

Decision Notice



Decision 166/2011 Unison and Scottish Water

PFI/PPP Wastewater contracts

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Summary

Unison requested from Scottish Water the full details of certain PFI/PPP wastewater contracts, in addition to copies of the Final Business Cases (FBCs) associated with these and two other projects. Scottish Water provided a large amount of information to Unison, but withheld parts of some of the contracts in terms of section 33(1)(a) and (b) of FOISA. It also advised Unison that it held no FBCs for any of the named projects. Following a review, Unison remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information was likely to comprise environmental information and asked for Scottish Water's comments as to whether the request should have been dealt with under the EIRs. Scottish Water did not agree that the information was environmental. However, it indicated that should the Commissioner continue to consider the case under the EIRs, it would wish to rely on section 39(2) of FOISA (environmental information) and on regulations 10(4)(a) (information not held), 10(5)(b) (substantial prejudice to the course of justice) and 10(5)(e) (substantial prejudice to the confidentiality of commercial or industrial information) and 11(2) (personal data) of the EIRs for withholding the information. Unison accepted the application of regulation 11(2) and Scottish Water later withdrew its reliance on regulation 10(5)(b) of the EIRs.

After some consideration, the Commissioner concluded that the information which had been withheld was environmental information and was therefore subject to the EIRs. While he concluded that Scottish Water did not hold the FBCs Unison had asked for (and therefore regulation 10(4)(a) applied to the FBCs), he found that disclosure of the remaining information would not, and would not be likely to, prejudice substantially the confidentiality of commercial or industrial information in terms of regulation 10(5)(e) of the EIRs.

He therefore required Scottish Water to provide the remaining information to Unison.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request) and 10(1), (2), (4)(a), 5(e) (Exceptions from duty to make environmental information available)



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

Background

1. On 20 October 2006, Unison wrote to Scottish Water, requesting copies of the Full Business Cases (FBCs) and final contracts for each of the following:

Moray Coast Waste Water Project
Levenmouth Purification Scheme
Dalmuir Sewage Treatment
Daldowie/Shieldhall Sludge Treatment Centres
Meadowhead (Irvine), Ayr, Stevenston and Inverclyde Sewage Treatment
Tay Waste Water Project
Aberdeen, Stonehaven, Fraserburgh and Peterhead Sewage and Sludge Treatment

along with copies of the FBCs for the:

Almond Valley, Esk Valley & Seafeld Sewage Scheme
Inverness Main Drainage/Fort William Sewage Treatment.
2. The request made it clear that Unison wanted complete copies of these documents, although they had no objection to individuals' names and personal data or "genuinely commercially confidential" information being redacted. Unison noted that they wanted the information in order to calculate the full costs of the projects.
3. Scottish Water responded to this request on 24 and 28 November 2006. In its responses, Scottish Water supplied Unison with full copies of the Moray Coast and Tay Waste Water Project contracts. Scottish Water also supplied Unison with redacted copies of the five remaining contracts, with information withheld in terms of sections 33(1)(a) (trade secrets) and 33(1)(b) (substantial prejudice to commercial interests) of FOISA. Scottish Water provided Unison with a schedule showing which information had been withheld from the contracts for all but the Aberdeen, Stonehaven, Fraserburgh and Peterhead Sewage and Sludge Treatment contract.
4. Scottish Water advised Unison that it did not appear to hold the FBCs for these contracts. It advised Unison that the contracts had been signed by predecessor water authorities, e.g. North of Scotland Water Authority (NOSWA). It also advised Unison that it did not hold FBCs for any of the projects it had listed.
5. Unison subsequently asked Scottish Water for some clarification and pointed out that some of the information was missing from the response. Unison received the missing information from Scottish Water on 3 April 2007.



6. On 9 May 2007, Unison wrote to Scottish Water, requesting a review of its decision in terms of regulation 16 of the EIRs, and noting that it had not been possible to calculate the full cost of the contracts from the information which had been provided. Unison drew Scottish Water's attention to the fact that the information disclosed in the redacted contracts varied; for example, termination payments had been withheld from the Levenmouth Purification Scheme contract, but had not been withheld from most of the other contracts. Similarly, the interest rate on late payments in the Daldowie/Shieldhall Sludge Treatment Centres contract had been withheld, but had been disclosed in other contracts. (Unison also made it clear, as it had in its initial request, that it did not require employees' personal data.)
7. Unison also indicated that it expected Scottish Water to hold FBCs for each of the projects and asked it to search again for these documents.
8. Scottish Water notified Unison of the outcome of its review on 6 July 2007. Scottish Water advised Unison that it had consulted the contractors involved in each of the projects and had concluded that it was unable to disclose any further information contained within the contracts. Scottish Water reiterated that the information it had withheld was exempt in terms of section 33(1)(a) and (b) of FOISA.
9. Scottish Water noted Unison's wish to obtain complete copies of the contracts in order to calculate the costs of the project and provided Unison with three other pieces of information, which, it understood, would provide this information.
10. Scottish Water again reiterated that it did not hold the FBCs for any of the named projects.
11. On 31 October 2007, Unison wrote to the Commissioner, stating that it was dissatisfied with the outcome of Scottish Water's review and applying to the Commissioner 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 certain specified modifications.) The application focussed on two aspects, i.e. the redactions from the contracts and the fact that Scottish Water had advised them that it did not hold the FBCs. Unison described it as "incredible" and "suspicious" that none of these had been traced by Scottish Water.
12. The application was validated by establishing that Unison had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

