

# Decision Notice

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**Decision 082/2019: Mr E and Orkney Islands Council**

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**Public right of way investigation, South Ronaldsay**

Reference No: 201802070

Decision Date: 22 May 2019



Scottish Information  
Commissioner

## Summary

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The Council was asked about the status of two tracks on South Ronaldsay.

The Council considered the request under the EIRs and disclosed some information. It withheld other information, on the basis that disclosure would prejudice the confidentiality of proceedings (regulation 10(5)(d)).

The Commissioner investigated and found that, while the Council had correctly withheld some information under regulation 10(5)(d) of the EIRs, it had wrongly withheld other information under this exception. He also found that some information, only identified during the investigation, should have been identified earlier.

## 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 (5)(d) (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.

## Background

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1. On 26 September 2018, Mr E made a request for information to Orkney Islands Council (the Council). In his request, he referred to an earlier consultation held by the Council, aimed at determining the status of the “Burma Road”, a track running from the Hoxa Road along the east side of the Oyce of Quindry, and of the green way running east from the Burma Road up past Ronaldsvoe Kennels to Quoy Angry. Mr E understood, having submitted information to that inquiry, that the Council had not published any results. He requested a copy of all information relating to the results of that inquiry, including any relevant Council minutes, and also any information on what the Council’s position was in relation to the two tracks.
2. The Council responded on 30 October 2018. It disclosed some information and apologised for the delay in responding.
3. On 30 October 2018, Mr E wrote to the Council requesting a review of its decision. He did not believe the Council’s response answered his request. He contended that while the Council had provided partial results to the inquiry, it had not provided any information on the results of the inquiry, including the Council’s position on the status of the two tracks as requested.
4. On 31 October 2018, Mr E again wrote to the Council, clarifying that, while the Council had provided partial results of the public survey used to inform the inquiry, this did not in any way meet his request.
5. The Council notified Mr E of the outcome of its review on 26 November 2018, modifying its original decision. It provided some further information on its position in relation to the two tracks. The Council refused to provide any further information, as it considered this to be

covered by legal professional privilege and therefore to be excepted from disclosure under regulation 10(5)(d) of the EIRs, the public interest favouring non-disclosure.

6. On 28 November 2018, Mr E wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 E stated he was dissatisfied with the outcome of the Council's review because he disagreed with its decision to withhold information under regulation 10(5)(d).

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr E had made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 10 January 2019, the Council was notified in writing that Mr E had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr E. The Council provided the information and the case was allocated to an investigating officer.
9. 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 to answer specific questions. These focused on the adequacy of the Council's searches and its justification for withholding the information under the exception in regulation 10(5)(d) of the EIRs.
10. Mr E was also asked for his views on the public interest in disclosure of the information.
11. Both parties provided submissions to the Commissioner.
12. During the investigation, on 29 April 2019, the Council informed the Commissioner that it also wished to rely on regulation 11 of the EIRs to withhold any personal information.
13. Mr E subsequently confirmed to the Commissioner that he was raising no dissatisfaction with any personal information withheld under regulation 11.

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

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14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr E and the Council. He is satisfied that no matter of relevance has been overlooked.

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

15. The Council considered Mr E's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
16. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.

17. The Council submitted that the information requested by Mr E related to land. Having examined the withheld information, the Commissioner is satisfied, in the circumstances, that the information requested by Mr E falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (c) and (f) of that definition. Mr E has not challenged the Council's decision to deal with the information as environmental information and the Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.

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

18. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
19. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
20. In order to ascertain whether all relevant information had been identified, the Council was asked to explain the steps it took to establish what information it held and which fell within the terms of Mr E's request.
21. The Council explained that the Council's Access Officer, in consultation with a Senior Policy Planner, considered that the information Mr E wanted was the results of the questionnaires. The Access Officer searched the relevant sub-folder of an "Access Disputes" folder to locate the relevant information. As the Access Officer had knowledge of where these results were held, and was able to access them easily, the Council was satisfied that no further searches were necessary.
22. The Council submitted that the information requested comprised evidence, obtained via questionnaires (in which Mr E was a participant), in relation to a right of way. It acknowledged that Mr E's request sought all information relating to the results of that process, and the Council's position in relation to the two tracks. The Council submitted that, as Mr E was requesting the results, it reasonably interpreted the request to be referring to the results of the questionnaires, and so this was the information disclosed to him in its initial response. It did not consider published information from other Committee meetings relating to this matter to be relevant, on the basis that no decision was taken at those meetings, either on the results of the evidence-gathering process or on the Council's position in relation to the tracks.
23. The Council maintained that while its initial response did not appear to fully consider all aspects of Mr E's request, this was not a deliberate attempt to withhold information. It submitted that, as there was no Council position on the tracks, there was no information to be disclosed.
24. The Council submitted that, at review stage, the request was reconsidered in consultation with a solicitor involved in the Public Right of Way investigation. As a result, the Council determined that it did hold further information falling within the scope of that part of Mr E's request concerning the Council's position on the tracks. The Council explained that this information, withheld under regulation 10(5)(d) of the EIRs, should also have been assessed as forming part of the results of the investigation (this was addressed in the review outcome).

