irish Government disputed the UK and Scottish claims to ownership of Rockall and its territorial waters, as did the Icelandic Government. He believed this was why Irish trawlers had deliberately entered UK waters to fish there, and why Marine Scotland was sending fishery protection vessels to interdict the Irish vessels. He described the Rockall basin as having potentially very large unexploited oil and gas reserves; it was an area of very high international conservation interest; it was used routinely by UK fishers and was therefore of economic value to UK residents and businesses, particularly in peripheral coastal communities.
42. The Applicant further argued that, in the context of UK and Scottish economic and strategic interests post-Brexit, these conflicts were of greater significance, amplified, in turn, by the question of Scottish independence. He commented on the Scottish Government pursuing a second independence referendum: if Scotland did become independent, Rockall would fall within Scottish territorial waters and extend them deep into the Atlantic, as they did presently



for the UK. He believed this was not an abstract debate as, crucially, it was also the locus of the only direct territorial conflict between the Scottish Government and a neighbouring country.

43. At a macro level, the Applicant believed there was also great public interest in relations between the Scottish and other European governments, particularly given the current constitutional contexts of Brexit and Scottish independence, and with the prospect that Irish reunification may become a major issue. He submitted that the Scottish Government repeatedly released information regarding its relations with the UK Government when it suited its political interests to do so, or made claims about what UK Ministers and officials had or had not done. In light of this, he believed it was arguable that the Authority was seeking secrecy over Rockall and its dealings with the Irish because it suited its narrow and temporary political interests. In the Applicant's view, those were not automatically equivalent to the public interest.
44. The Applicant believed that the information met the public interest test of being "something which was of serious concern and benefit to the public" and highlighted the explicit presumption in favour of disclosure in regulation 10(2)(b) of the EIRs.
45. Referring to the claim by the then Justice Secretary (described in his request for review) about police resources and the Scottish Government's interactions with the UK Government (which the Applicant believed to be untrue and which, he alleged, were not supported by Police Scotland), the Applicant submitted that the Commissioner was very clear that the EIRs could not be used to prevent "possible embarrassment to government or other public authority officials". He believed it was therefore in the public interest to establish what the Justice Secretary had based his claims on, particularly if there was evidence that the Scottish Government knew this to be untrue and was withholding information which showed that it was untrue, or that the Justice Secretary may have known it was untrue.
46. The Applicant further submitted that transparency and accountability were at the heart of his application to the Commissioner. He argued that Scottish Ministers made repeated public statements including warnings of direct intervention, on social and official media. He believed the public were entitled to be able to test the basis and outcomes of those statements, particularly as these diplomatic and jurisdictional conflicts were not secret by definition.
47. In conclusion, in direct contrast with what the Applicant described as the Authority's attempt to justify non-disclosure, he believed the intensity of the diplomatic negotiations on this topic of great public significance, and the frequency with which it was discussed at inter-governmental events, including the British-Irish Council, proved there was an overriding public interest in favour of, and a compelling case for, disclosure of the information requested.
48. The Commissioner will take these submissions into account when considering the balance of public interest for each exception being relied on by the Authority, in what follows.

### ***Consideration of submissions by the Commissioner***

49. During the investigation, the Authority provided detailed submissions to the Commissioner. Due to the nature of the subject matter of the request, the Authority asked the Commissioner not to include details of certain submissions within this Decision Notice on the basis that publishing those submissions would, in itself, divulge the contents or details of withheld information.

50. In this case, the Commissioner is mindful that explaining his reasoning with reference to some of the submissions made by the Authority would inevitably disclose details of certain of the withheld information. As the Court of Session recognised in [Scottish Ministers v Scottish Information Commissioner \[2006\] CSIH 8](#)<sup>2</sup> (at paragraph [18]):

*It is important ... to bear in mind that the [Commissioner], in giving reasons for his decision, is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed.*

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

51. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
52. 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. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). 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)).

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

54. The Authority explained that the information withheld under this exception comprised email exchanges, shared internally between Scottish Government officials, legal advisers, Special Advisers and/or Ministers, which discussed the Scottish Government position in relation to Rockall.
55. The Authority also considered that some of that information would also fall within the scope of legal advice, disclosure of which would breach legal professional privilege. It further explained that, for this information:
- Some of it comprised direct communications with a legal adviser acting in a professional capacity, which occurred in the context of the legal adviser's professional relationship with clients, including material which evidenced the substance of those communications. These exchanges, it submitted, were made for the principal or dominant purpose of seeking and giving legal advice.
  - Some of it comprised internal exchanges between Scottish Government officials and Ministers which summarised legal advice as part of the internal process of analysis and consideration leading to the Scottish Government's adoption of its legal position, and therefore release would disclose the source and/or substance of the legal advice received and undermine the internal process of analysis.
56. In the Authority's view, disclosure would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments, and the issues being flagged up for further consideration, particularly as matters concerning Rockall were ongoing. It submitted that all of the necessary conditions for legal advice

---

<sup>2</sup> <https://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

privilege to apply were satisfied and confirmed that the legal advice was provided by individuals acting in their professional capacity as legal advisers to Marine Scotland.