13. On 22 November 2007, Scottish Water was notified in writing that an application had been received from Unison and was asked to provide the Commissioner with two copies of the information, one showing what had been redacted, and the other a full, unredacted copy of the information. Given the large amount of information covered by Unison's request, Scottish Water provided the Commissioner with the information in a CD rom. The case was then allocated to an investigating officer.
14. After reviewing the information, the investigating officer contacted Scottish Water on 7 February 2008, noting that, having compared both sets of documents, Scottish Water appeared to have provided two copies of the unredacted contracts and had not provided a set of documents that illustrated the withheld material. Scottish Water was asked to provide a marked set of redacted documents. It was also given an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and to respond to specific questions. In particular, Scottish Water was asked to justify its reliance on the provisions of FOISA it considered applied to the information requested, and for details of the searches it had undertaken for the FBCs.
15. The investigating officer also noted that the projects involved the discharging, treatment or disposal of waste and advised Scottish Water that it was possible that the Commissioner would take the view that the withheld information was environmental information for the purposes of the EIRs. Scottish Water was asked to comment on this matter and to provide submissions on whether it would also consider the information to fall under the scope of any of the exceptions contained in the EIRs, if the Commissioner were to judge that the information withheld from Unison was environmental information. Scottish Water was also asked if it would rely on the exemption contained in section 39(2) of FOISA in relation to any information that the Commissioner judged to be environmental.
16. In its response dated 5 March 2008, Scottish Water provided the investigating officer with copies of the redacted and unredacted sections of the contracts. Scottish Water also responded to the questions raised by the investigating officer and provided arguments supporting its application of the exemptions contained in section 33(1)(a) and (b) of FOISA. Scottish Water stated that it accepted that the request could appropriately be handled under the EIRs, and notified the investigating officer that it would apply the exception in regulation 10(5)(e) of the EIRs to certain of the redacted information, and the exception in regulation 10(4)(a) to the FBCs. Scottish Water confirmed that it now wished to rely upon the exemption contained in section 39(2) of FOISA in relation to any information that the Commissioner deemed to be environmental.
17. In subsequent correspondence, Scottish Water provided additional submissions on the exceptions it had applied to the redacted information and also provided details of the searches it had undertaken for the FBCs. Scottish Water also notified the Commissioner that it was now withholding some of the redacted information in terms of regulations 10(5)(b) (on the basis of ongoing legal proceedings) and 11(2) of the EIRs.



18. Further into the investigation, Scottish Water identified some further information that it was willing to disclose to Unison. Scottish Water decided to disclose the whole of the Daldowie contract with only personal data redacted.
19. Scottish Water also subsequently withdrew its reliance on the exception at regulation 10(5)(b) of the EIRs as the legal proceedings in question were settled. As a result, the Commissioner will not consider this exception any further in this decision. He is also not required to consider the personal data which Scottish Water has withheld under regulation 11(2), given that Unison has accepted throughout that the personal information of individuals could be withheld by Scottish Water.
20. During the latter stages of the investigation, Scottish Water provided further submissions underlining to the Commissioner its overriding view that the withheld information was not environmental and should be considered under FOISA. Scottish Water reiterated, however, that should the Commissioner decide that the withheld information was environmental, it would wish its earlier submissions based on the EIRs to be taken into account. The submissions made by both Scottish Water and Unison will be discussed in more detail below in the Commissioner's analysis and findings section.
21. On 1 September 2010, Scottish Water wrote to the Commissioner asking him to contact Unison to ask if Unison would be willing to withdraw its application to the Commissioner on the basis that it had received the bulk of the information contained in the contracts it had asked for. However, Unison responded that it wished the case to proceed to a decision by the Commissioner on the basis of the information still being withheld.
22. Additional submissions were received from Scottish Water towards the end of the investigation and these are also considered, where relevant, below.

Commissioner's analysis and findings

Does the request fall to be decided under FOISA or the EIRs?

23. Scottish Water provided the Commissioner with a number of detailed submissions as to why it considered that the financial information redacted from the contracts was not environmental information. However, given that Scottish Water advised the Commissioner that, if he came to the conclusion that the information which had been withheld was environmental information, that it would be happy to accept that that was the case and would rely instead on exceptions in the EIRs (as opposed to exemptions in FOISA) for withholding the information, the Commissioner has not found it necessary to address the submissions from Scottish Water in full. He will, however, summarise and comment on the main points of the submissions from Scottish Water.



24. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹, the Commissioner 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 that:
- 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 exemption in section 39(2), 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.
25. As noted above, the bulk of the information in the contracts has been disclosed by Scottish Water to Unison. However, Scottish Water has withheld information associated with the financial aspects of the individual contracts, such as general costs and fees of providing the contracted services (including insurance cover) along with technical or operational data relating to how the services will be provided by the parties. This includes matters such as wastewater treatment and sludge treatment tariff rates and levels of indemnity against matters such as odour nuisance. It also covers matters such as the quality of sludge set against a number of targets, such as the maximum volume of arsenic acceptable.
26. Scottish Water referred in its submissions to *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*². This involved a request for an agreement between East Renfrewshire Council and MacDonald Estates (Braidbar) Ltd. relating to the development of Braidbar Quarry in Giffnock. The Council took the view that the agreement, whilst referring to the broad outline of the remediation for the site, comprised largely of contractual legal clauses relating to the relationship of the parties and various obligations, agreements and financial provisions appropriate to the proposals, and that such complex legal documentation could not appropriately be considered to fall within the definition of environmental information. However, the Commissioner disagreed, noting that, when taken in the context of the contract as a whole, they must be considered to be environmental information.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800429.asp>