25. Following consideration of the withheld information, the investigating officer conducted a search of the Council's website in relation to meetings of the Council's Development and Infrastructure Committee, where the public rights of way in question had been considered. The Council was asked to provide copies of specific reports and extracts of minutes, and was asked to explain why this information was not previously considered to fall within scope.
26. The Council duly provided the information requested. It submitted that its primary position was that it did not consider this information fell within the scope of Mr E's request, as no decision had been taken by the Council at those meetings on the results of the evidence gathering process, or on the Council's position in relation to the tracks. The Council also argued that some of this information pre-dated the results referred to in Mr E's request and so fell outwith scope.
27. The Council explained that these items were heard in private in terms of section 50A(4), section 50J and paragraphs 6 and 12 of Part 1 of Schedule 7A to the Local Government (Scotland) Act 1973<sup>1</sup> (the LGSA). The Council submitted that, should the Commissioner deem this information to fall within the scope of Mr E's request, its secondary position was that it was entitled to withhold this information as exempt in terms of the LGSA, as well as being protected at common law by legal professional and litigation privilege.
28. During the investigation, Mr E clarified that he was seeking information covering the period from the public consultation on the rights of way (July 2014) to the date of his request (26 September 2018).
29. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
30. Having considered all the information identified, the relevant submissions and the terms of the request, the Commissioner accepts that any of the information identified during the investigation which pre-dated the public consultation could not be deemed to fall within the scope of the request.
31. With regard to the remainder of the further information identified during the investigation, the Commissioner notes the Council's contention that this information does not fall within the scope of the request, on the basis that no decisions had been taken on the results of the evidence-gathering process, or on the Council's position on the tracks. However, in the Commissioner's view, whether or not any decisions had been taken is, to some extent, irrelevant, given that Mr E's request asked for any information on the results of the consultation, as well Council's position in relation to the tracks. It is clear that the scope of the request cannot be confined simply to any decisions taken at meetings held subsequent to the public consultation. In the circumstances, the Commissioner considers this information does fall within the scope of the request.
32. The Commissioner is satisfied that, by the end of the investigation, the Council had identified the information it held that was relevant to the request. However, the information referred to in paragraph 31 should clearly have been identified by the close of the Council's review, at

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/1973/65/contents>

the latest. In failing to do this, the Council failed to deal with the request fully in accordance with regulation 5(1) of the EIRs.

### **Regulation 10(5)(d) of the EIRs**

33. The Council submitted that the information withheld was excepted from disclosure by virtue of regulation 10(5)(d) of the EIRs.
34. In his application to the Commissioner, Mr E was dissatisfied with the Council's decision to withhold information under regulation 10(5)(d), believing the Council was hiding behind legal professional privilege to avoid disclosing the information.
35. The exception in regulation 10(5)(d) 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 confidentiality of proceedings of any public authority where such confidentiality is provided for by law.
36. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). 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)).
37. The Aarhus Convention: an Implementation Guide<sup>2</sup> (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) looks at this exception on page 86 but does not comprehensively define "proceedings of any public authorities". It suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
38. The first matter to consider is whether the information relates to proceedings of the Council, the confidentiality of which is protected by law. The Commissioner must then consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings.
39. The Council submitted that the proceedings, which would be prejudiced substantially by disclosure of the information, were its legal position in an action of litigation. In this regard, the Council explained it had held initial discussions to determine whether the route was a right of way and, if so, to what extent and purpose. Subsequent discussions surrounded whether there was sufficient evidence, from a legal perspective, to take the matter to Court, in the course of which legal advice on the prospects of court proceedings had been obtained.
40. The Commissioner notes that "proceedings", in the context of this regulation, will cover a range of activities, but usually confined to internal deliberation in some form or another. The matter under consideration here is the assessment of evidence for rights of way and, in so doing, the Council obtained legal advice. Having considered the Council's submissions on this point, the Commissioner accepts that the Council's actions – broadly, in determining whether the routes were rights of way and whether there was sufficient evidence for proceeding with legal action – fell within the intended meaning of "proceedings".

