

Decision Notice



Decision 038/2009 Fish Legal and the Scottish Environment Protection Agency

Pollution incidents

Reference No: 200801126
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Scottish Information Commissioner

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Summary

Fish Legal (originally Anglers' Conservation Association) requested from the Scottish Environment Protection Agency (SEPA) information relating to specified pollution incidents. SEPA responded by providing some information but withheld the remainder on the basis it was exempt under section 39(2) of FOISA as environmental information and also excepted from disclosure under the EIRs. Following a review, Fish Legal remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that SEPA had been correct to deal with Fish Legal's information request under section 39(2) of FOISA but had partially failed to deal with the request in accordance with the EIRs. The Commissioner found that SEPA was incorrect in its application of regulation 10(5)(b) (relating to the course of justice, fair trials and the conduct of criminal investigations) in relation to statements made by SEPA employees, but correct in its application of this exception to the remaining information. He required SEPA to disclose the SEPA staff statements and relative notebook extracts, subject to agreed redactions of personal information.

Relevant statutory provisions and other sources

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

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 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 7 April 2008, the Anglers' Conservation Association wrote to SEPA requesting information relating to the investigation of a pollution incident in April 2007. It identified the information requested as that detailed in an earlier request of 26 May 2007, being:



- All SEPA records of the incident, including staff notebook entries and any photographs taken by SEPA staff
- All witness statements made by SEPA staff, Scottish Water or other third parties
- All records of reports of the pollution incident made to SEPA
- All relevant discharge consents held by Scottish Water (e.g. for the Allers STW) and associated discharges
- All compliance monitoring carried out by SEPA for Allers and for any associated discharges for the last 3 years to date
- Any in-river monitoring data held by SEPA concerning the chemical, biological, fisheries or ecological quality of Rotten Calder in the last 3 years
- Any chemical, biological, fisheries, or ecological assessment of the impact of the incident on the Rotten Calder
- All correspondence between SEPA and Scottish Water relating to the incident.

In response to the earlier request, SEPA had provided most of the information but withheld certain items on the basis that regulations 10(5)(b) and 10(5)(d) of the EIRs applied.

2. In the course of this case, the Anglers' Conservation Association changed its name to Fish Legal. This new name will be used for the remainder of this decision.
3. SEPA responded to Fish Legal's request of 7 April 2008 on 12 May 2008. In this response, having applied section 39(2) of FOISA on the basis that the information requested was environmental information as defined in regulation 2(1) of the EIRs, SEPA provided some further information but maintained its earlier application of regulation 10(5)(b) to the Standard Prosecution Report and referred Fish Legal to its response (to the 26 May 2007 request) of 23 October 2007.
4. On 22 May 2008, Fish Legal wrote to SEPA requesting a review of its decision. In particular, Fish Legal was not satisfied that SEPA had addressed the following elements of its request:
 - Staff notebooks
 - Witness statements made by SEPA staff or Scottish Water staff
 - Compliance monitoring carried out by SEPA at Allers Sewage Treatment Works
 - Correspondence between SEPA and Scottish Water relating to the April 2007 offence.
5. SEPA notified Fish Legal of the outcome of its review on 24 June 2008. In its response SEPA accepted that correspondence between SEPA and Scottish Water, withheld at the time of the earlier request, could now be released. It also informed Fish Legal that in response to that earlier request it had provided all the information it held in relation to compliance monitoring carried out at the Allers Sewage Treatment works. In relation to witness statements made by SEPA or Scottish Water staff, SEPA maintained its earlier reliance on regulation 10(5)(b) of the EIRs and continued to withhold the information.



6. On 30 July 2008, Fish Legal wrote to the Commissioner's Office, stating that it was dissatisfied with the outcome of SEPA'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.
7. The application was validated by establishing that Fish Legal 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

8. On 29 August 2008, SEPA was notified in writing that an application had been received from Fish Legal and asked to provide the Commissioner's Office with any information withheld from the applicant. SEPA responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted SEPA, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, SEPA was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
10. Fish Legal also provided full arguments in support of its position that the information should be released. The arguments presented by both parties will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Fish Legal and SEPA and is satisfied that no matter of relevance has been overlooked.