57. The Authority considered that a claim to confidentiality could be maintained in legal proceedings because the correspondence in question was only shared between the Scottish Government and its legal advisers and the advice had not, at any time, been shared with anyone outwith the Scottish Government. As such, the information remained confidential at the time the Authority responded to the request and requirement for review, and it remained so now.
58. On a separate note, during the investigation, the Authority also confirmed that it was no longer relying on the exception in regulation 10(4)(e) to withhold certain information which was similar to information that had already been disclosed to the Applicant at review stage.

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

59. In his submissions to the Commissioner, the Applicant argued that the Authority does release, and has released, legal advice and correspondence (e.g. on its handling of complaints against Alex Salmond), and argues vociferously for the release of the UK Government's legal advice where it suits its political interests (such as on Brexit). He also commented on the Commissioner's [Decision 048/2022](#)<sup>3</sup>, requiring the Authority to publish its legal advice on holding a second independence referendum.

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

60. In respect of the information withheld under regulation 10(4)(e) at review stage which, the Authority confirmed, it was no longer seeking to withhold, the Commissioner must find that the Authority incorrectly withheld that particular information under regulation 10(4)(e). He requires the Authority to disclose it to the Applicant.
61. The Commissioner has also considered the information provided to him by the Authority during the investigation which, the Authority claimed, fell outwith the scope of the Applicant's request. He considers that a small amount of this information does, in fact, fall within scope. In the Commissioner's view, this information is captured by the exception in regulation 10(4)(e) and he has therefore included consideration of this information in what follows, for this exception.
62. Having considered the remaining information withheld under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). While the Commissioner also accepts that some of that information is, as the Authority described, internal legal advice, he is not satisfied that certain parts of that information can be accepted as such. However, for that particular information, the Commissioner does accept that it continues to be captured by the exception in regulation 10(4)(e) as it comprises internal communications.
63. The Commissioner 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 Authority's submissions on the public interest – regulation 10(4)(e)*

64. The Authority recognised that there was some public interest in the release of the information as part of an open and transparent government, and to inform public debate. It also

---

<sup>3</sup> <https://www.itspublicknowledge.info/decision-0482022>

acknowledged there was a strong public interest concerning Rockall fishing rights, and that disclosure could help greater public understanding on this topic.

65. However, for those internal communications comprising legal advice, the Authority considered that there was a very strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and clients. It argued that it remained important, in all cases, that lawyers could provide free and frank legal advice which considered and discussed all issues and options without fear that the advice may be disclosed and, as a result, potentially taken out of context.
66. The Authority submitted that, in areas such as this, which it described as emotive and the subject of political debate, an expectation that legal advice could be released would inevitably lead to the legal advice being much more circumspect and therefore less effective. It believed there was therefore a strong public interest in protecting the confidentiality of this information to ensure that the Scottish Government was able to consider legal advice privately to reach a fully considered position which was consistent with that advice.
67. While the Authority recognised some public interest in releasing the legal advice, it believed this was not sufficient to outweigh the very strong public interest in maintaining the confidentiality of the legal advice in this case.
68. In respect of internal communications not comprising legal advice, the Authority believed there was a greater public interest in ensuring that the Scottish Government was able to maintain good relations with the Irish Government, in order to protect the Scottish Government's ability to negotiate a resolution with the Irish Government and to engage effectively to protect Scotland's interests. It argued there was a vital public interest in allowing Scottish Ministers and officials a private space within which to engage in full and frank discussions and explore options before the Scottish Government reached a settled public view or course of action in its ongoing efforts to address this issue with Irish Government counterparts.
69. In the Authority's view, release of information relating to the ongoing discussions of Rockall with the Irish Government, which set out the Scottish Government's position in relation to those discussions and highlighted its efforts to resolve the issue with Irish counterparts, would not be in the public interest, as this would prejudice those discussions and the ongoing efforts in relation to Rockall.

*The Applicant's submissions on the public interest – regulation 10(4)(e)*

70. The Applicant's submissions on the public interest in disclosure of the information are set out in paragraphs 39 to 47 above.

*The Commissioner's view on the public interest – regulation 10(4)(e)*

71. The Commissioner has considered carefully all the submissions put forward by both parties on the public interest, alongside the withheld information (which he has accepted comprises internal communications for the purposes of this exception).

Internal communications comprising, or discussing, legal advice

72. For the information comprising legal advice (as described in paragraph 55 above), the Commissioner notes that the Authority has argued that the public interest favoured maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and clients. 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.

73. 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>. 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.
74. The Commissioner acknowledges that disclosure of the legal advice would help fulfil the public interest in understanding the Scottish Government's legal position in relation to matters concerning the island of Rockall, and any discussion of that legal position. He acknowledges the public interest in having clarity on the Authority's approach to addressing and potentially resolving any issues regarding EU fishing rights around the island of Rockall.
75. On the other hand, the Commissioner recognises the strong public interest in ensuring that the Authority can give and receive, and discuss internally, legal advice in confidence to facilitate the discharge of its functions as thoroughly and effectively as possible.
76. The Commissioner accepts that the disclosure of such advice could discourage staff in a Scottish public authority from seeking legal advice, or would deter frankness and openness by the parties involved when seeking or discussing advice, if they feared that the advice may then be disclosed. If, for this reason, the Authority was unable to obtain impartial, full and objective legal advice in respect of its actions, this would not be in the public interest.
77. 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.
78. On balance, having examined the withheld information which, the Commissioner is satisfied, comprises legal advice, 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 this particular information (i.e. that comprising legal advice) was properly withheld under regulation 10(4)(e) of the EIRs.