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<sup>2</sup> [http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

41. Having accepted that the information falls within the definition of “proceedings” for regulation 10(5)(d), the Commissioner must now determine whether the confidentiality of those proceedings is protected by law.
42. In many cases where this exception applies, there is a specific statutory provision prohibiting the release of the information. However, there will also be cases where the common law of confidence will protect the confidentiality of the proceedings. One aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege. This includes legal advice privilege, which applies to communications in the course of which legal advice is sought or provided.
43. For information to be confidential under common law, two main requirements must be met:
  - (i) The information must have the necessary quality of confidence about it, and it must not be generally accessible to the public already; and
  - (ii) The information must have been communicated in circumstances importing an obligation of confidentiality.

*Does the information have the necessary quality of confidence?*

44. The Council submitted that the reports and minutes were deemed confidential in terms of national law and also the common law of confidentiality.
45. The Council explained that the reports, discussions thereon and subsequent minutes were considered in private, as provided for under section 50A(4), section 50J and paragraphs 6 and 12 of Part 1 of Schedule 7A of the LGSA, which gives local authorities the power to hold committee meetings in private where necessary. The Council further submitted that section 50D(4)(a) of the LGSA makes an exception to the general rule of disclosure, providing that disclosure is not required rather than prohibiting it, the intention of which is to allow public authorities to withhold exempt information. The Council submitted that decisions to consider matters in private were fully considered at the time Committee reports were prepared, and were not entered into lightly or unnecessarily.
46. In terms of the common law of confidence, the Council submitted this applied insofar as it related to legal professional privilege and litigation privilege, as the reports contained legally privileged information. It explained that following preliminary discussions on whether there was sufficient evidence, from a legal perspective, to take the matter to Court, the questionnaires gathered evidence relating to potential witnesses for an action of litigation that was in contemplation at the time, and which had the potential to arise again. The Council submitted that, were the matter to be referred back to Committee, the information gathered and the legal advice obtained would be used.
47. The Council was asked to explain:
  - (i) why it considered that some information, previously disclosed to third parties, could be considered to have the necessary quality of confidence,
  - (ii) why it considered that some information, which appeared to be already publicly available, could be considered to have the necessary quality of confidence, and
  - (iii) what consideration it gave to disclosing the responses to the questionnaires (with any personal information redacted), given that the questionnaire pro forma contained the statement *“Please note that we may require to disclose the information you have provided under the Freedom of Information Act”*.

48. The Council responded as follows:
- (i) It confirmed that some information had previously been disclosed in error, and that this had only come to light in the course of dealing with Mr E's request. The Council took the view that the information still remained excepted from disclosure under regulation 10(5)(d) and the common law of confidentiality.
  - (ii) With regard to information that appeared to be publicly available already, the Council explained that this was contained in appendices to reports that were considered in private as a single unit, as opposed to each appendix being considered separately. While disclosure of some of the information in specific appendices would be unlikely to prejudice the Council's proceedings, the information was both integral to the reports and the legal advice referred to therein, as part of reports prepared in contemplation of litigation, and so was protected by legal privilege.
  - (iii) The Council submitted that the evidence forms (questionnaires) contained the personal data and views of the individuals who had completed them and, as such, would not be subject to release under FOISA or the EIRs. It explained that relevant information from these responses was compiled into table format prior to receipt of Mr E's request, and subsequently disclosed to him with personal data redacted. The Council submitted that this release satisfied the disclosure statement in the pro forma. It maintained that there was no requirement, or intention, to disclose the actual completed forms which, in the Council's view, formed witness statements and were protected by Data Protection legislation.
49. The Commissioner has carefully considered all relevant submissions, together with the withheld information. While the information may have been exempt information for the purposes of the LGSA, it does not necessarily follow that it would be excepted from disclosure under FOISA or the EIRs in a "blanket fashion". However, it is clear that, in considering the information in private, the Council's intention was that it was not intended for wider dissemination.
50. For the majority of the information, the Commissioner accepts the Council's submissions that this information was not generally accessible and so had the necessary quality of confidence.
51. That said, the Commissioner is not satisfied that all of the withheld information (specifically that referred to in paragraphs 48(i) and (ii) above) has the quality of confidence claimed by the Council. This information is either already publicly available, or has been disclosed (albeit erroneously) by the Council. The Commissioner notes the Council's position that some of this information forms part of reports (held in appendices) which were considered in private. However, given that the information has been made available, or is available, outwith the Council, the Commissioner cannot agree that the report and appendices, as a whole, can be claimed to have the quality of confidence in their entirety. Notwithstanding the Council's intentions for, or its position on this information, the Commissioner does not accept that this particular information has the quality of confidence to be excepted from disclosure under regulation 10(5)(d) of the EIRs.
52. As such, the Commissioner must find that the Council was not entitled to withhold this information under regulation 10(5)(d) of the EIRs and requires it to be disclosed to Mr E, with any personal data redacted.

