

Decision Notice



Decision 099/2008 R Hill & Co and the Scottish Ministers

Advice concerning Powhillon Farm

Reference No: 200701018

Decision Date: 21 August 2008

www.itspublicknowledge.info

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Summary

R Hill & Co (the applicants) requested from the Scottish Ministers (the Ministers) information relating to advice given to Ministers concerning activities at or connected with a named farm. The Ministers responded by providing some information, while also indicating that other information was not held. The Ministers also relied on the exemptions in sections 30(b) and 36(1) of FOISA for withholding information from the applicants. Following a review, in which the Ministers upheld their original decision, the applicants remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Ministers accepted that the information requested was environmental information and therefore subject to the EIRs. Consequently, they applied section 39(2) of FOISA and thereafter relied upon the exceptions in regulations 10(4)(a) (information not held) and 10(4)(e) (internal communications) of the EIRs for withholding information. Following the investigation, the Commissioner found that the Ministers had been correct to conclude that they did not hold information and therefore accepted that the information in question could properly be refused under regulation 10(4)(a) of the EIRs. However, while accepting that certain information had been properly withheld under regulation 10(4)(e), the Commissioner found that the Ministers were wrong to rely on this exception for other withheld information, either because it did not comprise internal communications or because, where it did, the balance of the public interest lay in making the information available. He also required the redaction of personal data from certain of the withheld documents, finding that the exception in regulation 11(2) applied to those data.

The Commissioner required the Ministers to release certain information to the applicants.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, Safety and the Environment).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of “environmental information”); 10(1), (2), (4)(a) and (e) (Exceptions from duty to make environmental information available); 11(2) and (3) (Personal data).

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) and 2 (Sensitive personal data); Part 1 of Schedule 1 (The data protection principles - the first data protection principle).



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

Background

1. On 19 March 2007, the applicants wrote to the Ministers requesting the following information:
 - i) The advice Ministers acted on when refusing to grant licences to protect crops and SSSI at Powhillon Farm
 - ii) The advice Ministers acted on when appointing arbiters for the rent, damages, shooting and eviction arbitrations at Powhillon Farm
 - iii) The advice Ministers acted on for granting extensions to a named arbiter.The applicants indicated that what was sought under these headings was “only the advice from the top officials, along with the legal advice and the Ministers’ responses”. They also sought the following information:
 - iv) The process for appointing a new arbiter following the death of the previous arbiter, or the advice given to Ministers following a judicial review hearing in January 2006, along with the implications of that advice
 - v) Advice that a named Scottish Executive solicitor gave Ministers after a meeting on 18 July 2000, as well as the advice from two other named officials also in attendance at the meeting.
2. The Ministers responded to the applicants on 12 April 2007. They sought to provide some information by way of explanation in response to all five requests, in addition providing copies of certain documents concerning extensions to the damages arbitration and referring to previous communications with the applicants in relation to certain other points (including the process for the appointment of a replacement arbiter). The Ministers advised the applicants that they held no further information which would address requests ii or iii. In responding to requests i, iv and v, the Ministers advised that any further relevant information held by them was exempt under sections 30(b)(i) &(ii) and/or 36(1) of FOISA.
3. On 15 April 2007, the applicants wrote to the Ministers requesting a review of their decision. In particular, the applicants argued that FOISA should not be used to prevent the release of poor advice which had been acted on or given to Ministers.
4. The Ministers carried out a review and notified the applicants of its outcome on 16 May 2007. The Ministers upheld the original decision communicated to the applicants in their letter of 12 April 2007.



5. On 15 July 2007, the applicants wrote to the Commissioner's Office, stating that they were dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. They advised that the application did not cover that part of request iv relating to the process for appointing a new arbiter
6. The application was validated by establishing that the applicants had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.