#### Other internal communications

79. For the other internal communications, the Commissioner notes that the Authority has argued that Ministers and officials require a private space in which to discuss, consider and explore options in order to reach a settled view on its approach to addressing matters concerning Rockall.
80. The Commissioner acknowledges the public interest in ensuring that Ministers and officials can communicate ideas and opinions on this topic freely, and without fear that their initial

---

<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>

views will routinely be made public. He also recognises the importance of maintaining good relations with the Irish Government in any negotiations that may take place with a view to resolving any issues on this matter.

81. However, he does not accept the relevance of such arguments for all of the remaining information being withheld under regulation 10(4)(e). For the majority of this information, the Commissioner is satisfied that there is a strong public interest in allowing Ministers and officials a private space in which to discuss such matters and offer opinions without concern that such discussions would be made public. Recognising the Applicant's arguments for transparency surrounding discussions on fishing rights around Rockall and having considered the content of the withheld information in question, the Commissioner is satisfied that, for the majority of this information, the public interest in making the information available is outweighed by that in maintaining the exception. He therefore finds that the Authority was entitled to withhold the majority of the other internal communications under regulation 10(4)(e) of the EIRs.
82. For the remainder of the information being withheld under this exception, however, the Commissioner disagrees with the Authority's suggestion that this information satisfies the requirement of "allowing a private space within which to engage". Some of this information is purely factual, and is already publicly known (or contained in information already disclosed). Given the importance of the subject matter, the Commissioner is not persuaded that the public interest lies in withholding this particular information. He therefore finds that the Authority wrongly withheld this information under regulation 10(4)(e) of the EIRs.
83. As the Authority is not relying on any other exception to withhold this information, the Commissioner requires the Authority to disclose it to the Applicant.

***Regulation 10(5)(a) – Prejudice to international relations, defence, national security or public safety***

84. Regulation 10(5)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially, international relations, defence, national security or public safety.
85. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). 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)).
86. There is no definition of "substantial prejudice" in the EIRs. However, the standard to be met in applying the test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.

***The Authority's submissions on regulation 10(5)(a)***

87. In its submissions to the Commissioner, the Authority stated that the exception in regulation 10(5)(a) applied to certain information as its disclosure would be likely to prejudice substantially relations between the UK (including Scotland) and Ireland, and/or relations between the UK and the EU.
88. The Authority submitted that discussions had taken place between the Scottish Government (due to fisheries management being a devolved matter) and the Irish Government,

specifically while the UK remained an EU member state. Since the UK's withdrawal from the EU, those ongoing discussions between Scotland and the Irish Government were now in preparation for a formal resolution between the UK and the EU, as the coastal states. These discussions, the Authority stated, were highly sensitive, and were pertinent to the interests of the people of the UK, including those living in Scotland, where both parties participated on the understanding that the discussions would remain confidential. The Authority considered that maintaining the confidentiality of sensitive exchanges with the Irish Government (and the Irish Government leading for the EU) and other international contacts was critical for Scottish Government capacity to be trusted by its interlocutors and thus protect and promote Scottish interests.

89. As foreign relations were a matter reserved to the UK Government, the Authority considered that UK interests were as directly involved as any distinctly Scottish interests, and were considered to be inextricably linked. The issue of fisheries, the Authority stated, was a particularly sensitive issue in both diplomatic and political terms.
90. The Authority submitted that there would be no expectation that details of such private discussions would be released into the public domain, and the accepted convention was that such information would not be routinely made available. Given the established convention that such diplomatic communications were made in terms of inferred or assumed confidentiality, the Authority strongly believed that the release of exchanges between the Scottish and Irish governments would substantially prejudice UK relations with Ireland, and more broadly with the EU and its member states.
91. In the Authority's view, disclosing details of these discussions would undermine the trust between the UK (including Scotland) and Ireland, and inhibit the free flow of information at a crucial point in relation to the matter of Rockall. It further argued that disclosure would also inhibit such discussions in the future because Ireland may be reluctant to engage in a free and frank exchange of views if they believed those views were likely to be made public.
92. As well as potentially prejudicing the prospect of further open dialogue on the status of Rockall, the Authority believed that disclosure could also potentially lead individual EU member states and other foreign governments to consider the nature and substance of their contact with the Scottish Government if they believed it likely that information, which they would reasonably expect to be exchanged on a confidential basis, would subsequently be released. In this respect, the Authority highlighted that the act of release could substantially prejudice UK interests internationally if it was seen that material relating to private meetings was likely to be released. Disclosure, it argued, could therefore have far-reaching consequences for its ability to maintain and build relationships with other governments, and indirectly impact on other aspects of the Scottish Government's work which may involve European or international interests, such as research and innovation, low carbon investment, law enforcement co-operation, cultural collaboration and educational opportunities for Scotland.
93. In support of its position, the Authority provided the Commissioner with comments from the Irish Government expressing reservations about disclosure of the information. It additionally submitted that officials who had fostered good working relationships with the Irish Government were aware, through these discussions, that they would be less likely to be willing to have free and frank discussions with the Scottish or UK governments on sensitive topics in future because they would be concerned about the information being released.