53. The Commissioner will go on to consider whether the remaining information withheld under regulation 10(5)(d) was communicated in circumstances importing an obligation of confidence.

*Was the information communicated in circumstances importing an obligation of confidence?*

54. In its submissions to the Commissioner, the Council stated that, even setting aside the litigation aspect, it considered the legal opinion and background thereto remained legally privileged. It contended that a solicitor was entitled to give a client legal advice without risk that it would be shared with an opposing party, who could then use it against the client, in this case the Council.
55. The Council submitted that were the contents of the reports and minutes disclosed, it would no longer be able to litigate as its legal position would be irreparably compromised.
56. Having considered the Council's submissions together with the remaining withheld information, the Commissioner is satisfied that some of the information was communicated in circumstances importing an obligation of confidence, although such an obligation will not necessarily follow from the information being exempt information under the LGSA provisions discussed above.
57. The Commissioner is satisfied that certain of this information is a record of the seeking and provision of legal advice from a legal adviser, all within the context of a professional relationship in circumstances in which legal professional privilege could apply. The Commissioner takes the view that a claim to confidentiality of communications could be maintained in legal proceedings in respect of this particular information. The substance of the legal advice received has not been disclosed, and so the confidentiality of the advice has been maintained.
58. However, the Commissioner does not agree that some of the other withheld information, namely the responses to the questionnaires, can be deemed to have been communicated in circumstances importing an obligation of confidence. It is evident, from the pro forma used, that potential respondents were clearly made aware that the Council might require to disclose any information thus provided under freedom of information legislation. Given this awareness, and bearing in mind that Mr E is not seeking personal data, the Commissioner cannot accept that the information provided by respondents (and under consideration here) was communicated in the expectation that their responses would remain confidential.
59. As such, the Commissioner must find that the Council was not entitled to withhold this information under regulation 10(5)(d) of the EIRs and requires it to be disclosed to Mr E, with any personal data redacted.
60. The Commissioner will now go on to consider whether disclosure of the remaining withheld information would prejudice substantially, or be likely to prejudice substantially, the confidentiality of the proceedings.

*Would disclosure prejudice substantially, or be likely to prejudice substantially, the confidentiality of proceedings?*

61. The Council submitted that the advice was provided by its legal team, and disclosure would materially prejudice its legal position and the conduct of litigation. The Council maintained that the confidentiality of this information was provided for as described previously, and formed the Council's position in relation to the specific documents.

62. The Commissioner has taken account of all relevant submissions, together with the corresponding remaining withheld information. Having done so, he does not consider that disclosure of the majority of this particular information would prevent the Council from seeking legal advice in future, nor would it prejudice proceedings in contemplation of litigation (which he acknowledges remains a possibility). The Commissioner also notes that the Council's earlier "erroneous" disclosure of some information referenced some information on the Council's position in relation to legal action, and the Council has offered no submissions to evidence that this earlier disclosure resulted in the harm claimed by the Council.
63. As such, the Commissioner cannot accept that disclosure of this information would, or would be likely to, prejudice substantially the confidentiality of proceedings at the time Mr E made his request. He therefore finds that the exception in regulation 10(5)(d) does not apply to some of the remaining withheld information.
64. The Commissioner therefore requires the Council to disclose this information to Mr E with any personal data redacted.
65. For the remainder of the withheld information, the Commissioner is satisfied that this comprises a record of legal advice obtained in circumstances in which legal professional privilege could apply, where a claim to confidentiality of communications could be maintained in legal proceedings, and where the confidentiality of the advice has not been compromised.
66. The Commissioner is clear that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. That said, given the content of the information and its inherently confidential nature, and having taken full account of the Council's arguments, the Commissioner accepts that making this information available would, or would be likely to, substantially prejudice the confidentiality of the Council's proceedings.
67. Consequently, the Commissioner is satisfied that the exception in regulation 10(5)(d) is engaged for that information.
68. As the exception in regulation 10(5)(d) has been found to apply to the remaining withheld information, the Commissioner is now required (for this information) to go on to consider the public interest test in regulation 10(1)(b) of the EIRs.

