

# Decision Notice

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**Decision 072/2017: Mr David Telford and North Ayrshire Council**

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**Whether request was manifestly unreasonable**

Reference No: 201700056

Decision Date: 10 May 2017



Scottish Information  
Commissioner

## Summary

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The Council was asked for information explaining the calculation of figures contained in planning documentation for a housing development being built in Fairlie.

The Council considered the request under the EIRs, concluding that it was manifestly unreasonable.

The Commissioner did not support the Council's view. She found that the Council had failed to demonstrate that the request was manifestly unreasonable and required it to issue a revised review outcome.

## Relevant statutory provisions

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

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

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of the Freedom of Information (Scotland) Act 2002 (FOISA).

## Background

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1. On 6 December 2016, Mr Telford made a request for information to North Ayrshire Council (the Council) in relation to a private housing development being built in Fairlie under the terms of the Council's Local Development Plan Policy RES3, as follows:

*Please provide the information which explains in detail the calculation of the developer's return as 10.79% of income.*

*This information is required as 10.79% of development income equates to 13.6% of development costs or true profit. This would appear to be a clear breach of North Ayrshire Council's Policy RES3 which requires that the Developer's reasonable profit should not exceed 12%.*

*Using the cost plan details contained within North Ayrshire Council's Planning Documentation, the foregoing suggests that a sum of £246,107 will be passed to the contractor/developer and that this important sum should properly and correctly be due as a proportion of the substantial community benefit described in Policy RES3.*

2. The Council responded on 9 December 2016, having considered the request under the EIRs. It informed Mr Telford that it considered the request to be manifestly unreasonable in terms of regulation 10(4)(b) of the EIRs. The Council stated that this was the latest in a series of requests about the same matter and it did not consider it had a serious purpose or value. In the Council's view, the request was designed to cause disruption and annoyance and had

the effect of harassing it. Recognising the public interest in transparency and scrutiny, the Council considered there was a greater public interest in allowing it to carry out its statutory functions without unreasonable disruption. As the question had been considered by the Council several times in the past, it did not consider it was reasonable to expect it to constantly deal with this matter, and so the public interest lay in refusing the request.

3. On 12 December 2016, Mr Telford wrote to the Council, requesting a review of its decision on the basis that he did not agree that regulation 10(4)(b) applied. Mr Telford disputed that his request was designed to cause annoyance and disruption, or the implication that he had previously requested (and had been provided with) the information. Mr Telford asked that the Council's review be carried out by a fully qualified and experienced chartered quantity surveyor.
4. The Council notified Mr Telford of the outcome of its review on 6 January 2017. It upheld its original decision without modification. The Council stated that:
  - (i) all the information it held on this matter had been disclosed to Mr Telford over a number of years;
  - (ii) he was asking the Council (in his request for review) to create new information it did not hold; and
  - (iii) the request to have a chartered quantity surveyor carry out the review did not fall within the scope of FOISA or the EIRs.

The Council considered Mr Telford was using the EIRs as a method of entering into correspondence while he was subject to its Unacceptable Contact Policy (UCP).

5. On 10 January 2017, Mr Telford wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Telford stated he was dissatisfied with the outcome of the Council's review because he disagreed that regulation 10(4)(b) applied. Mr Telford asked the Commissioner to establish whether his being subject to its UCP was an acceptable reason for the Council refusing his request.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Telford made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 7 February 2017, the Council was notified in writing that Mr Telford had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, with particular reference to its claim that it considered Mr Telford's request to be manifestly unreasonable.
9. Mr Telford was also invited to comment on why he believed it was in the public interest for the information to be disclosed, and to provide further explanation of the figures cited in his request.