*The Applicant's submissions on regulation 10(5)(a)*

94. In his submissions to the Commissioner, the Applicant argued that there must be a clear distinction made by the Commissioner between what types of information can be withheld under the exception in regulation 10(5)(a). He highlighted that he was not asking for secret intelligence reports, documents supplied by spies, details about the deployment of military vessels or secret communications with the skippers of the fishery protection vessels involved.

*The Commissioner's view on regulation 10(5)(a)*

95. In determining whether the information would fall within the scope of this exception, the Commissioner has been mindful of the explanation given in the [Aarhus Convention: An Implementation Guide](#)<sup>6</sup>, where the principles behind the Convention provision on which the exception is based are set out in the following way (page 86):

*If release of the requested information would adversely affect international relations, national defence or public security, the public authority may consider whether to deny the request.*

The Guide goes on to explain that:

*The Convention does not define the terms "international relations", "national defence" or "public security", but it is implicit that the definition of such terms should be determined by the Parties in accordance with their generally accepted meaning in international law. Many national Governments already have similar exceptions in place and have interpreted them narrowly. Some countries have chosen to require information concerning the environment to be made publicly accessible, regardless of how it affects international relations, national defence or public safety.*

96. The Commissioner notes that the Authority, in this case, is claiming that regulation 10(5)(a) applies to some of the information being withheld, on the basis that its disclosure would, or would be likely to substantially prejudice international relations between the UK (including Scotland) and Ireland, and extending, more broadly, to the EU and its member states.
97. In determining whether the exception in regulation 10(5)(a) applies, the Commissioner is required to consider the potential impact that disclosure of the information would likely have on the particular relationships at stake here, and not solely the nature, content and/or sensitivity of the information being withheld under this exception. He must take into consideration any existing political relations or diplomatic sensitivities or legislative differences that may be relevant.
98. Even if a negative reaction is anticipated as a result of disclosure of the information, the Commissioner must assess whether this reaction would, or would be likely to, prejudice substantially international relations. While disclosure of the information may cause diplomatic annoyance or irritation, he must consider whether it would result in serious, long-term harm to the relations between countries or states.
99. Having considered the information being withheld under this exception and the submissions from both parties, it is clear to the Commissioner that international relations, including relations with the EU, are reserved matters, which remain the responsibility of the UK Government and the UK Parliament.

---

<sup>6</sup> <https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition>



100. The Commissioner notes that there have clearly been discussions and communications between the Scottish and Irish governments on the matter of fishing rights around the island of Rockall. These relate to the Scottish Government's perceived position on the matter and consideration of options for an approach to resolving, with the Irish Government, any issues on this matter between both countries that may exist. While these represent a Scottish perspective and do not necessarily represent the views of the UK as a whole, the Commissioner does accept that the matters under discussion do impinge on the UK Government and reserved matters.
101. The Commissioner accepts that disclosure of this information would, or would be likely to, have a substantially prejudicial impact on relations between the UK (including Scotland) and Ireland or the EU. He recognises that, while the information relates to exchanges and discussions between officials of both the Scottish and Irish governments, foreign relations are a reserved matter for the UK Government. He accepts that disclosure of sensitive information exchanged between the Scottish and Irish governments could not only harm relations between Scotland and Ireland, but would also be likely to extend to harming relations between the UK and Ireland or the EU.
102. The Commissioner is satisfied that the information withheld under this exception was created with an expectation of confidentiality. He notes the comments from the Irish Government expressing reservations about disclosure of the information. The Commissioner also acknowledges the Authority's view that Scottish and UK interests would be harmed internationally if it was anticipated that material relating to private discussions on sensitive topics was likely to be released. He also recognises that such disclosure would lead to less free and frank exchanges between the parties involved in future.
103. The Commissioner accepts that the withheld information is sensitive, in terms of its content, and he considers that its disclosure could cause significant harm to the working relationships between the governments of the UK (including Scotland) and Ireland.
104. For the reasons given above, therefore, the Commissioner accepts that disclosure of the information withheld under regulation 10(5)(a) would, or would be likely to, prejudice substantially relations between the UK (including Scotland) and Ireland or the EU, and that the Authority was entitled to apply the exception in regulation 10(5)(a) to that information.
105. The Commissioner will now go on to consider whether, in all the circumstances of the case, the public interest in disclosing that information is outweighed by that in maintaining the exception.