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

69. Having accepted that the exception in regulation 10(5)(d) applies to some of the information withheld from Mr E, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
70. In his submissions to the Commissioner, Mr E argued that a material public interest existed, given the initiation of the inquiry by the Council and the high level of local responses (he referred to 52 responses against a population of approximate 200 in the immediate area, or 3-400 in the more general area - i.e. users of / impacted by the route).
71. Mr E believed the Council's failure to establish and publish the status of the tracks was incomprehensible and contrary to the public interest. He submitted that the Council had both the responsibility and the ability to resolve the issue, but was choosing not to, hiding behind claims of legal advice and confidentiality. In Mr E's view, even if legal advice had been

obtained, this should not prevent disclosure of the Council's final decision on the status of the tracks.

72. Mr E also maintained that disclosure was in the public interest as this issue affected many local people who used the tracks.
73. The Council submitted that the public interest lay in the right to receive proper legal advice, and to preserve its ability to litigate. It argued that the public had a right to rely on their local authority obtaining sound legal advice when making decisions. Disclosure of the contents of legal advice or any legally privileged information would, the Council maintained, unfairly undermine its position in any litigation or negotiation.
74. The Council believed disclosure would deter it from seeking legal advice in future, adversely impacting on sound and informed decision making. It contended that, as with any client, it had the right to have open and frank discussions with its legal representatives without fear of disclosure.
75. The Council acknowledged that a proportion of the public wanted the area to be deemed a right of way and so it was in the public interest that the Council was able to maintain the ability to litigate without revealing the contents of the legal advice to any potential opponent.
76. On balance, the Council considered that the risk of prejudice to its legal position outweighed any public benefit in disclosure of the information.

*The Commissioner's view on the public interest*

77. The Commissioner has considered carefully all the public interest arguments he has received, alongside the remaining withheld information he has accepted as capable of being withheld under regulation 10(5)(d). He must consider the actual circumstances of the case, and whether the Council was correct in its decision, at the time it responded to the request and subsequent requirement for review. That position may change in time, but the issue here is whether the Council responded to this particular request correctly at the relevant time.
78. The Commissioner recognises the public interest in accountability and transparency in the decision-making processes of public authorities, and in understanding how particular actions are effected and progressed. He acknowledges that disclosure of this information would help fulfil a public interest in understanding the Council's legal position in relation to the rights of way.
79. On the other hand, the Commissioner recognises the strong public interest in ensuring that the Council can receive legal advice in confidence, to enable it to discharge its functions as thoroughly and effectively as possible. This is particularly the case where the legal advice concerns an issue that is ongoing or which may recur.
80. The Commissioner considers disclosure of such information could adversely impact on the openness and frankness of the parties involved in seeking and providing legal advice, if they believed that advice might be disclosed, and this would not be in the public interest.
81. In all of the circumstances of the case, therefore, the Commissioner finds that the public interest in maintaining the exception outweighed that in making the information available, at the time the Council responded to Mr E's request and requirement for review. He therefore concludes that the Council was entitled to withhold this particular information under regulation 10(5)(d) of the EIRs.

## Compliance required

82. The Council is required to disclose to Mr E the information he has found to have been wrongly withheld, subject to the redaction of any personal data and that which he has found to have been correctly withheld under regulation 10(5)(d) of the EIRs. This will be marked on copies of the withheld information and provided to the Council along with this Decision Notice.

## Decision

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The Commissioner finds that Orkney Islands Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr E.

The Commissioner finds that the Council was entitled to withhold some information under regulation 10(5)(d) of the EIRs.

However, the Commissioner finds that the Council wrongly withheld other information under regulation 10(5)(d), and also failed to identify some information after the Commissioner's investigation had started, thereby failing to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to disclose to Mr E the information he has found to have been wrongly withheld, by **8 July 2019**.

## Appeal

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Should either Mr E or Orkney Islands 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 Orkney Islands 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**  
**Head of Enforcement**

**22 May 2019**

### 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;

...

(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.

...

- (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-

...

- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...

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