27. Scottish Water questioned whether this was the correct approach. It believed that context is relevant, but only to the extent to which it forms part of examining the information with reference to the definition of environmental information in the EIRS (and, if required, with the reference to the definitions given in Directive 2003/4/EC on public access to environmental information (“the Directive”)³ and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)⁴). Scottish Water commented that it did not see how information of the type such as the commercial redactions in this particular case was the sort of information that was contemplated when the Directive and the Convention were drafted.
28. Furthermore, Scottish Water stated that a document has boundaries which double as the boundaries for the context. However, information is simply information, and if one paragraph can be environmental information, the next paragraph can be non-environmental. Likewise, one sentence in a paragraph can be environmental or, indeed, half of a sentence can be environmental whilst the other half can be non-environmental.
29. The Commissioner would wish to make it clear that his comments on “context” in *Decision 033/2009* and in other decisions should not be taken to mean that information does not need to fall within the definition of environmental information in the EIRs. It is, of course, necessary for information to fall within the definition of environmental information for it to be environmental information; the context in which information is to be found is relevant to determining whether it does fall within the definition. For example, in *Decision 182/2006 Bruce Sandison and the Fisheries Research Services*⁵, the only information which had been withheld from the applicant was the name of the farm from which salmon had escaped. Taken on its own (and out of context), there is nothing to suggest that the name of the farm comprised environmental information. However, as noted in paragraph 25 of that decision, the information sought by the applicant related to an incident (i.e. the escape of farmed fish) affecting or likely to affect elements of the environment, and which brought about a changed interaction between elements of the environment. In that respect, the Commissioner was satisfied that the name of the farm was environmental information for the purposes of the EIRs.

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

⁴ <http://www.unece.org/env/pp/documents/cep43e.pdf>

⁵ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2006/200601180.asp>



30. The Commissioner notes the case of *OFCOM v IC and T-Mobile* (EA/2006/0078)⁶, which gives some guidance as to how “environmental information” has been interpreted by the Information Tribunal and courts when dealing with a request under the (UK) Environmental Information Regulations 2004 (the EIR). In that case, OFCOM had argued that, even if the broader body of information in the database which had been requested fell under the definition of environmental information, the identity of the individual operators did not. However, the Tribunal decided that it would create unacceptable artificiality to interpret the language of the definition as referring to the nature and effect of (in this case) radiation, but not to its producer. It concluded that the name of a person or organisation responsible for the installation that (again, in this case) emits electromagnetic waves fell comfortably within the meaning of the words “any information ... on ... radiation” for the purposes of the definition.
31. This case was eventually referred to the European Court of Justice by the Supreme Court (although not in relation to the question of whether the names of the individual operators was environmental information). Neither the Supreme Court⁷, nor the Advocate General⁸ (as at the date of this decision, no judgement has been issued by the European Court of Justice) questioned whether the information was environmental information and, indeed, the Commissioner notes that the judgement of the High Court⁹ which dealt with the appeal from the Tribunal, while not discussing the matter in detail, agrees with the view of the Tribunal that the names of the operators were environmental information (paragraph 64). The Commissioner therefore takes comfort that his approach of taking account of the context of information is one which has been supported by the courts. While a name, or figure, taken on its own, outwith the context in which it appears, may not appear to be environmental information, he considers that it would be artificial to ignore the context in which the figure is placed.
32. The Commissioner has also taken account of the findings in the case of *MTUA v IC and Halton Borough Council* (EA/2009/0001)¹⁰ in which the Tribunal considered whether information on introducing tolls within the Mersey Gateway Project fell within the definition of environmental information. In this case, the Tribunal accepted that the Mersey Gateway Project itself would have a significant impact on the environment and that information relating to it would fall squarely within the definition of environmental information under the EIR. But the Tribunal also gave weight to the fact that the terms under which the project could be funded made it clear that the only way in which it could be delivered was by tolling both a proposed new bridge and an existing bridge. The Tribunal found that tolling was an integral part to the project and its viability and for this reason the information on tolling fell within the definition of environmental information set out in the EIR.

⁶ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i104/Ofcom.pdf>

⁷ Office of Communications v The Information Commissioner [2010] UKSC 3 (judgement given on 27 January 2010)

⁸ Delivered 10 March 2011 - <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Submit&numaff=C-71/10>

⁹ Office of Communication v The Information Commissioner [2009] EWCA Civ 90 (judgement given on 20 February 2009)

¹⁰ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i319/MTUA%20v%20IC%20&%20HBC%20\(0001\)%20Decision%2023-06-09%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i319/MTUA%20v%20IC%20&%20HBC%20(0001)%20Decision%2023-06-09%20(w).pdf)