*Public interest test – regulation 10(5)(a)*

106. The Commissioner must now go on to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

*The Authority's submissions on the public interest – regulation 10(5)(a)*

107. The Authority acknowledged that there was some public interest in the Scottish Government's discussions with the Irish Government in relation to the matter of Rockall.
108. It believed, however, that there was a greater public interest in ensuring that both the Scottish and UK governments were able to maintain good relations with the Irish Government, in order to protect the Scottish Government's ability to negotiate a resolution

with the Irish Government and to engage effectively to protect Scotland's interests and the broader interests of the UK as regards the EU/UK withdrawal agreement in relation to fishing rights.

109. The Authority further submitted there was a vital public interest in allowing Scottish Ministers and officials a private space within which to engage in full and frank discussions with their counterparts in Ireland. Such discussion, it argued, enabled better quality and better informed policies and decisions on issues with an international dimension. The Authority believed that inappropriate disclosure was likely to damage the Irish Government's trust in the UK, including Scotland, and thus undermine future discussions and wider international relations more generally.
110. In the Authority's view, there was no public interest in jeopardising those relations by the disclosure of information which was discussed or shared in confidence. It believed that the public interest lay in maintaining good relations, based on trust and respect, between the UK, Scotland and Ireland which included trust and respect between Ireland and the individual nations which make up the UK, especially given that matters concerning Rockall remained ongoing. The public interest, it submitted, lay in favour of maintaining an effective dialogue with the Irish Government to explore ways of resolving this matter, where disclosure would undermine efforts to discuss resolution and could limit the scope for one being reached, or make such an outcome impossible.

*The Applicant's submissions on the public interest – regulation 10(5)(a)*

111. In addition to his public interest submissions set out in paragraphs 39 to 47 above, the Applicant argued that discussions about the applicability of international maritime law were of significant public interest and involved published and widely-understood international treaties and practices. He stated that the fisheries dispute which triggered the numerous conversations between Scottish and Irish Ministers happened in plain sight: they were argued about in public by Ministers of both governments. This led him to ask why the resolution to this was happening under a cloak of secrecy, with a government doubling down on that secrecy.
112. The Applicant also stated he was not clear what information this exception alluded to, and questioned whether it included the report referenced in part (iii)(a) of his original request which, he stated, was also referenced in one of the redacted documents initially disclosed by the Authority as follows:

*"2. The attached report, agreed by Irish and SG officials, summarises the situation and the position of both Governments, and sets the issue in the context of the wider bilateral relationship (see below). [redacted]"*

The Applicant contested the secrecy of that report, arguing that it was mentioned by the Irish Government to the national broadcaster as proof of how significant the issues at stake were. In his view, that provided a clear public interest basis for publication.

*The Commissioner's view on the public interest – regulation 10(5)(a)*

113. The Commissioner has considered carefully all the submissions put forward by both parties on the public interest, alongside the information being withheld under regulation 10(5)(a).
114. The Commissioner accepts that there is a public interest in understanding the nature and content of the discussions which have taken place between and among officials from the Scottish and Irish governments, at least to the extent that it might inform the public interest in

matters surrounding fishing rights around the island of Rockall, the Scottish Government's position on this and the considerations it has given to any options for possible resolution, with the Irish Government, of any issues that may exist. Having considered the withheld information, the Commissioner accepts that some of it could, perhaps, go some way towards fulfilling this interest.

115. However, the Commissioner recognises that this interest has to be balanced against the public interest in fostering and maintaining international relations between the UK (including Scotland) and Ireland or the EU. The Commissioner has already commented that international relations, including relations with the EU, are reserved matters, which remain the responsibility of the UK Government and the UK Parliament. The Commissioner accepts the Authority's assertion that there is a public interest in fostering and maintaining good relations with Ireland and the EU, not just in the short term, but also for long term stability and co-operation, and on wider matters. He is mindful of the public interest in not disclosing information which might harm or prejudice discussions on this, or any other, sensitive topic in future.
116. In considering the public interest in release of the information withheld under this exception, and the fact that certain of the withheld information would perhaps fulfil this public interest in disclosure, the Commissioner is also mindful of the fact that the discussions and considerations recorded had only recently taken place (following the Applicant's request) and were very much still subject to debate. As far as the Commissioner is aware, at the material time, the matter remained (and still appears to remain) under consideration and debate between both governments.
117. In balancing the relevant arguments on the public interest both for and against disclosure, the Commissioner does not, however, accept the relevance of such arguments for all of the information being withheld under regulation 10(5)(a). For the majority of this information, the Commissioner is of the view that there is a greater public interest in allowing officials from both the Scottish and Irish governments to discuss, in private, sensitive issues on matters which are still subject to ongoing debate and which, if made public prematurely, would, or would be likely to, substantially prejudice international relations. The Commissioner recognises the Applicant's arguments for transparency surrounding discussions on fishing rights around Rockall, but is satisfied, having considered the content of the withheld information in question, that the public interest in making the information available is outweighed by that in maintaining the exception. He therefore finds that the Authority was entitled to withhold the majority of the information under regulation 10(5)(a) of the EIRs.
118. For the remainder of the information being withheld under this exception, however, the Commissioner considers that this information would inform, and therefore support, the public interest in transparency and debate on this important topic. For this information, the Commissioner is of the view that the public interest in knowing the official stance taken by the Scottish Government, set out in certain reports and official correspondence, outweighs the public interest in withholding that information. He therefore finds that the Authority wrongly withheld this information under regulation 10(5)(a) of the EIRs.
119. With the exception of one piece of this information, the Authority is not seeking to rely on any other exception to withhold the information found to have been wrongly withheld (as referred to in the preceding paragraph) under regulation 10(5)(a). The Commissioner therefore requires the Authority to disclose that information to the Applicant.