10. Mr Telford explained that the figures in the cost plan (part of the Section 75 agreement between the Council and the developer) showed the developer's return as 10.79% of development income (which, on his calculations, equated to 13.6% of development costs), leaving a surplus of £1,912,463 to be paid to the Trust (for the community benefit purposes described below). Mr Telford believed the calculation of the developer's profit, as per Criterion 6 of Local Development Plan Policy RES3, was limited to 12% of development costs, which would leave a surplus of £2,158,480. In his view, the shortfall between the two surplus figures (which he believed fell to be paid to the Trust) was £246,017.
11. The investigating officer provided the Council with Mr Telford's explanations, with a view to ascertaining what information the Council held that would satisfy his request.
12. Both parties provided submissions to the Commissioner.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to her by both Mr Telford and the Council. She is satisfied that no matter of relevance has been overlooked.

### Background to request

14. As rehearsed in *Decision 003/2017 Mr David Telford and North Ayrshire Council*<sup>1</sup>, Policy RES3 forms part of the Council's Local Development Plan<sup>2</sup>. It is a site-specific policy for Kelburn Castle, Fairlie, providing for a housing development and subsequent programme of restoration and maintenance for Kelburn Castle and improvements to the Country Centre in Fairlie.
15. Criterion 2 of Policy RES3 requires the submission of a detailed, fully verifiable, financial and business plan for the overall development, showing that all funds raised from the sale and development (except a reasonable developer's profit, as detailed in Criterion 6) are to be channelled into the conservation and subsequent maintenance of Kelburn Castle and the enhancement of Kelburn Country Centre, to secure their ongoing use.
16. Criterion 6 of Policy RES3 requires open book accounting on both land and development sales, which would allow for a reasonable developer's profit only (indicatively 12%, as advised by Historic Scotland) with all other proceeds being channelled to the development to be enabled (i.e. the works outlined in the previous paragraph).
17. Policy RES3 also provides that any permitted development is subject to an appropriate Section 75 agreement, to ensure that monies are only used for the works to Kelburn Castle and the Country Centre described above.

### Application of the EIRs

18. It is clear from the Council's correspondence with both Mr Telford and the Commissioner that any information falling within the scope of this request would be environmental information, as defined in regulation 2(1) of the EIRs. Mr Telford has asked for information relating to costings required by a Section 75 agreement concerning a proposed housing development.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201601710.aspx>

<sup>2</sup> <http://www.north-ayrshire.gov.uk/resident/planning-and-building-standards/local-development-plan.aspx>

As such, the Commissioner is satisfied that it would fall within paragraphs (a), (c) and (f) of the definition of environmental information (reproduced in Appendix 1).

19. Mr Telford has not disputed the Council's decision to handle the request under the EIRs (and indeed the Commissioner reached the same conclusion in Decision 003/2017). Accordingly, the Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Regulation 5(1)**

20. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
21. A Scottish public authority applying any of the exceptions under regulation 10 of the EIRs must interpret them in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
22. In this case, the Council confirmed to the Commissioner that it wished to rely upon the exception in regulation 10(4)(b) of the EIRs in respect of the information sought in Mr Telford's request.

### **Regulation 10(4)(b)**

23. Regulation 10(4)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable.
24. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC from which they are derived. The Commissioner's general approach is that the following factors are relevant when considering whether a request is vexatious or manifestly unreasonable. These are that the request:
  - (i) would impose a significant burden on the public body;
  - (ii) does not have a serious purpose or value;
  - (iii) is designed to cause disruption or annoyance to the public authority;
  - (iv) has the effect of harassing the public authority; or
  - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
25. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence.
26. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account. The term "manifestly unreasonable" must be applied to the request and not the requester, but an applicant's identity, and the history of their dealings with the public authority, may be relevant in considering the nature and effect of the request and the surrounding circumstances.