33. The Commissioner notes that information relating to toll charges, although on the face of it appears to be purely financial/commercial information, in the context of the request it can, and indeed should, also be considered to be environmental information.
34. Finally, the Commissioner would make reference to a Tribunal decision, *Nottinghamshire County Council v Information Commissioner EA/2010/0142*¹¹, issued on 29 December 2010. In this case, the information in dispute was a schedule to a PFI contract, detailing the arrangements under which the Council had an option to lease certain land from UK Coal Mining Ltd. The intention was that, once the leasing option was exercised by the Council, the contractor, Veolia, would take a sub-lease of the land and would then build and maintain an incinerator on the land for the purpose of discharging its waste management obligations under the contract.
35. In determining whether the information in the schedule was environmental information for the purposes of the EIR, the Tribunal referred to the case of *Eva Glawischnig v Bundesmeister für Soziale Sicherheit und Generationen*¹² and, in particular, to paragraphs 24 and 25 of that judgement. (Scottish Water also referred to the *Glawischnig* case in its submissions.)
36. *Glawischnig* noted that the intention behind Directive 90/313 (the precursor to Directive 2003/4/EC) was to make the concept of “information relating to the environment” a broad one. However, it also noted that Directive 90/313 had not been intended to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors.
37. In *Nottinghamshire County Council*, the Tribunal determined that this meant that simply because information had a slight or tangential association with the state of the elements of the environment, that will not necessarily bring it within the scope of the EIRs.
38. When considering the information in the schedule to the contract, the Tribunal found that it contained information which had no bearing on the state of the elements of the environment. The litmus test, in the Tribunal’s view, was that the information in the schedule, and the key financial indicators within it, can be adjusted over a broad commercial range of negotiations without having any effect on environmental issues. Consequently, the Tribunal found that the information was not environmental information (although it did then fall to be considered under the Freedom of Information Act 2000).

¹¹ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i486/20110419%20Decision,%20Review%20&%20Rulings%20EA20100114.pdf> – The First Tier Tribunal has given UK Coal Mining Ltd. leave to appeal this decision to the Upper Tribunal. However, the point which is being appealed does not relate to the extent to which the information which was withheld was environmental information.

¹² C-321/926 [1998] ECR I-3809



39. As noted above, Unison has requested contracts relating to waste water, sewage treatment and sludge treatment. The Commissioner considers that all of these schemes will have a significant effect on the state of a number of the elements of the environment referred to in definition (a) of environmental information in the EIRs, including air, water, soil and land and will potentially generate factors including energy, waste, emissions, discharges and other releases into the environment affecting or likely to affect the elements of the environment, in terms of definition (b) of environmental information. The Commissioner also consider that the contracts are measures, in terms of definition (c) of environmental information, affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures designed to protect those elements. (The definition of environmental information is set out in full in the Appendix to this decision.)
40. Scottish Water accepts that the contracts are measures in terms of definition (c), but state that just because something is a measure or activity it does not become environmental information unless that measure or activity is “affecting or is likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures and activities designed to protect those elements”. The Commissioner agrees with this approach.
41. Having considered the information which has been withheld from the contracts in question, the Commissioner has determined that the redactions in this case do amount to measures and activities likely to affect the relevant elements and factors in paragraphs (a) and (b) of the definition of environmental information. For example, the severity of financial penalty clauses for concessionaires who allow more than the defined parameters of sludge to escape into the waters (and the defined parameters themselves) are clearly intended to protect the environment and will affect or are likely to affect the level of duty of care exercised by those concessionaires, to avoid discharges which could harm the environment . Similarly, the level of indemnity required in relation to matters such as odour nuisance will affect or will be likely to affect the environment for the same reason.
42. While the information may be “financial information”, this does not mean that it cannot at the same time be “environmental information”, provided that it is information on measures which will affect or will be likely to affect the state of the elements or factors of the environment. Unlike the information which was in dispute in the *Nottinghamshire County Council* case, it cannot be said that the information in dispute here has only a slight or tangential association with the state of the elements of the environment.
43. He is therefore satisfied that all of the information which has been withheld is environmental information for the purposes of the EIRS.

Application of section 39(2) of FOISA

44. The exemption in section 39(2) of FOISA provides 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.



45. As outlined above, the Commissioner is satisfied that the information withheld in this case is environmental information as defined in regulation 2(1) of the EIRs.
46. As mentioned earlier, Scottish Water advised the Commissioner that should he find the redacted information to be environmental, it wished to apply the exemption in section 39(2) of FOISA to the information and to rely also on exceptions contained in the EIRs.
47. The Commissioner accepts that Scottish Water was entitled to apply the exemption at section 39(2) of FOISA to the withheld information, given his conclusion that the withheld information is environmental information.
48. As there is a separate statutory right of access to environmental information available to Unison in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with Unison's request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner is therefore satisfied that the information was properly withheld under section 39(2) of FOISA and has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Consideration of regulation 10(4)(a) of the EIRs

49. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. It should be noted that, under regulation 10(2), authorities are required to (a) interpret the exceptions in a restrictive way and (b) apply a presumption in favour of disclosure.
50. Regulation 10(4)(a) of the EIRs provides 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.
51. In its submissions to the Commissioner, Scottish Water submitted that it was applying the exception in regulation 10(4)(a) of the EIRs to all nine of the FBCs requested by Unison.
52. In its correspondence with Unison, Scottish Water indicated that the FBCs would have been prepared by its predecessor water authorities, which included NOSWA and East of Scotland Water Authority (ESWA) and that it did not hold any FBCs in relation to the named projects.
53. Unison was dissatisfied with this response and, in its application to the Commissioner, it referred to the Scottish Government's Financial Partnership Unit's (FPU's) "done deals" website, which stated that the FBCs for both the Aberdeen and Tay projects had been published. Unison also referred to a statement made by NOSWA which indicated that both of these FBCs were lodged with local libraries. Although Unison was unable to locate a copy of these documents in any of the named libraries, it was of the view that Scottish Water would have retained copies.