120. As the Authority is also seeking to withhold one piece of information - found to have been wrongly withheld under regulation 10(5)(a) - under regulation 10(5)(b), the Commissioner will now go on to consider the application of that exception for that particular information.

***Regulation 10(5)(b) – Prejudice to the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an enquiry of a criminal or disciplinary nature***

121. In this case, all of the information withheld by the Authority under regulation 10(5)(b) of the EIRs was simultaneously withheld under regulation 10(5)(a). As the Commissioner has found – with one exception - that all of the information withheld under regulation 10(5)(a) was correctly withheld, he is therefore not required to consider regulation 10(5)(b) for that information. He will therefore solely consider regulation 10(5)(b) for the information which he has found to have been wrongly withheld under regulation 10(5)(a).
122. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially, the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
123. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). 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)).
124. Although there is no definition of “substantial prejudice” in the EIRs, the standard to be met in applying the test is high. The word “substantial” is important here: the harm caused, or likely to be caused, by disclosure must be of real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.

***The Authority’s submissions on regulation 10(5)(b)***

125. In its submissions to the Commissioner, the Authority considered that some of the information withheld under regulation 10(5)(a) would now also be excepted from disclosure under regulation 10(5)(b) as its disclosure would breach legal professional privilege.
126. It explained that some of the information comprised a request for legal advice, and some other information summarised the legal issues being discussed and/or aspects of the Scottish Government’s legal analysis.
127. The Authority submitted that, although the Scottish Government had disclosed this information to the Irish Government, it considered the legal advice would remain privileged as this information was disclosed on the condition that it would remain confidential. It confirmed that this information remained confidential at the time the request was received.
128. The Authority further argued that, both now and at the time the privileged information was created, the Irish Government and the Scottish Ministers had a common interest in the content of the advice provided. It had shared these aspects on the basis of that common interest and considered it had done so without losing confidentiality or waiving privilege.
129. In the Authority’s view, release of the material would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged up for further consideration. It maintained that all of the necessary conditions for legal advice privilege to apply were satisfied.

130. The Authority also submitted that the exception in regulation 10(5)(b) would also apply to certain information as revealing the source of the Scottish Government's legal advice on this matter would be likely to lead to conclusions being drawn from the fact that any particular lawyer has, or has not, provided advice which, in turn, would be likely to impair the Government's ability to take forward its work on matters concerning Rockall.

*The Applicant's submissions on regulation 10(5)(b)*

131. The Applicant submitted that he was unclear about what information this exception was being applied to. To the best of his knowledge, no-one was being prosecuted, there was no reporting of legal action against the Irish skippers involved, and there was no reporting of any disciplinary enquiries. He restated that Scottish Ministers had released legal advice previously and had also insisted on UK Government legal advice being produced, and again commented on the ruling by the Commissioner in Decision 048/2022, referred to in paragraph 59 above.

*The Commissioner's view on regulation 10(5)(b)*

132. In determining whether the information would fall within the scope of this exception, the Commissioner has been mindful of the explanation given in the Aarhus Convention: An Implementation Guide, where the principles behind the Convention provision on which the exception is based are set out in the following way (page 87):

*If the release of information would adversely affect the "course of justice", public authorities may have a legal basis to refuse to release it. The course of justice refers to active proceedings within the courts. The term "in the course of" implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused.*

The Guide goes on to explain that:

*Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation. In some countries, public prosecutors are not allowed to reveal information to the public pertaining to their cases. The Convention clearly does not include all investigations in this exception, but limits it to criminal or disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered.*

133. As set out previously, the Commissioner is only required to consider the application of regulation 10(5)(b) for the particular information, also withheld under this exception, for which he has found that regulation 10(5)(a) was wrongly applied.

134. The Commissioner notes that the Authority, in this case, is claiming that regulation 10(5)(b) applies to some of the information being withheld, on the basis that its disclosure would breach legal professional privilege.

135. While recognising that disclosure of the information in question may well breach legal professional privilege, the Commissioner is finding difficulty in accepting that the exception in regulation 10(5)(b) has any relevance to that information. At the time of the request, the information did not relate to any active proceedings within the courts, there was no ongoing or impending trial of any person or party to whom the information related, and there was no

clear indication that any criminal or disciplinary investigations were being brought. As set out above, at least one of these factors requires to be extant to enable the exception in regulation 10(5)(b) to be engaged.