Investigation

7. On 14 September 2007, the Ministers were notified in writing that an application had been received from the applicants and asked to provide the Commissioner's Office with any information which had been withheld from the applicants. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, providing them with an opportunity to make comments on the application (as required by section 49(3)(a) of FOISA, which by virtue of regulation 17 of the EIRs covers applications made under the EIRs as well as those made under FOISA) and asking them to respond to specific questions in relation to it. In the course of exchanges with the investigation officer, the Ministers agreed with the Commissioner that all of the information requested was properly considered environmental information as defined in regulation 2(1) of the EIRs. They considered section 39(2) of FOISA to apply to the information and substituted reliance on regulation 10(4)(e) of the EIRs for their earlier reliance on sections 30(b) and 36(1) of FOISA. In relation to their earlier contention that certain information was not held, they relied on regulation 10(4)(a) of the EIRs. Their arguments in relation to these exceptions will be considered further in the Commissioner's analysis and findings below.
9. In the course of the investigation, the investigating officer considered a number of documents referred to in (but not initially supplied with) those originally provided by the Ministers, along with arguments as to why the Ministers did not consider the information in these to fall within the scope of the applicants' requests.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the submissions and other information presented to him by both the Ministers and the applicants and is satisfied that no matter of relevance has been overlooked.



11. Firstly, the Commissioner has considered the information in the documents referred to in paragraph 9 above. In relation to the minute of 30 December 1993 referred to in document 8, the letter referred to as being attached to document 15, the note relating to agricultural subsidies referred to as being attached to document 27 and the minute of 9 March 1998 also referred to in document 27, he accepts that the information in question does not fall within any of the descriptions of information requested by the applicants and therefore does not require to be considered further in this decision. He cannot come to the same conclusion, however, with regard to the information in the following documents:

- Report and draft letter referred to as being attached to document 6
- Suggested letter referred to as being attached to document 21
- Report with copy letters referred to as being attached to document 25
- Minutes referred to as being attached to document 30
- Draft letter referred to as being attached to document 39

In each of these cases, the information in the relative attachment appears (in the context of being that attachment) to be integral to the advice or request for advice to which it is attached. As such, the Commissioner considers that information to fall as much within the scope of the requests as the principal document does, and he will therefore go on to consider that information under the exemption claimed in relation to that principal document (regulation 10(4)(e) in each case). He has also concluded that the information in the minute of 21 December 1993 referred to in document 8 itself falls within the scope of request i: while noting the Ministers' arguments that its import is entirely of a broader nature, it came about as a consequence of events at Powhillon Farm and given its content he has some difficulty in the circumstances regarding it as advice the Ministers would not have had in mind when considering questions falling within the scope of that request. He will consider this document under regulation 10(4)(e), as document 8a.

12. The Commissioner has also looked at the information in documents 4, 9, 14, 15 and 22 in the context of the applicants' requests. Given the content of these documents and their nature as correspondence between the Scottish Office (as it was at the time – pre-devolution) and either a third party or the applicants' Member of Parliament, he does not consider that on any reasonable interpretation the information in them could be regarded as falling within the scope of any of the requests set out at paragraph 1 above. He will not, therefore, consider that information further in this decision.

13. The Commissioner is also satisfied that the following sections of documents do not fall within the scope of the applicants requests and therefore do not require to be considered further in this decision:

- Document 6: paragraph 7
- Document 7: paragraph 2
- Document 8a: second and third sentences of paragraph 5
- Document 13: fifth paragraph



- Document 16: paragraph 3.7 of appendix B
- Document 18: paragraphs 5 and 7
- Document 19: final sentence of first paragraph
- Document 27: final sentence of paragraph 1; paragraph 3 of background note on barnacle geese
- Document 28: fourth bullet point under paragraph 2
- Document 29: third, fourth and fifth sentences of paragraph 3
- Document 32: paragraph 4

Section 39(2) of FOISA – environmental information

14. In the Commissioner's *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, he considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
- The definition of what constitutes environmental information should not be viewed narrowly
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - Any request for environmental information therefore **must** be dealt with under the EIRs
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
15. The Ministers' decision to cite section 39(2) of FOISA means that they consider the information requested to be environmental information as defined in regulation 2(1) of the EIRs. Given that the information withheld by the Ministers relates to the management of geese on a particular farm, more particularly to the shooting of the geese there and the licensing of that activity, and more widely to related aspects of agricultural practice and the agricultural tenancy there, the Commissioner is satisfied that it all falls within the definition of environmental information set out in regulation 2(1). For the same reasons, he considers it likely that any information held by the Ministers and falling within the scope of the applicants' requests ii and iii (in relation to which the Ministers claimed that no further information was held) would also fall within that definition. Therefore, he accepts that all of the information requested is exempt under section 39(2) of FOISA.



16. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that in this case, as there is a separate statutory right of access to environmental information available to the applicant, the public interest in maintaining this exemption and dealing with the requests in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA.