### *The Council's submissions*

27. In its submissions to the Commissioner, the Council explained that Mr Telford's request related to details and calculations within the cost plan which the developer was required to lodge with the Council in terms of Local Plan Policy RES3. Noting that Mr Telford's request was dated 6 December 2016, the Council explained that the details to which Mr Telford referred were indicative (rather than real) details, used to work out how the cost plan would be developed to be realistic and usable. The cost plan was subsequently inserted into the Section 75 agreement with the developer as a blank template.
28. The Council submitted that this matter had been discussed with Mr Telford, and information disclosed to him under freedom of information legislation, on previous occasions. To support its position, the Council provided evidence of the relevant previous correspondence. This comprised:
- (i) A copy of a letter to a Councillor in November 2011, providing him with a copy of a letter sent to Mr Telford and the accompanying disc with the information Mr Telford sought regarding Policy RES2B. The disc contained approximately 1,600 pages of information dating from between 2006-2011, and included correspondence between the Council and Mr Telford in his capacity as Chairman of Fairlie Community Council.
  - (ii) A copy of a review outcome issued to Mr Telford in February 2015. This related to information requests concerning Policy RES2B (now RES3), seeking information on the sums of money to be paid by the developer to the landowner.
  - (iii) A copy of a review outcome issued to Mr Telford in August 2015. This related to an information request concerning the new cost plan and associated documentation, following publication of sale prices for the houses in Fairlie. In this case, the Commissioner issued *Decision 165/2015 Mr David Telford and North Ayrshire Council*<sup>3</sup>.
  - (iv) A copy of a review outcome issued to Mr Telford in July 2016. This related to an information request about a "blank" cost plan and details of cost reports required by the Section 75 agreement. In this case, the Commissioner issued *Decision 003/2017 Mr David Telford and North Ayrshire Council*<sup>4</sup>.
  - (v) A copy of the review outcome issued to Mr Telford for the request under consideration here.
  - (vi) A copy of *Decision 165/2015* which, the Council submitted, provided a useful summary of the process.
  - (vii) Copies of financial schedules detailing various costings concerning the conservation and maintenance of Kelburn Castle.
29. This information, the Council submitted, detailed its reasons for considering Mr Telford's request to be manifestly unreasonable.

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<sup>3</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201501478.aspx>

<sup>4</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201601710.aspx>

30. The Council submitted that there had been constant requests for information about Policy RES3 and it had disclosed all the relevant information it held (and also new information that was not relevant to this request). The Council stated that if the information had been sought by a different person, the same information would have been disclosed to them as had been disclosed to Mr Telford.
31. The Council submitted that it considered Mr Telford's request was designed to cause disruption and had the effect of harassing the Council. Furthermore, the Council considered it imposed a serious burden on the Council.
32. The Council confirmed that, although Mr Telford was subject to its UCP, it was aware it still had an obligation to respond to him in terms of FOISA or the EIRs, and that any information held required to be disclosed. At the time of Mr Telford's request, the Council explained, no new information was held and all information had been disclosed. The Council submitted that its decision to rely on regulation 10(4)(b) was not because Mr Telford was subject to its UCP, but more in view of all the previous contact with him as detailed above.
33. In considering the public interest, the Council did not believe, as all information had been disclosed to Mr Telford, that there was any reason to apply the presumption in favour of disclosure (regulation 10(2)(b)), or to disclose any information. In the Council's view, the request was considered to be manifestly unreasonable due to the information previously disclosed and the number of similar requests.

#### *Mr Telford's submissions*

34. In his submissions to the Commissioner, Mr Telford referred to paragraph 5.16 of the Council's Local Development Plan which states:

*It is considered that there is a substantial community benefit in allocating a site for housing to fund a programme of restoration and subsequent maintenance for Kelburn Castle and improvements to the centre. Policy RES3 allocates a site accordingly subject to criteria.*
35. Mr Telford explained that the Council had refused Fairlie Community Council's request to be represented on the Trust established under these criteria to administer this "community benefit". He submitted that the Council had also failed to explain its reasons for this refusal. Mr Telford believed it was self-evident that the proper administration of Policy RES3 (and information demonstrating this) could not be more in the public interest. In Mr Telford's view, what little information had "leaked out" would lead any reasonable person to fear that the "substantial community benefit" to be provided under Policy RES3 was at risk of something far more serious than simple maladministration.
36. Referring to the calculation of the costs cited in his request, Mr Telford confirmed that the figures cited were his own calculations, comparing the figures in the cost plan with the criteria in Policy RES3. Mr Telford argued that it was not possible to take an arbitrary percentage of a house sale price and declare such a sum as true profit. In his view, actual profit could only accrue by deducting the true build cost (the "development costs") from the sale price obtained (the "development income").
37. Mr Telford believed the true percentage profit could only be calculated against the building cost. By his calculation, the figures set out in the cost plan showed that this equated to 13.6% of the building cost, whereas Policy RES3 dictated that the developer was limited to 12% actual profit (with any excess to be used for community benefit).