Fish Legal's submissions

12. Within its application to the Commissioner, Fish Legal advised that it was appealing the refusal of SEPA to provide SEPA staff notebooks, interview transcripts and/or witness statements (with exhibits) relating to two successful prosecutions of Scottish Water (which arose out of separate pollution incidents, one in 2006 and one in 2007). Fish Legal requested that the Commissioner limit the scope of his investigation to the following items:
 - The refusal of SEPA to provide staff notebooks and transcripts of interviews relating to the first of the two Scottish Water pollution incidents which occurred in 2006



- The refusal of SEPA to provide witness statements from SEPA staff, staff notebooks and transcripts of interviews with/witness statements taken from Scottish Water staff relating to the second of the two Scottish Water pollution incidents that occurred in 2007.
13. It is clear that Fish Legal intended its request of 7 April 2008, referring back to its earlier request of 26 May 2007, to cover both of the incidents referred to in the previous paragraph, with a view to asking SEPA to reconsider its position in the light of what it believed to be changed circumstances. The Commissioner considers it arguable whether the 2008 request could reasonably have been interpreted in these terms, or for that matter whether it was in fact so interpreted by SEPA in the course of its handling of the request. He is satisfied, however, that all issues pertinent to the staff notebooks and interview transcripts in respect of the 2006 incident have been fully considered in this decision.
 14. Fish Legal emphasised that in relation to the 2006 incident, SEPA had provided witness statements from its own employees that had been used in the successful prosecution and that it was only in relation to the 2007 incident that it had decided to withhold the witness statements of its own staff. Fish Legal considered it inconceivable that the statements from one incident would contain information allowing the application of regulation 10(5)(b) while those from the other did not, noting in particular SEPA's reference in refusing the information to processes undergone by it in the preparation of evidence (and expressing surprise that a large utility such as Scottish Water would not be aware of these processes in any event). Further, Fish Legal did not accept that there could be substantial prejudice in the general sense following the disclosure of the 2007 documents.
 15. Within its submissions, Fish Legal argued that statements of the kind requested were disclosed regularly in England and Wales following completion of the relevant proceedings, within a very similar regulatory framework for environmental information. Fish Legal appreciated that, unlike in England, the involvement of the Crown Office procurator fiscal Office (COPFS) as the prosecuting agency in SEPA-investigated offences in Scotland might complicate the process for applying the EIRs in prosecuted pollution cases. It believed the COPFS position on withholding witness statements with a view to the continued participation and co-operation of witnesses to be overly cautious and to relate more properly to witness statements in "traditional" criminal offences rather than those (as in the case of the two pollution incidents raised by Fish Legal) more correctly described, suggested Fish Legal, as regulatory offences.
 16. Referring to the Aarhus Convention implementation guide, Fish Legal submitted that once the successful prosecution had been completed, there could be no prejudice to a fair trial or to SEPA's ability to conduct the relative inquiry, and consequently regulation 10(5)(b) should not be used to refuse the disclosure of relevant statements and other evidence used in that prosecution.



17. Fish Legal also referred to the fact that SEPA had withheld certain information under regulation 10(5)(d) of the EIRs initially but then changed its position on review and decided that regulation 10(5)(b) was the appropriate exemption. However, in the Commissioner's view the function of a review is to allow the relevant information request to be considered afresh and it is perfectly acceptable, where appropriate, for a different exception to be substituted for that originally applied to information. In this case, the Commissioner can see no basis for concern in SEPA doing this.

SEPA's submissions

18. In its submissions, SEPA made reference to a number of the Commissioner's previous decisions in relation to section 34(1) of FOISA, noting the similarities between the information sought in those cases and in this, and also between that exemption and the regulation 10(5)(b) exception. It considered reference to these decisions useful in the absence of similar decisions in respect of regulation 10(5)(b).
19. SEPA submitted that requests for the release of similar types of material from the police had formed the subject of a number of decisions on section 34(1), including *Decisions 066/2007 Mr Hugh McDerment and the Chief Constable of Strathclyde Police, 089/2008 Ms B and the Chief Constable of Grampian Police, 138/2008 Mr B and the Chief Constable of Strathclyde Police* and *121/2008 Mr W and the Chief Constable of Strathclyde Police*. From these decisions, SEPA identified four reasons favouring the maintenance of the exemption and argued that these were also relevant in applying the exception in regulation 10(5)(b). It considered disclosure of the information sought in this particular case would substantially prejudice the course of justice and its ability to conduct an inquiry of a criminal nature, because it might:
- inhibit/deter the flow of information
 - compromise future investigations by disclosing how the information was gathered
 - prejudice substantially the freedom with which the investigating body gathered information and reported to the procurator fiscal
 - make it difficult for the investigating body to carry out investigations to the highest standard.
20. In addition, with regard to the witness statements obtained from Scottish Water staff, SEPA highlighted that there was no obligation to provide any information in response to a common law caution administered by a SEPA senior officer. This being the case, SEPA was concerned that if such witnesses thought that their statements were going to be disclosed other than in the course of criminal proceedings, they might be less inclined to make such statements voluntarily. In SEPA's view, this also applied to notebook entries, given that they contained the statements of such witnesses.
21. In relation to statements by SEPA officers, SEPA believed that the release of these in connection with a previous incident would adversely affect these officers' continuing ability to regulate the waste water treatment plant involved in the incident and to conduct further investigations with a view to enforcement proceedings should similar problems arise in the future.