Regulation 10(4)(a) of the EIRs – information not held

17. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
18. In determining whether the Ministers were correct to rely on this exception in relation to requests ii and iii, the Commissioner must be satisfied in this case that the Ministers do not (and did not at the time of the applicants' request) hold information which would meet these requests, in addition to information provided to the applicants in response to these or previous requests.
19. In their submissions to the Commissioner, the Ministers explained the arrangements for storage of all documentation referring to the applicants' arbitrations, activities at Powhillon Farm, the restriction of licences to shoot geese and subsequent requests for information. The Ministers stated that at various stages during the course of the arbitrations and in responding to requests for information made by the applicants, the relevant papers had been examined and re-examined by up to 10 different officials of various grades at different times, each examination confirming that all relevant papers had been correctly identified. Information contained in electronic files had been subject to the same examination as those in paper files.
20. Having considered the submissions made on this point by the Ministers, the Commissioner is satisfied in the circumstances that they have undertaken adequately thorough searches in an effort to determine whether relevant information was held. He does not believe there to be any basis, either from arguments advanced by the applicants or otherwise, for taking a contrary view. On the basis of these searches, therefore, he accepts that the Ministers do not (and did not at the time of the applicants' requests) hold any additional information falling within the scope of requests ii or iii. He is also satisfied on the basis of these searches and further checks carried out during the investigation that the Ministers have located and provided to him all material relevant to the remainder of the applicants' requests.
21. The Commissioner is therefore satisfied that exception in regulation 10(4)(a) of the EIRs is (and was at the time of the requests) applicable to requests ii and iii.



22. All of the exceptions set out in regulations 10(4) and 10(5) are, however, subject to the public interest test in regulation 10(2). Therefore, a request may be refused under regulation 10(4)(a) only where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception. In this case, the Commissioner is satisfied that the information in question was not held by the Ministers at the time of the relevant requests and has not been so held subsequently. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner is therefore satisfied that the Ministers were entitled to rely upon regulation 10(4)(a) as a basis for refusing requests ii and iii.

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

23. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
24. This regulation directly reflects Article 4.1(e) of the European Directive 2003/4/EC on public access to environmental information, and also Article 4.3(c) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark, on 25 June 1998 (the Aarhus Convention). The regulation does not expand upon what is meant by internal communications.
25. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive manner and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released 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)).
26. For information to fall within the scope of the exception, it need only be established that the information is an internal communication. Only if the Commissioner decides that a document is an internal communication will he be required to go on and consider the public interest test.
27. Having read and considered the withheld information, the Commissioner is not satisfied that all of it falls within the definition of internal communications for the purposes of regulation 10(4)(e) of the EIRs. In particular, he is not satisfied that the information in document 4 could be described as comprising internal communications. Document 4 is a letter from a Minister in the Scottish Office (as it was at the time – pre-devolution) to the applicants' Member of Parliament: a degree of confusion may have arise in relation to this letter because the MP in question became a Scottish Office Minister shortly afterwards, but he was not a Minister (in the Scottish Office or elsewhere) at the time and the letter appears to relate to constituency business. As this documents is not an internal communication, the Commissioner cannot uphold the exception in regulation 10(4)(e) in relation to the information in it. Furthermore, as the Ministers have not applied any other exceptions to this information the Commissioner requires them to release it to the applicants.



28. Having considered the remaining information that has been withheld, the Commissioner is satisfied in the circumstances that this does fall within the definition of internal communications for the purposes of 10(4)(e) of the EIRs. Although certain of this information is contained in communications within the pre-devolution Scottish Office, the Commissioner is satisfied that these all relate to matters now devolved to the Scottish Parliament and therefore should be regarded as internal communications.
29. Certain of the withheld information (specifically that in documents 10, 11, 24, 25, 26, 30, 31, 34, 35, 36, 37, 38 and 39) either seeks legal advice from the internal solicitors of the Scottish Office or the Scottish Executive, or provides such advice in response to a request for it. As he indicated in similar circumstances in *Decision 056/2008 Mr Rob Edwards and the Scottish Ministers*, the Commissioner is satisfied in the circumstances that these communications, in each case entirely within the Scottish Office or (as the case may be) the Scottish Executive, can be regarded as internal communications for the purposes of regulation 10(4)(e).