54. Unison also referred to comments made by the Scottish Parliament Transport & Environment Committee in 2001, which noted that “there should be a strong presumption that business cases and contracts be made public after agreement is finalised”. Unison’s general view was that there was evidence that at least two of the FBCs it was seeking existed, and that it would therefore expect copies of them to be held by Scottish Water, on the basis that it would have inherited them from its predecessor organisations.
55. The Commissioner reviewed the FPU website referenced by Unison, and noted that it does clearly state that FBCs for the Aberdeen and Tay projects had been published. Furthermore, when reviewing the 9th Report of the Transport & Environment Committee (the 9th Report), the Commissioner found a copy of an advert placed by NOSWA in the local press, which indicated that the FBCs for both the Aberdeen and Tay projects were to be placed in local libraries for public dissemination.
56. In light of this, the Commissioner contacted Scottish Water and asked it to provide details of the searches it had undertaken to locate the FBCs. The Commissioner also asked Scottish Water whether it had searched through all of the records it held. The Commissioner referred Scottish Water to the 9th Report, which included a statement from its predecessor organisation advising that FBCs for both the Aberdeen and Tay projects were completed and would be placed in local libraries, and that the FBC for the Moray project was nearing completion. The Commissioner asked Scottish Water for further explanation as to why it was unable to locate the FBCs for each project, when the evidence seemed to suggest that at least three FBCs had been prepared.
57. In its response, Scottish Water advised the Commissioner that it had searched through all of the hard copy NOSWA and ESWA board papers it held and that no reference to an FBC had been found. In addition, Scottish Water spoke to members of staff who worked for NOSWA at the time, and none of them recalled any FBCs being prepared by NOSWA or ESWA. In relation to the FBCs mentioned in the 9th Report, Scottish Water commented that it was possible that a document had been liberally referred to as an FBC when it was not actually an FBC.
58. The Commissioner asked Scottish Water to conduct a search of its records management facility. The Commissioner noted that, as NOSWA had clearly placed an advert publicising the existence of the FBCs, it would be useful to know if Scottish Water held any documents that related to the commissioning and placement of the advert, for example, evidence that this advert had been discussed in any meetings.
59. The Commissioner also asked Scottish Water for copies of any documentation or evidence it held which supported its view that the FBCs referred to in the NOSWA advert were not FBCs but were in fact other documents.



60. In an effort to determine whether the two named FBCs were published, the Commissioner contacted the libraries named in the NOSWA advert and discovered that Aberdeen Central Library had a copy of the FBC referred to in the advert, along with an explanatory covering letter. Having reviewed the FBC, however, it was clear to the Commissioner that this document was not the in-depth business case that Unison was seeking, but was in fact a copy of a document already publicly available and which formed part of the agenda for the meeting detailed in the 9th Report. However, the covering letter from NOSWA clearly referred to this document as an FBC, and it was obvious that this was the material referred to in the 9th Report.
61. The Commissioner provided Scottish Water with a copy of the document and covering letter provided by Aberdeen Central Library, and asked it for an explanation as to why Scottish Water had found no mention of an FBC in the records it had so far searched. The Commissioner acknowledged that the current definition of an FBC may differ from that used in 2000, but he pointed out that NOSWA was clearly using the term “FBC” in relation to the document lodged at Aberdeen Central Library, and he queried why Scottish Water had found no mention of this in the NOSWA papers it had searched. The Commissioner referred to the advert which had been placed in the local press and expressed surprise that NOSWA could have placed an advert, authorised a covering letter and sent out at least one FBC to Aberdeen Central Library without creating any kind of paper trail that Scottish Water would have inherited.
62. In its responses, Scottish Water advised that it had searched through various key files (including an ESWA file which contains an evaluation of the PFI route) and had found no reference to a FBC. Scottish Water submitted that, if an FBC existed, it would have expected to have found it in the files it had searched. Scottish Water also submitted that it was committed to disclosing information in accordance with the legislation, and that it would not seek to withhold FBC documents that had been prepared specifically for publication.
63. Scottish Water advised the Commissioner that, prior to May 1998, when the UK government asked NHS bodies to publish FBCs, there was no requirement to prepare or publish such documents. Then, in June 1999, the then Minister for Finance, Jack McConnell MSP, during a debate in the Scottish Parliament, introduced similar measures for government departments. He announced his expectation that the rest of the public sector would follow suit from 24 June 1999, but that the changes would not be applied retrospectively. Scottish Water submitted that all of the projects except the Moray Coast PFI had commenced well before that date. Scottish Water reiterated that it had been unable to locate any FBCs, including the FBC for the Moray project that was referred to in the NOSWA letter provided by Aberdeen Central Library.