38. Mr Telford provided the Commissioner with copies of two emails he had previously sent to the Council in September 2016 and October 2016 asking it to explain this anomaly, stating that the Council had not responded to either email.

#### *The Commissioner's view*

39. The Commissioner notes that the Council has determined Mr Telford's request to be manifestly unreasonable as it considers responding would impose a significant burden. It also believes the request was designed to cause disruption and had the effect of harassing the Council. She will consider each of these points in turn.

#### Significant burden

40. The Commissioner notes that the Council considers responding to Mr Telford's request would impose a serious burden in view of the previous contact with him, the extent of the information previously disclosed and the number of previous similar requests. She has considered the documentary evidence provided by the Council to support its position in this regard.
41. With reference to the documentary evidence provided by the Council, the Commissioner acknowledges that there appears to have been a considerable amount of correspondence with Mr Telford on a range of matters concerning the housing development in Fairlie. The majority of the supporting evidence provided by the Council is contained in the copy of the disc provided to Mr Telford in 2011 which, the Commissioner notes, preceded both the completion of the Section 75 agreement and granting of the planning consent. Furthermore, the majority of the correspondence with Mr Telford (dating between 2006 and 2011) appears to be in his capacity as Chairman of Fairlie Community Council, and not as an individual.
42. Turning to the more recent review outcomes issued to Mr Telford concerning Fairlie, the Commissioner does not consider that these are of a quantity sufficient to show that requests have been "constant", as claimed by the Council.
43. Recognising that the Council's submissions appear to have been intended to show the cumulative burden on the Council in responding to Mr Telford's request, the Commissioner notes that the Council has not provided any submissions detailing the amount of time required to respond to Mr Telford's request, or any consequent diversion of its resources (whether that be financial or human) away from its core functions.
44. Indeed, the Council's submissions appear to indicate that it does not hold the information Mr Telford requested and, in such circumstances, the Commissioner cannot see why responding to his request (in the absence of having to consider any relevant information it might hold) would impose the significant burden claimed by the Council.
45. Taking regard of all the circumstances and the supporting evidence, the Commissioner considers the Council has failed to demonstrate that responding to Mr Telford's request would impose the significant burden claimed.

#### Designed to cause disruption or annoyance/effect of harassment

46. The Commissioner's views on both of these factors are similar, and so she will consider them at the same time.
47. The Council considers Mr Telford's request was designed to cause disruption to the Council and has had the effect of harassing it. However, the Council provided no submissions explaining why it considered either factor to be present, other than to state that Mr Telford

had previously been given all the relevant information it held, and there was no new information.