Public interest in relation to regulation 10(4)(e)

30. As indicated above, the exception in regulation 10(4)(e) is subject to the public interest test. In their consideration of the public interest, the Ministers submitted that there was no real public interest in disclosure of the information, as they considered it to be of interest only to the applicants.
31. In relation to the withheld information seeking or providing legal advice, the Ministers argued that any public interest in disclosure was outweighed by the public interest in ensuring that Government, solicitors and their clients could discuss relevant issues and give and receive legal advice in confidence. They submitted that their decisions required to be taken, where appropriate, in a fully informed context setting out the arguments for and against a particular issue. Without such comprehensive advice, they considered that the quality of their decision making would be restricted, which would not be in the public interest. The Ministers referred to the importance placed by the courts on the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds, arguing on this basis that such communication should be released only in highly compelling cases. They did not believe there to be any compelling reasons for disclosure in this case.
32. In previous decisions where the Commissioner has examined the application of regulation 10(4)(e) in relation to the obtaining and provision of internal legal advice (for example, *Decision 056/2008 Mr Rob Edwards and the Scottish Ministers*), he has concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As the Ministers have indicated, 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 the House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*.



33. While the Commissioner recognises that release of this information may inform the public as to the discussions among officials and with Ministers in dealing with the issues covered by the applicants' requests for information (which may be of some wider public interest, notwithstanding the Ministers' arguments to the contrary), he is of the view that the greater public interest in this case is in allowing Ministers and officials to have access to full, frank and comprehensive legal advice on which to base their deliberations. In reaching this conclusion, he recognises that although certain of the withheld information dates from a considerable period before the applicants' requests, these matters then under consideration remain current for all parties concerned.
34. Having considered all relevant arguments in relation to the information detailed in paragraph 28 above, therefore, on balance the Commissioner has concluded that in this case the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of FOISA.
35. In relation to the rest of the information withheld, the Ministers argued that there was a strong public interest in high quality decision making, in the pursuit of which officials had to be free to consider all available options, exploring and debating them fully. They also argued that it was in the public interest for them to be able to rely on high quality advice in their decision making, particularly where the issues were of a highly contentious nature, as in this case where there had been arbitrations and the situation was still ongoing. They contended that the prospect of early disclosure would inhibit the freedom and candour with which options were considered and advice given.
36. The applicants also made a number of submissions on the public interest, providing some context to their requests for information and arguing that there was a public interest in disclosure because the public purse subsidised the agriculture industry and justice system.
37. Amongst these, the applicants referred to various pieces of legislation which they considered relevant, in particular the Agricultural Holdings (Scotland) Act 1947 and the Holdings Act 1991, which provided for the protection of the land and environment for the public at large, so that food could be produced safely, free from contamination and at minimum prices, farmers in return being guaranteed a fair return for securing efficient agricultural production. They also referred to statutory responsibilities on Ministers to prevent damage to crops by birds and animals, and to provision for the appointment of an arbiter by the Land Court (rather than by Ministers) when damage occurred to a farm and the Minister was involved in any question or difference to be decided by arbitration.
38. The applicants referred to the damage sustained to Powhillon Farm from migrating geese and argued that in not providing them with a licence to shoot geese when they had applied for one, the Ministers had acted with malice and contrary to the whole principle underlying that the Holdings Acts: to prevent damage to land, farm, animals, crops and the environment. They also argued that failing to grant them the licence and take other measures to prevent damage, the Ministers were deliberately interfering with the protection from prosecution afforded by the Wildlife and Countryside Act 1981 to those working in the farming industry and preventing damage to crops etc.