22. SEPA explained that the initial request from Fish Legal in May 2007 had been received before the proceedings relating to the 2007 incident were concluded. The request received in April 2008 (which is the subject of this decision) had been received after court proceedings for both incidents had been completed. SEPA explained that a material factor it took into account when responding to a request for information was whether the information sought related to criminal proceedings which had yet to be concluded, given that regulation 10(5)(b) required consideration of the ability of a person to receive a fair trial.
23. SEPA clarified that although statements from SEPA witnesses relating to the 2006 incident had been released, witness statements obtained from Scottish Water staff relating to the 2006 incident had not. The only witness statements to have been released, therefore, were those of SEPA staff relating to the 2006 incident. More detailed arguments for the withholding of witness statements were provided by SEPA and will be considered below.
24. It will be noted that the only information relating to the 2006 incident falling within the scope of Fish Legal's application and not already disclosed comprises the transcript of an interview with a member of Scottish Water staff and the relative notebook entry.

Section 39(2) of FOISA – environmental information

25. Essentially, the exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt information under FOISA (thereby allowing any such information to be considered solely in terms of the EIRs), subject to the public interest test in section 2(1)(b) of FOISA. In this case the Commissioner accepts that SEPA was correct to apply the exemption to the withheld information, which relates to incidents of environmental pollution and is clearly environmental information as defined in regulation 2(1). As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA.

Regulation 10(5)(b)

26. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
27. The Commissioner has interpreted this exception as including purposes, activities or functions undertaken by public authorities in relation to their regulatory activities.



28. Unlike the exemptions in section 34(1) of FOISA, the exception in regulation 10(5)(b) of the EIRs requires a Scottish public authority to identify substantial prejudice to the exercise of a particular function or functions. Where a public authority can show that the exception in regulation 10(5)(b) does apply to the withheld information, it is also required to consider the application of the public interest test under regulation 10(1)(a). Important features of the EIRs are that regulation 10(2) requires a public authority considering the application of any exception to interpret the exception in a restrictive way and apply a presumption in favour of disclosure.
29. The Commissioner has considered the application of regulation 10(5)(b) in *Decision 125/2007 Mr Robert Hogg and the City of Edinburgh Council*, referred to in Fish Legal's submissions. In that case, the Council applied the exception to information it held in relation to an alleged breach of planning control, which could (depending on the outcome of the investigation) have led to criminal proceedings. There, the Commissioner was satisfied that the exception had been applied appropriately. While the investigation was properly a civil or administrative matter at the time of Mr Hogg's request, the Commissioner accepted that the planning authority's investigations, findings and submissions on the matter could in turn lead to and inform any subsequent decision on prosecution made by the procurator fiscal. The Commissioner was satisfied in the circumstances that disclosure while the matter was ongoing would undermine the investigation process and therefore that the information was exempt under regulation 10(5)(b).
30. The circumstances in this case can be distinguished from the case detailed above. In this instance Fish Legal's request was received after the investigatory process had been completed and successful prosecutions had taken place.
31. *The Aarhus Convention: An Implementation Guide* explains the principles behind the convention provision on which the exception is based in the following way:
- If the release of the information would adversely affect the "course of justice", public authorities may have a legal basis to refuse to release it. The course of justice refers to active proceedings within the courts. The term "in the course of" implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. The provision should be interpreted in the context of the law pertaining to the rights of the accused. Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation... The Convention clearly does not include all investigations in this exception, but limits it to criminal or disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered.*
32. The arguments of SEPA focus on the need to preserve the confidentiality of the investigatory process. SEPA explained that the information withheld related to a criminal investigation and that disclosure would substantially prejudice its ability to conduct an enquiry of a criminal nature (and, as indicated above, the course of justice and the ability of a person to receive a fair trial).