48. Having examined the criteria in Policy RES3, the Commissioner notes that this makes no reference to the developer's profit being a percentage of development costs (as opposed to development income) and does not "dictate" or "limit" the percentage level, as suggested by Mr Telford: rather, it provides an indicative percentage. She also notes that Policy RES3 states that any development will be "subject to an appropriate Section 75 agreement". In the Commissioner's view, this would appear to suggest that, while Policy RES3 indicates the principles to be applied, these are likely be subject to more detailed provision in the corresponding Section 75 agreement.
49. The Commissioner also notes that *Decision 165/2015* clearly explains that, in January 2013, the developer's profit was reduced to 10.79% of sales income when planning consent was granted, subject to the completion of a Section 75 agreement. This is information Mr Telford would have been in possession of at the time he made the information request under consideration here.
50. The Commissioner understands the view taken by Mr Telford that "true profit" ought to be calculated as a percentage of development costs, and not development income. However, the reasons and methodology behind the calculations adopted by the Council in this case, in determining the developer's profit and resultant surplus, are not matters over which she has any jurisdiction. The Commissioner's role here is to determine whether the Council was correct in determining Mr Telford's request to be manifestly unreasonable.
51. With regard to the cost comparison which formed the basis of Mr Telford's request, the Commissioner considers it is not unreasonable to accept that Mr Telford believed the position concerning the calculation of the developer's profit contravened not only the criteria set out in Policy RES3, but also any standard calculation of true profit. In that context, the Commissioner considers it might be reasonable to make a request for any further information the Council might hold explaining any such anomaly.
52. Mr Telford does appear to have been provided with all the relevant information held by the Council, and was aware – at the time he made his request – of how the profit would be calculated. In the circumstances, the Commissioner considers there could be a case for considering his request to be manifestly unreasonable, in terms of being designed to cause disruption or of having the effect of harassing the Council. However, in the absence of submissions to support the Council's position on this point, the Commissioner has no alternative but to determine that Mr Telford's request was not designed to cause disruption and did not have the effect of causing harassment.

#### Presumption in favour of disclosure

53. The Commissioner is concerned to note the Council's belief that, as all the information it held had already been disclosed to Mr Telford, there was no requirement to apply the presumption in favour of disclosure required by regulation 10(2)(b) of the EIRs. This provides that public authorities shall apply a presumption in favour of disclosure when considering the application of any exception in regulations 10(4) and (5). The Commissioner would remind the Council, and indeed all public authorities, that this applies to all of these

exceptions, including that in regulation 10(4)(b). In this regard, the Commissioner urges the Council to revisit her guidance on the public interest which is available on her website<sup>5</sup>.

*The Commissioner's conclusions*

54. In all the circumstances of this case, the Commissioner is not persuaded, on the basis of the submissions made by the Council, that it has demonstrated that Mr Telford's request was manifestly unreasonable.
55. The Commissioner welcomes the fact that the Council has acknowledged that managing communications under its UCP does not remove an applicant's right to information under FOISA or the EIRs, nor the public authority's duty to respond.
56. Although the fact that Mr Telford is currently subject to the Council's UCP undoubtedly has a bearing on the strained relationship between him and the Council, the Commissioner accepts that this was not the basis of the Council's decision to respond in terms of regulation 10(4)(b).
57. However, the Commissioner is not satisfied that the Council has provided sufficient submissions or supporting evidence to demonstrate that Mr Telford's request was manifestly unreasonable for the purposes of regulation 10(4)(b). She does not uphold the Council's decision to rely upon this exception in this case.
58. Having reached this finding, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
59. The Commissioner requires the Council to respond to Mr Telford's request in accordance with the requirements of the EIRs, otherwise than in terms of regulation 10(4)(b). In other words, the Commissioner requires the Council to carry out a fresh review of its response to Mr Telford's request in accordance with regulation 16 of the EIRs, and to communicate the outcome to Mr Telford.
60. The Commissioner notes that, when seeking a review on 12 December 2016, Mr Telford asked that the review be carried out by a fully qualified and experienced chartered quantity surveyor. Mr Telford is not entitled to specify how a review should be carried out.

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<sup>5</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx>

## Decision

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The Commissioner finds that North Ayrshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Telford.

She finds that the Council was not entitled to refuse Mr Telford's request under regulation 10(4)(b) of the EIRs.

The Commissioner therefore requires the Council to respond to Mr Telford's requirement for review in accordance with the requirements of the EIRs (otherwise than in terms of regulation 10(4)(b)) by **26 June 2017**.

## Appeal

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Should either Mr Telford or North Ayrshire Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## Enforcement

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If North Ayrshire Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**10 May 2017**

### 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

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(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

(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

...

- (b) the request for information is manifestly unreasonable;

...

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