39. In the applicants' view, the arbitrations in relation to Powhillon Farm remain current. In any event, there is no doubt that the situation between the applicants and the Ministers remains contentious.
40. The Commissioner has considered the arguments advanced by both the Ministers and the applicants, together with the content of the remaining withheld information, some of which dates back as far as 1990. He takes the view that there is a public interest in knowing whether Ministers and officials are fulfilling their responsibilities under the relevant agricultural legislation and taking account of appropriate considerations in making decisions under that legislation. He accepts that much of the withheld information would inform public debate on these matters, particularly where the issues raised (for example in documents 20 and 21) had a particular bearing on the making or review of policy or legislation.
41. On the other hand, the Commissioner accepts that Ministers and officials should have the opportunity in appropriate circumstances to debate issues fully before decisions are taken and information is placed in the public domain, and should be able to do so freely and frankly on the basis of comprehensive information and advice. Nonetheless, he also takes the view in this case that for the most part the relevant decisions had been taken well before the information was requested (and that even more recent information to a large extent revisits events which occurred some time earlier), and that generally it would be appropriate and feasible in the circumstances to redact any information which was expressed in a particularly free or frank manner, or which remained otherwise sensitive, or which might be relevant to proceedings or other matters which remained current between the applicants and the Ministers or third parties.
42. The Commissioner has noted in the withheld information the presence of personal data relating to certain individuals, principally the partners of the applicants' firm, as defined in section 1(1) of the DPA. By its nature, some of this is sensitive personal data as defined in section 2 of the DPA. Sections 1(1) and 2 are reproduced in the Appendix to this decision. While the Ministers did not specifically argue that regulation 11(2) (the exception in the EIRs relating to personal data) applied to any of the withheld information, the Commissioner is satisfied that there would be a strong public interest in withholding personal data where its disclosure would be unfair and therefore contrary to the first data protection principle (also reproduced in the Appendix), important considerations in addressing any question of fairness in this case being the age of the information in question and the data subjects' expectations as to disclosure when it was created. He has also noted, however, the explicit consent given to disclosure of his own data by the individual to whom most of the personal data relates, which he is satisfied meets relevant conditions in both Schedule 2 and Schedule 3 of the DPA for the purposes of the first principle. The individual in question has also publicised extensive information about his dealings with the Ministers on his own website and the Commissioner can see no reason why disclosure of any of the personal data in question would be unlawful. In the case of that individual, therefore, he is satisfied for the most part (save in some cases where he would not reasonably expect the data subject to agree to disclosure without detailed knowledge of the information in question) that disclosure would be fair and lawful and therefore consistent with the first data protection principle (the only one which would appear to be relevant in the circumstances).



43. On balance therefore, having taken into account the considerations set out above, the Commissioner is satisfied in respect of the following information that in all the circumstances the public interest in making it available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs:

- In document 2, the words in brackets in paragraph 1
- The financial sum in paragraph 8 of document 6
- Document 7
- In the fifth paragraph of document 13, the name and address of the farmer
- The financial sums in paragraph 5 of document 16
- The letter attached to document 16
- In appendix B to document 16, all content except paragraph 4
- Paragraphs 3 and 7 of document 18
- In document 27, the background note on arbitrations (pages 2 and 3 of the briefing on arbitrations)
- Document 28

And therefore accepts that this information (insofar as falling within the scope of the applicants' requests) was properly withheld under regulation 10(4)(e).

44. In relation to the remaining information in documents 1, 2, 3, 5, 6, 8, 12, 13, 16, 17, 18, 19, 20, 21, 23, 27, 29, 32 and 33 (that is, the information in these documents insofar as the Commissioner considers it to fall within the scope of the applicants' requests and has not accepted it as having been properly withheld in paragraph 44), however, the Commissioner has concluded that in all the circumstances the public interest in making it available is not outweighed by that in maintaining the exception in regulation 10(4)(e). He therefore cannot accept the withholding of that information under regulation 10(4)(e) and requires its disclosure.

DECISION

The Commissioner finds that in withholding the information requested by R Hill & Co (the applicants) under section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) the Scottish Ministers (the Ministers) dealt with the applicants' information requests in accordance with Part 1 of FOISA.

The Commissioner also finds that the Ministers partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the applicants' information requests. In particular, he finds that the Ministers were entitled to rely on the exceptions in regulations 10(4)(a) and 10(4)(e) of the EIRs in withholding certain of the information covered by these requests.



However, the Commissioner finds that the Ministers were not justified in relying on the exception in regulation 10(4)(e) of the EIRs for other information withheld from the applicants, in particular the information detailed in paragraph 45 above. The Commissioner therefore finds that the Ministers did not comply with the requirements of EIRs in withholding certain information from the applicants.

The Commissioner therefore requires the Ministers to release to the applicants the information detailed in paragraph 45, by 5 October 2008.

Appeal

Should either the applicants or the Ministers wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
21 August 2008



Appendix

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.
- (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.

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

...



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

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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

(a) it does not hold that information when an applicant's request is received;

...

(e) the request involves making available internal communications.

...

11 Personal data

...

(2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.

(3) The first condition is-

(a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Data Protection Act 1998

1 Basic interpretative provisions

In this Act, unless the context otherwise requires –



...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.