136. Having considered the content of this particular information alongside the Authority's submissions, the Commissioner is not persuaded that the information relates to a judicial matter which is being actively pursued in court proceedings, or which is being prepared for. There is nothing in the Authority's submissions that confirms this to be the case.
137. For the information being withheld under this exception, the Commissioner does not accept that, if that particular information were to be disclosed, the required potential for the substantial prejudice envisaged by the Ministers would exist.
138. In light of this, for this particular information, the Commissioner does not consider that the exception in regulation 10(5)(b) is engaged. He therefore finds that the Authority wrongly withheld this information under regulation 10(5)(b) of the EIRs.
139. As the Commissioner has found that the exception in regulation 10(5)(b) does not apply to the particular information being withheld, he is not required to go on to consider the public interest in regulation 10(1)(b) of the EIRs.
140. As the Authority is not relying on any other exception to withhold this information, the Commissioner requires the Authority to disclose it to the Applicant.

***Regulation 2(2)(a) – Interpretation – whether environmental information is held***

141. In terms of regulation 2(2)(a) of the EIRs, environmental information is held by a Scottish public authority if it is in its possession and it has been produced or received by that authority, and it has not been supplied by a Minister of the Crown or department of the Government of the UK and held in confidence.
142. In its submissions to the Commissioner, the Authority argued that information in one document was provided in confidence by the Cabinet Office (a department of the UK Government) and was therefore not held by the Authority for the purposes of the EIRs, and so it wished to now rely on regulation 2(2)(a) for that information.
143. The Authority explained that the information comprised a note of actions arising from a meeting of the EU Exit Operations Committee (a UK Government Cabinet Committee) regarding the use or availability of Royal Navy vessels on fishery patrols in Scottish waters. This information was provided by the UK Government voluntarily with the expectation that it would remain confidential.
144. In support of its position, the Authority provided the Commissioner with a copy of a consultation in which the Cabinet Office confirmed it considered the information was provided to the Authority with an expectation that it would be retained confidentially. To the best of the Authority's knowledge, the information was confidential at the time of the Applicant's request and that position had not changed.
145. The Authority submitted that disclosure would undermine the collective agreement process and, if discussions at Cabinet Committees were subject to premature public scrutiny, Ministers would feel less able to express their opinions freely and frankly before arriving at a collective decision. This, the Authority believed, would lead to a decline in the quality of debate at Cabinet Committees, leading to poorer quality decision-making.

146. The Authority stated that, if the Commissioner concluded that the information was held by it for the purposes of the EIRs, then it would wish to rely on the exception in regulation 10(5)(f) to withhold that information.
147. In his submissions to the Commissioner, the Applicant stated he was happy to allow the Commissioner to use his best judgement on whether regulation 2(2)(a) applied, since he did not know what the information comprised, or its relevance or significance.

*The Commissioner's view on regulation 2(2)(a)*

148. The Authority has claimed that it does not hold the information requested for the purposes of the EIRs, on the basis that regulation 2(2)(a) applies.
149. As stated above, this regulation provides that information is held for the purposes of the EIRs where it is in the Authority's possession (having been produced or received by it), but only where the information has not been supplied by a Minister of the Crown or Department of the UK Government and held in confidence.
150. The intention of regulation 2(2)(a) of the EIRs is to enable a public authority to withhold information if it is provided in confidence from the UK Government.
151. The Commissioner notes, from the Authority's submissions, that the document concerned was sent by the UK Government voluntarily and with an expectation of confidence. He has also considered the comments from the Cabinet Office confirming that the information had been provided in the expectation that it would remain confidential.
152. In this case, the Commissioner is satisfied that the information has been passed outwith the UK Government to a Scottish public authority in circumstances where an obligation of confidentiality was created. He therefore accepts that the provision in regulation 2(2)(a) applies and that the information in question is not held by the Authority for the purposes of the EIRs.

**Other issues**

153. Regulation 9(1) of the EIRs provides that a Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
154. Regulation 13(b) and (c) of the EIRs require a Scottish public authority, when refusing to disclose information it holds because it is excepted from disclosure by virtue of any provision in regulations 10(4), 10(5) or 11 of the EIRs, to specify the reasons for the refusal, state the exception(s) being relied on and the basis for this (if not otherwise apparent), and explain how the authority reached its decision with regard to the public interest test in regulation 10(1)(b) (where required).
155. Regulation 16(4) of the EIRs requires a Scottish public authority to notify the applicant of its decision following a request for review, and to do so within 20 working days of receipt.
156. In his submissions to the Commissioner, the Applicant further argued that the Authority had:
- (i) failed to detail what specific exceptions were being relied upon for specific redactions in documents partially disclosed, and
  - (ii) failed to indicate which documents were being withheld in their entirety and what topic or process these documents were linked to.

157. In its submissions to the Commissioner, the Authority acknowledged that its responses to the request and request for review could have been more helpful, by providing a response to each part in turn, and by explaining in detail which exceptions were being applied to each individual part.
158. The Authority accepted it had not met its obligations under the duty in regulation 9 of the EIRs to provide advice and assistance in this case, and acknowledged that its responses, on this occasion, did not meet the standard expected.