64. Scottish Water advised the Commissioner that it had spent more than 22 hours searching through files and documents, and that it had not located a single reference to an FBC in relation to the named projects, or found any FBCs. In relation to the NOSWA letter and FBC lodged at Aberdeen Central Library, Scottish Water submitted that the existence of these documents corroborates its view that FBCs were not developed. Scottish Water noted that the author of the covering letter was not a lawyer, financial adviser or PFI specialist, but was a public relations employee. Scottish Water points out that the “FBC” located at Aberdeen Central Library is identical to other material already in the public domain and that it has uncovered nothing new. Scottish Water has submitted that the NOSWA FBC is a red herring, and has indicated that the NOSWA submission provided in the 9th Report was not followed through (and no FBCs were created).
65. The Commissioner has considered the submissions by Scottish Water in relation to the FBCs and, on balance of probabilities, he is satisfied that Scottish Water does not hold FBCs for any of the listed projects. Very detailed, time consuming searches have been carried out by Scottish Water for the FBCs, but no relevant information has been located. The Commissioner also considers it relevant that FBCs were not required to be carried out for the projects in question.
66. Consequently, the Commissioner is satisfied that the information is subject to the exception in regulation 10(4)(a) of the EIRs.

Public interest test

67. As noted in paragraph 49 above, the exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. In this case, the Commissioner is satisfied that Scottish Water does not (and did not, at the time of Unison’s request) hold the FBCs. Consequently, he does not consider there to be any conceivable public interest in requiring that any information be made available.
68. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs. Consequently, he is satisfied that regulation 10(4)(a) applies to the FBCs.

Consideration of regulation 10(5)(e) of the EIRs

69. Under regulation 10(5)(e) of the EIRs, 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 confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest. As noted above, under regulation 10(2), authorities are required to (a) interpret the exception in a restrictive way and (b) apply a presumption in favour of disclosure.



70. The United Nations Economic Commission for Europe's Implementation Guide to the Aarhus Convention¹³ (the Aarhus Implementation Guide) notes (at page 60) that the first test for considering this exception states that national law must expressly protect the confidentiality of the withheld information. In practical terms, this means that national law must explicitly protect the type of information in question as commercial or industrial secrets.
71. The same guidance goes on to note that the Aarhus Convention does not define "legitimate economic interest" but that there are several steps that countries have taken to help define legitimate economic interest case by case. These are:
- Establish a process. Parties (to the Convention, i.e. relevant states) may wish to establish some type of process or test to identify information that has a legitimate economic interest in being kept confidential;
 - Determine confidentiality. Legitimate economic interest carries the implication that the information is only known to the company and the public authority, or at least is certainly not already in the public domain; and that the body whose interests are at stake took reasonable measures to protect the information. This can be objectively determined in each case;
 - Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.
72. The Commissioner has taken account of this guidance when considering this exception.
73. The Commissioner's view is that, before regulation 10(5)(e) can be engaged, authorities should consider the following matters:
- Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - Would disclosure of the information cause, or be likely to cause, substantial prejudice to a legitimate economic interest?

All four of these matters are relevant in determining whether the exception applies. It is not sufficient, for example, simply to show that a legally binding duty of confidence exists in relation to commercial or industrial information. Disclosure of that information must also cause, or be likely to cause, substantial prejudice to a legitimate economic interest before the exception can be found to apply.

¹³ <http://www.unece.org/env/pp/acig.pdf>



Is the information commercial or industrial in nature?

74. The Commissioner has reviewed the redacted information and is satisfied that the parts of the contracts to which the exception in regulation 10(5)(e) has been applied comprise commercial or industrial information, given that they contain information associated with the financial aspects of the contracts, such as general costs and fees of providing the contracted services (including insurance cover) along with technical or operational data relating to how the services will be provided by the parties.

Does a legally binding duty of confidence exist?

75. The Commissioner considers that “provided by law” in terms of regulation 10(5)(e) will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute. There is no need, under the exception in regulation 10(5)(e), for the information to have been obtained from another person and in that respect it differs from the “confidentiality” exemption in section 36(2) of FOISA. The exception can therefore cover information created by the public authority and provided to another, or to information jointly created or agreed between the public authority and a third party.
76. As noted above, all of the contracts from which information has been redacted contain confidentiality clauses, under which both the PFI concessionaires and Scottish Water agree to keep the contract (and all documents and other information supplied in connection with the contract) confidential except in certain, limited circumstances, such as where the other party consents in writing to the disclosure of the information.
77. As the information is subject to a contractual obligation, the Commissioner accepts that the information is subject to confidentiality provided for by law in terms of regulation 10(5)(e). As such, there is no need to consider the common law tests of confidence.

Is the information publicly available?

78. The Commissioner notes that, in this case, some limited information on the total value of the contracts is already in the public domain. However, the detailed information which has been redacted from the contracts has not been disseminated publicly. As such, the Commissioner is satisfied that the information is not publicly available.

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

79. The term “legitimate economic interest” is not defined within the EIRs. The interest in question will, however, be financial, commercial or otherwise “economic” in nature.