33. SEPA's enforcement policy states, in relation to reporting to the procurator fiscal:
- The objective of enforcement is to ensure that preventative or remedial steps are taken to protect the environment and to prevent; minimise or make harmless any releases that can cause pollution or harm to human health. Prosecution of offences under relevant legislation is one of the ways of achieving that objective.*
- SEPA can recommend to a procurator fiscal that a case be brought. Prosecution will be recommended only where it can be justified in order to punish offenders, to avoid a recurrence and/or to encourage improved compliance with the law. Where the circumstances warrant it, a case may be referred to a procurator fiscal without prior warning or recourse to alternative methods of enforcement.*
34. The Commissioner is satisfied that the information withheld relates to an investigation conducted by SEPA in pursuance of its functions, which led to criminal charges and subsequent prosecutions. Fish Legal highlighted that in relation to the 2006 incident criminal proceedings in respect of certain statutory offences had been completed before its initial information request of 26 May 2007. SEPA noted, however, that this initial request had been received before the criminal proceedings relating to the 2007 incident were concluded. However, the information request of 7 April 2008 was received after court proceedings in respect of both incidents had been completed.
35. Within its responses to Fish Legal, SEPA stated that disclosure of the information in question would be likely to prejudice substantially SEPA's ability to carry out its enforcement duties by making public the processes followed in the preparation of evidence required to recommend a prosecution to the procurator fiscal. As indicated above, Fish Legal submitted that it was unable to see what information of this kind could possibly be contained within the statements relating to the 2007 incident but not within the 2006 statements (which had been disclosed).
36. SEPA acknowledged in its submissions to the Commissioner's office that it seemed anomalous to have released statements of SEPA witnesses in relation to the 2006 incident while withholding such statements in relation to the 2007 incident, given that the prosecutions in both cases had been concluded. It explained that it considered the issue of whether statements of SEPA witnesses should be released following conclusion of the relative criminal proceedings to be perhaps the most difficult issue in the present case, given that it was firmly of the view that only in relatively few cases was it likely that the public interest would be in favour of releasing statements from third party witnesses (including witnesses from the entity under investigation) even once criminal proceedings had been concluded. Regarding witness statements where the witness was a member of the investigating body, SEPA acknowledged that the situation under the EIRs seemed less clear.



37. On this point, SEPA referred to a decision of the Information Commissioner (*FER0080372 Chief Constable of Warwickshire Police*) which considered the application of regulation 12(5)(b), the equivalent exception under the Environmental Information Regulations 2004. In that case the Information Commissioner had accepted that the opinions expressed by officers of the investigating authority (which effectively constituted witness statements) should not be disclosed, although the investigation had been concluded and there was no significant likelihood of it being reopened. He concluded that disclosure would have an adverse effect on the ability of the public authority to conduct an inquiry of a criminal nature, on the basis that witnesses would be dissuaded from coming forward and giving evidence if the material were released and also because the public would be aware of the authority's approach to such cases.
38. In assessing whether regulation 10(5)(b) is engaged in this case, the Commissioner has considered the age of the information in question and the stage in the process at which the request was made. He accepts that disclosure of the witness statements of third parties would, or would be likely to, prejudice substantially the ability of SEPA to conduct an inquiry of a criminal or disciplinary nature, given the expectations of third parties providing these statements (as described in SEPA's submissions). In particular, the Commissioner recognises the harm that could result to SEPA's ability to gather information from third parties during the investigatory process and acknowledges that this harm could crystallise even after the conclusion of the investigation and successful/unsuccessful prosecution. The Commissioner is therefore satisfied that SEPA was correct in its application of regulation 10(5)(b) in relation to those statements made by third parties (in this instance Scottish Water employees), including the transcripts of these witness statements contained within staff notebooks. The Commissioner will consider the application of the public interest to this information below.



39. However, the Commissioner would make a distinction between the statements of third parties and those of SEPA's employees. Again, the Commissioner has taken account the timing of Fish Legal's request. The Commissioner recognises that had Fish Legal made the request during the investigatory or criminal processes, disclosure of the SEPA employees' statements would have prejudiced, or would have been likely to prejudice, substantially the course of justice, the ability of a person to receive a fair trial, and potentially SEPA's ability to conduct an inquiry of a criminal nature. In this instance, however, the relevant inquiry had been concluded a successful prosecution had taken place: in the circumstances, there would appear to be no reasonable prospect of the case being reopened. The Commissioner stresses that each case must be treated according to its own merits, but given the quasi-expert nature of these statements and the context of the investigation in question (i.e. an investigation of a large utility company, which by its nature will have a number of cases with SEPA and will no doubt be aware of its investigatory procedures) the Commissioner does not accept that disclosure of SEPA's staff statements would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of SEPA to conduct an inquiry of criminal nature. In reaching this conclusion the Commissioner notes that the documents already released provide considerable information about the relevant investigative procedures and testing, and there appears to be nothing of this kind in the witness statements and notebook entries requiring protection by non-disclosure. The Commissioner therefore concludes that SEPA was incorrect in its application of regulation 10(5)(b) to the statements made by SEPA staff.