*The Commissioner's views*

159. Having considered both the Authority's initial response and review outcome to the Applicant, together with the information disclosed at the material times, the Commissioner agrees that the Authority failed to make clear to the Applicant which corresponding exemption(s) or exception(s) were being applied to the information being withheld or redacted, whether any documents were being withheld in full, and what part(s) of the request the information related to.
160. The Commissioner is of the view that it ought to have been clear to the Authority, from the wording and layout of the request, that each part could, to a certain extent, be deemed to be a request in its own right. Each part of the Applicant's request was perfectly clear, and sought different information from that sought in the other parts.
161. As indicated above, the Applicant's request was clearly a request in a number of separate parts. The Commissioner questions the adequacy of the advice and assistance the Authority gave to the Applicant to aid his understanding of what information fell within the scope of each part of his request, and also which exemption(s)/exception(s) was/were being applied for each part of his request and to each section of information redacted in the documents disclosed. In the absence of this, the Applicant's consequent dissatisfaction was understandable.
162. The Commissioner considers it would not only have been reasonable for the Authority to respond in the manner described in the preceding paragraph, but also that this would have been a requirement, as a minimum, in line with its obligations under FOISA/the EIRs. Where different exceptions are being applied, the Commissioner would expect authorities to make clear how each redaction links to the relevant exception and (where a request is in multiple parts) which parts of the request this ties in with. Without a clear explanation of what information fell within the scope of each part of the request, and which exemption(s)/exception(s) was/were being applied to which part and to each redaction, the Commissioner cannot see how the Applicant could reasonably understand the response provided by the Authority.
163. The Commissioner therefore concludes that, in the respects considered above, the Authority failed to comply with the duty in regulation 9 of the EIRs to provide advice and assistance. He also finds that, by failing to indicate which exception applied where, the Authority failed to comply with regulation 13(b) and (c) of the EIRs. He further finds that by providing a review outcome which was unclear to the Applicant, the Authority failed to comply with regulation 16(4) of the EIRs.

***Action required by Authority***

164. In line with this Decision Notice, the Commissioner requires the Authority to disclose to the Applicant the information which the Authority is no longer withholding, along with that which he has found to have been incorrectly withheld (variously) under the exceptions in



regulations 10(4)(e), 10(5)(a) and 10(5)(b) of the EIRs. This will be marked up on copies of the withheld information to be provided to the Authority with this Decision Notice.

165. In doing so, the Commissioner requires the Authority to make clear to the Applicant which exception is being relied on for each piece of withheld information, and to clearly specify which part(s) of the request the particular information being disclosed (or withheld) relates to.

## Decision

The Commissioner finds that the Authority complied with the Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and 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 complied with Part 1 of FOISA by correctly applying section 39(2) of FOISA, and considering the request under the EIRs.

The Commissioner finds that, by the conclusion of his investigation, the Authority complied with the EIRs by correctly withholding some information under (variously) the exceptions in regulations 10(4)(e) and 10(5)(a) of the EIRs. He is also satisfied that the Authority correctly applied regulation 2(2)(a) of the EIRs for certain other information.

However, the Commissioner also finds that, by the end of his investigation, the Authority failed to comply with the EIRs by:

- failing to identify all information falling within the scope of the request and, in doing so, failed to comply with regulation 5(1) of the EIRs,
- failing to comply with regulation 13(b) and (c) and regulation 16(4) of the EIRs respectively, by not making clear which exception applied where and by issuing a review outcome which was unclear, and in doing so, the Authority failed to comply the duty in regulation 9(1) of the EIRs to provide advice and assistance, and
- incorrectly withholding certain information under (variously) the exceptions in regulations 10(4)(e), 10(5)(a) and 10(5)(b) of the EIRs.

The Commissioner therefore requires the Authority to disclose to the Applicant the information which he has found to have been incorrectly withheld under the exceptions in regulations 10(4)(e), 10(5)(a) and 10(5)(b) of the EIRs, clearly indicating which part(s) of the request the particular information relates to and any exception(s) being applied to specific information, by

**23 November 2023.**

## 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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**9 October 2023**

## **Appendix 1: Relevant statutory provisions**

### **Freedom of Information (Scotland) Act 2002**

#### **1 General entitlement**

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### **2 Effect of exemptions**

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - ...
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

#### **39 Health, safety and the environment**

- ...
- (2) Information is exempt information if a Scottish public authority-
  - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - (b) would be so obliged but for any exemption contained in the regulations.
- ...

#### **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).
- ...

## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

- (1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“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;

...

- (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;

...

- (2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is –

- (a) in its possession and it has been produced or received by that authority; or

...

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...

## **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.

...

## **9 Duty to provide advice and assistance**

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

## **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.

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
  - (a) international relations, defence, national security or public safety;
  - (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

- (f) the interests of the person who provided the information where that person-
  - (i) was not under, and could not have been put under, any legal obligation to supply the information;
  - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
  - (iii) has not consented to its disclosure; or

...

### **13 Refusal to make information available**

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;

...

### **16 Review by Scottish public authority**

...

- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

...

### **17 Enforcement and appeal provisions**

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
  - (a) the Act is deemed to be a reference to these Regulations;
  - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...