80. It is self-evident from the contracts that both Scottish Water and the contractors have a legitimate economic interest in the information which has been withheld. However, for the exception to apply, disclosure must prejudice substantially, or be likely to prejudice substantially, the economic interests in question. In order to apply this exception, an authority must therefore be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
81. Scottish Water argued that disclosure of the redacted information would, or would be likely to, substantially prejudice the contractors' legitimate economic interests in the following ways (the views of the contractors have been shared with the Commissioner and are reflected in the following):
- The redactions reveal the PFI concessionaires' or operators' approach to these types of contracts; disclosing these details would damage their legitimate economic interests and unfairly assist their competitors by, for example, gaining an insight into the parties' commercial and risk positioning;
 - As the concessionaires' commercial activities are being conducted in a competitive environment, disclosure of the information would put the concessionaires at a competitive disadvantage;
 - Disclosure would adversely impact the commercial activities of the concessionaires in relation to future PFI contract bids/negotiations (both Scottish Water and the concessionaires were concerned that if a refinancing or variation of the PFI projects were to be conducted, disclosure would prejudice their interests);
 - The way a company divides total costs between different elements of the contract is information that would be of considerable interest to competitors and could influence future bids to the detriment of fair competition. Disclosure could therefore affect the concessionaires' ability to participate successfully in bidding for contracts.
 - Scottish Water also argued that a fundamental requirement for PFI projects is that the private sector should genuinely assume risk. The successful bidders' detailed explanation of how they address and assume risk is regarded as confidential, and the parties have a legitimate economic interest in keeping them confidential. Bidders' attitudes to assuming these commercial risks are among the most important issues that led to them being chosen to deliver the waste water services in the first place.
82. Scottish Water also argued that its own interests would, or would be likely to be, prejudiced substantially by the disclosure of the information. Although it is a Scottish public authority for the purposes of FOISA and the EIRs, Scottish Water is run as a commercial entity and is benchmarked against privatised water companies in England (which are neither subject to the Freedom of Information Act 2000 nor, in line with a decision of the Upper Tribunal (Administrative Appeals Chamber), to the (UK) Environmental Information Regulations 2004¹⁴).

¹⁴ [Smartsource Drainage & Water Reports Ltd v The Information Commissioner and a Group of 19 Water Companies](http://www.informationtribunal.gov.uk/DBFiles/Appeal/i460/GI%202458%202010.pdf)
<http://www.informationtribunal.gov.uk/DBFiles/Appeal/i460/GI%202458%202010.pdf>



83. Scottish Water argued that it has provided efficiencies both in terms of resources and value for money for the tax payer, which many other public authorities have been challenged to replicate, and that this has been achieved as a result of various factors, one being a robust competitive bidding process, leading to strong and healthy competition in large scale projects and ensuring effective delivery of service by contractors.
84. It considers that disclosure would allow future contractors to gain an insight into the commercial and risk positioning that it and its predecessor authorities considered acceptable and which Scottish Water continues to consider acceptable.
85. It is vital, Scottish Water argued, that when it tenders contracts for future projects, the bidders are exposed to an environment in which they have to submit the most attractive offer, which would facilitate the achievement of best value for money for the tax payer. Scottish Water commented that it has a duty to obtain best value for money and to encourage innovation when awarding future contracts, and that disclosure of the information would result in potential bidders basing their tenders on existing figures and methodologies, rather than being challenged to find innovative approaches which might bring benefits to its customers.
86. In considering the arguments put forward by Scottish Water, the Commissioner considered whether the passage of time would have any effect on the likelihood or level of harm caused by the disclosure of the information, given that methodologies are likely to evolve with the passage of time and that figures which were relevant in 1999/2000 may have lost a degree of their relevance in the intervening period. (The contracts were all signed between 1999 and 2000 and all of the projects were in operation by the end of 2002/2003. However, in considering this point, it is important to remember that the Commissioner must consider whether the exception applied to the information at the date when the review of the request was carried out by Scottish Water, i.e. July 2007.)
87. In its submissions, Scottish Water referred to *Decision 104/2009 Unison and the Scottish Prison Service*¹⁵, which considered a request made by Unison for the financial model relating to the contract for Kilmarnock Prison. In that decision, the Commissioner considered the passage of time between the creation of the financial model and the date of the request to be “extremely relevant.” In that case, the model was created around nine years before the date of the request. While the Commissioner accepted that the basic structure of the model might still be in use, he was satisfied that the significance of the information contained within the model would have diminished substantially over time, as prices, costs, service delivery methods/requirements and market, financial and other conditions (and, therefore, the assumptions underlying these and other relevant considerations) changed. He therefore came to the conclusion that disclosure of the model would not, and would not be likely to, prejudice substantially the contractor’s commercial interests under section 33(1)(b) of FOISA.

¹⁵ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200701446.asp>



88. Scottish Water argued that its PFI contracts can be distinguished from PFI contracts for building schools, hospitals and prisons, on the basis that its contracts often require substantial variations, for example as a result of changes in European environment law, which, according to Scottish Water, result in PFI companies implementing changes to service delivery and often require considerable capital expenditure to devise and build new solutions to meet the changing operational climate in which the companies operate.
89. Scottish Water stated that, even if it was accepted that, as a matter of fact, prices, costs, service delivery methods, etc. had changed to a material extent, this does not avoid substantial prejudice to a public authority, as a purchaser striving to seek best value, in having its commercial tolerance of risk and reward with incumbent contractors being used by future tenderers so that their tender proposals are geared towards the authority's commercial tolerance, rather than geared to further the public authority's aim to maximise best value for money.
90. Scottish Water also commented that, even if there had been material changes, that would not mean that the information which had been withheld would have no commercial value requiring protection; each contract does not have a radically different delivery of service, and when a new supplier takes over, its service delivery will not be completely different.
91. Given that the contracts extend over such a long period, it is difficult to see how disclosure of the information would, or would be likely to, prejudice substantially the legitimate economic interests of the concessionaires or of Scottish Water. The contracts are in place and will remain so until they are reviewed. However, the Commissioner has not been provided with any evidence to suggest that the contracts will imminently be renewed. In the event that they are renewed, for example if Scottish Water were to be privatised, or there were to be a major change in European environmental legislation, then the retendering is likely to take place on a very different set of circumstances and the disclosure of the information which has been withheld is unlikely to have the negative effect which Scottish Water and the concessionaires have put forward.
92. The Commissioner notes that three of the concessionaires, in the Moray, Tay and Daldowie contracts, have released all of the information in their contracts (with the exception of some personal information which is not at issue here). He notes that the Daldowie concessionaire originally stated that it wished to withhold the bulk of this information, but subsequently gave permission for the whole of it to be released.
93. Scottish Water submitted that, due to the nature of the Daldowie contract differing from the others (being in relation to a power station), there is not the same level of detriment to the legitimate interests in this case.
94. The Commissioner understands that Daldowie is a sludge treatment centre, run by Scottish Power, which processes sludge from wastewater treatment plants into waste delivered fuel. It has not been made clear to the Commissioner why this should mean that the level of detriment should be different.