Public interest test

40. As the Commissioner is satisfied that SEPA was correct in its application of 10(5)(b) to third party witness statements and extracts from notebooks recording these witness statements, he is required to go on and consider the public interest test.
41. As stated above, an important feature of the EIRs is that regulation 10(2)(b) requires a public authority to apply a presumption in favour of disclosure when considering the application of this and other exceptions.
42. SEPA acknowledged a general public interest in information being accessible, to enhance scrutiny of the decision making process and thereby improve accountability. While not excluding the possibility that in other cases the balance of public interest might favour the disclosure of witness statements/extracts from notebooks, SEPA submitted that in this particular case the balance of public interest lay in maintaining the uninhibited flow of information from witnesses, ensuring future investigations were not compromised by releasing information about how information was gathered, avoiding prejudice to the freedom with which it gathered information and reported to the procurator fiscal, and ensuring that it might continue carrying out investigations to the highest standard.



43. The Commissioner acknowledge the strong public interest in all of the things cited by SEPA and referred to in the previous paragraph, but also recognises the general public interest in allowing access to information leading to the successful prosecution, with a view to ensuring that SEPA was appropriately carrying out its regulatory functions. This public interest is emphasised given the nature of the offence, involving pollution of waterways used for public recreation.
44. However, having considered the competing arguments in relation to the public interest, the Commissioner has decided that in all the circumstances of this case, the public interest in making the withheld information available is outweighed by that in maintaining the exception in regulation 10(5)(b) of the EIRs. In reaching this conclusion, the Commissioner has taken into account the expectations of third parties making statements and the ability of (and need for) SEPA to gather such witness statements in order to carry out its regulatory functions adequately. The Commissioner takes the view that the public interest must be particularly compelling in order to require the release of third party witness statements, and is satisfied that such a compelling public interest has not been evidenced in the facts of this particular case.

Regulation 11 – Personal data

45. Within its submissions to the investigating officer, SEPA stated that should the Commissioner decide that some of the witness statements/notebooks entries should be released, it would (prior to such release) intend redacting personal data falling within regulation 11 of the EIRs.
46. SEPA confirmed that it wished to redact the following information from SEPA staff witness statements and notebooks:
- Date of birth
 - Age
 - Working life before SEPA
 - Staff number
 - University attended
 - Signatures
 - Name and contact details of pollution complainant/other individual not directly involved.
47. The investigating officer contacted Fish Legal requesting comments on the redactions suggested by SEPA. Fish Legal was content for SEPA to redact information such as dates of birth, home contact details and signatures, required to protect an individual's private life. However, it was not content for an individual's employment history to be redacted, if the context in which it was mentioned was, for example, to lend weight to any view or opinion provided by that person.



48. Having reviewed the information in question, there is only one instance in which the employment history prior to SEPA is mentioned. The Commissioner recognises the point made by Fish Legal, but is satisfied that in this instance the information conveyed does not add any additional weight to the view/opinion expressed by the person concerned.
49. Having taken into account the views of Fish Legal, the Commissioner is satisfied that the documents which he does not consider to be correctly withheld under regulation 10(5)(b) can be redacted as proposed by SEPA prior to release. As he accepts that the proposed redactions are consistent with what Fish Legal accepts should be redacted, he does not consider it necessary to consider the application of regulation 11 of the EIRs to these redactions.

DECISION

The Commissioner finds that SEPA 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 Fish Legal.

The Commissioner finds that by withholding the information requested under section 39(2) of FOISA, SEPA complied with Part 1 of FOISA.

The Commissioner finds that by withholding third party witness statements and relative extracts of SEPA staff notebooks under regulation 10(5)(b), SEPA complied with the EIRs.

However, by also withholding statements made by SEPA staff and relative extracts of staff notebooks under regulation 10(5)(b), SEPA failed to act in accordance with regulation 5(1) of the EIRs.

The Commissioner therefore requires SEPA to supply Fish Legal with a copy of SEPA staff statements and relative notebook extracts, subject to the redaction of personal information as detailed in paragraph 44 above, by 15 May 2009.



Appeal

Should either Fish Legal or the Scottish Environment Protection Agency 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
31 March 2009

Decision 038/2009
Fish Legal
and the Scottish Environment Protection Agency





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);

...

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.
- ...
- (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-
 - ...
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
 - ...