95. However, given the submission from Scottish Water that the Daldowie contract was different from the others, the Commissioner compared what had been disclosed in contracts other than Daldowie. He noted, for example, the following:
- the Levenmouth concessionaire withheld information relating to termination payments, funding thresholds, insurances, tariff rate equations and pollution incident concentration level parameters, while examples of these had been disclosed by the Tay concessionaire; and
 - while the Meadowhead concessionaire had withheld information relating to contract payments, tariff rates, tariff threshold calculations and pollutant parameters, examples of these had been disclosed by the Moray concessionaire.
96. The Commissioner could find nothing to explain why different contracts should be treated in different ways, or why Scottish Water was content for certain types of information to be disclosed in one contract but withheld in another. This brings into question Scottish Water's concerns about the effect which disclosure of the information would have on Scottish Water's ability to achieve best value, etc. and, indeed, the effect of the disclosure on the concessionaires who wished information to be withheld; the Commissioner has not been provided with any evidence of harm having come about since the information in the Moray and Tay contracts was disclosed in 2006 (although he accepts that the concessionaire now clearly feels differently about the disclosure of the contracts) and the information in the Daldowie contract was disclosed in 2008. (The Commissioner notes that the Daldowie contract was disclosed after Scottish Water carried out its review, and accepts that the time between the disclosure of the Moray and Tay contracts was unlikely to have given any evidence of harm by the time of the review. However, given that submissions on this case have been received from Scottish Water throughout the investigation, the Commissioner fully expects that any evidence of harm would have been brought to the Commissioner's attention by Scottish Water.) It is clear that the concessionaires differ in their opinion as to the level of detriment that would likely be caused to them by the disclosure of the types of information in question.
97. The Commissioner has also noted that Scottish Water did not provide any reasoning as to why the disclosure of particular information in certain contracts appears not to have damaged Scottish Water's interests while the disclosure of similar information in other contracts would, or would be likely to, prejudice those interests substantially.
98. Having taken into account the submissions from Scottish Water and from the contractors, it is the Commissioner's considered conclusion that the arguments advanced by Scottish Water are not sufficiently persuasive to support its assertion that the release of the information would, or would be likely to, cause substantial harm to the legitimate economic interests of the PFI contractors or of Scottish Water itself.
99. As such, the Commissioner is not satisfied that the exception in regulation 10(5)(e) applies to the information which has been withheld in this case.
100. As the Commissioner has not upheld the use of the exception contained within regulation 10(5)(e), he is not required to consider the public interest test required by regulation 10(1)(b) of the EIRs in relation to this exception.



Information v documents

101. As noted above, Unison asked Scottish Water to provide it with copies of the contracts. In response, Scottish Water provided copies of the contracts, albeit that some were in a redacted form. However, during the investigation, Scottish Water argued that Unison had no right to ask for copies of documents, given the ruling of the Court of Session in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73*¹⁶.
102. However, the Commissioner would comment that the *Glasgow City Council* case was considered solely under FOISA and did not consider the position under the EIRS.
103. The Commissioner notes the terms of Directive 2003/4/EC and the Aarhus Convention, from which the Directive is derived. Recital 5 of the Directive refers to the need for provisions of Community law to be consistent with the Aarhus Convention. Article 4(3) of that Convention obliges public authorities to make environmental information available when requested including "copies of the actual documentation containing or comprising such information".
104. The Commissioner further notes that the Aarhus Implementation Guide states, at page 54, that:

"...under the Convention, public authorities must upon request provide copies of the actual documents containing the information, rather than summaries or excerpts prepared by the public authorities ...The requirement that copies of actual documents should be provided ensures that members of the public are able to see the specific information requested in full, in the original language and in context ..."
105. The Commissioner is therefore satisfied that an applicant is entitled to ask for copies of documents under the EIRS.

DECISION

The Commissioner finds that Scottish Water complied with 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 Unison.

The Commissioner finds the withheld information to be environmental information and, therefore, subject to the EIRs. The Commissioner finds that the exception in regulation 10(4)(a) applied to the FBCs requested by Unison. However, he finds that the exception in regulation 10(5)(e) does not apply to the information in the contracts which has been withheld from Unison and that, in failing to disclose this information, Scottish Water failed to comply with the EIRs.

The Commissioner therefore requires Scottish Water to provide Unison with the withheld information, by 3 October 2011.

¹⁶ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



Appeal

Should either Unison or Scottish Water 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.

Kevin Dunion
Scottish Information Commissioner
15 August 2011



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 –

- (a) the provision does not confer absolute exemption; and
- (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);

...

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.

...

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;

...

- (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-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...