Decision Notice 028/2024

Crown consent

Authority: Scottish Ministers
Case Ref: 202200012

Summary

The Applicant asked the Authority for information relating to the seeking and obtaining of Crown consent for the Aquaculture and Fisheries (Scotland) Act 2013 and the Regulatory Reform (Scotland) Act 2014. The Authority provided the Applicant with some information, but it withheld the remainder on the basis that it was excepted from disclosure.

The Commissioner investigated and found that the Authority had partially breached the EIRs in responding to the request. This was because, while it had correctly withheld some information, it had wrongly applied exceptions to other information, or wrongly deemed it to be outwith the scope of the request. The Authority disclosed some of this information during the investigation. The Commissioner required the Authority to provide the Applicant with the remaining information it had wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2), (3), (4)(e) and (5)(d) (Exceptions from duty to make environmental information available); 11(2), (3A)(a) and (7) (Personal data); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 5(1)(a) (Principles relating to processing of personal data): 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5) and (10) (Terms relating to the processing of personal data)

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

1. On 27 July 2021, the Applicant made a request for information to the Authority. He asked for

   (i) Copies of all the correspondence, sent and received, between the Scottish Government and representatives of HM The Queen, including The Queen's legal representatives, and the Crown regarding the Aquaculture and Fisheries (Scotland) Act 2013, including but not exclusively on whether any of its clauses required amendment regarding Queen's consent in line with rule 9.11 of Standing Orders for the Scottish Parliament.

   Please also disclose:

   (a) Copies of all minutes of any meetings regarding obtaining Queen's consent to that bill, as above

   (b) Copies of all internal emails involving Scottish Government officials and ministers regarding seeking and obtaining Queen's consent to that bill and/or internal memos written by or for Scottish Government officials and Ministers, as above.

   (ii) Copies of all the correspondence, sent and received, between the Scottish Government and representatives of HM The Queen, including The Queen's legal representatives, and the Crown regarding the Regulatory Reform (Scotland) Act 2014, including but not exclusively on whether any of its clauses required amendment regarding Queen's consent in line with rule 9.11 of Standing Orders for the Scottish Parliament.

   Please also disclose:

   (a) Copies of all minutes of any meetings regarding obtaining Queen's consent to that bill, as above

   (b) Copies of all internal emails involving Scottish Government officials and ministers regarding seeking and obtaining Queen's consent to that bill and/or internal memos written by or for Scottish Government officials and Ministers, as above.

2. The Authority responded on 23 September 2021. It provided the Applicant with some information, but it withheld other information under regulations 10(4)(e), 10(5)(d) and 11(2) of the EIRs.

3. On 3 November 2021, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant asked the Authority to review every element of its response, including its decision to redact whole paragraphs from some documents.

4. The Authority notified the Applicant of the outcome of its review on 14 December 2021. It disclosed further information to the Applicant, and it clarified which information was redacted because it was outwith the scope of his request, and which was redacted because it fell under an exception. The Authority continued to rely on the exceptions contained in

regulations 10(4)(e), 10(5)(d) and 11(2) of the EIRs to withhold information from the Applicant.

5. On 29 December 2021, the Applicant 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. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not accept its reliance on regulations 10(4)(e) and 10(5)(d) of the EIRS. In later correspondence, on 27 April 2023, the Applicant confirmed that he was also challenging the Authority's reliance on regulation 11(2) of the EIRs.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

7. The Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information 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 Authority was invited to comment on this application and to answer specific questions. These related to its reliance on regulation 10(4)(e), 10(5)(d) and 11(2) of the EIRs.

9. The Authority provided submissions. During the investigation, the Applicant also provided submissions on the public interest.

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

11. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.

12. 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.

13. The Applicant requested information that was related to the Aquaculture and Fisheries (Scotland) Act 2013 and the Regulatory Reform (Scotland) Act 2014, both of which regulate the use and protection of the environment in specific circumstances.

14. The Commissioner has considered the terms of the request and the information captured by the request and he is satisfied that the information falls within the definition of environmental information set out in regulation 2(1), in particular, paragraphs (a) and (c) of that definition.

Section 39(2) of FOISA - Environmental information

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.

16. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.

17. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.

Regulation 5(1) of the EIRs

18. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.

19. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.

Regulation 10(4)(a) of the EIRs

20. During the investigation, the Authority submitted that it did not hold any information falling within the scope of requests (i)(a) and (ii)(a), and it sought to retrospectively apply regulation 10(4)(a) to this information. The Authority notified the Applicant of this change on 12 April 2023. The Applicant did not challenge the Authority's reliance on regulation 10(4)(a) of the EIRs, so the Commissioner will not consider regulation 10(4)(a) or requests (i)(a) or (ii)(a) in his decision.

Out of scope information

21. During the investigation, the Authority reviewed all of the information it had identified in this case, and it determined that some of these documents did not, in fact, fall under the scope of the request. The Authority argued that documents 1 to 4, 6, 7, 13, 14, 23, 30, 33, 58, 77, 82, 83, 85, 125, 126 ,140, 142, and 154 did not fall within the scope of the request.

22. The Authority provided arguments explaining why each document was not relevant, and this included cases where correspondence was exchanged between the Scottish Government and the Scottish Parliament (parties not specified by the Applicant), where the content of the document did not discuss the seeking or obtaining of Crown Consent, and correspondence with the Queen's Printer (now called the King's Printer) which is a statutory body and is not considered a representative of the monarch.

23. The Commissioner reviewed all of these documents, and he agrees that most of them are out of scope of the request. However, he notes that there are identical attachments to documents 82, 83 and 85 (which he has named 82a, 83a and 85a) which comprise a timeline for the progress of the Aquaculture and Fisheries Protection and Development Bill and he finds that point 38 of the timeline, and the accompanying notes for point 38, to be within the

scope of the request. He notes that point 38 makes explicit references to Crown Consent, and it clearly falls within the scope of the Applicant's information request.

24. As the Authority has not applied any exceptions to this information, he requires it to disclose point 38 (and the accompanying notes for point 38) in documents 82a, 83a and 85a to the Applicant. He finds that the Authority was not entitled to withhold this information and that, in doing so, it breached regulation 5(1) of the EIRs.

Information disclosed during the investigation

25. During the investigation, the Authority disclosed the names of Special Advisors, acknowledging that these names were wrongly withheld under regulation 11(2) of the EIRs. The Authority also disclosed some information in document 154 that it had originally withheld under 10(4)(e) of the EIRs. As this information has now been disclosed, the Commissioner will not consider it any further in this decision notice. However, in each instance the Commissioner must find that the Authority has failed to comply with the requirements of regulation 5(1) of the EIRs, as it did not disclose this information when requested to do so by the Applicant.

Searches

26. The Commissioner noted that of the more than 160 documents that were identified by the Authority as falling within the scope of the request, only three of those documents related to the Regulatory Reform (Scotland) Act 2014, which was specified in request (ii). The rest of the documents all related to the Aquaculture and Fisheries (Scotland) Act 2013, which was the focus of request (i).

27. In its submissions, the Authority acknowledged that it had identified significantly more information relating to request (i) than request (ii). It provided the Commissioner with details of the searches it had carried out, including the names of the files and staff accounts that were searched, the search terms used and the results of each search. During the investigation, the Authority carried out another search for information relating to request (ii) but it did not find any information beyond that which it had already identified.

28. The Commissioner has reviewed the searches carried out by the Authority for each request, and he is satisfied that they were proportionate and thorough. It is not clear, to the Commissioner or the Authority, why such little information has been retained in relation to request (ii) but the Commissioner is satisfied that the Authority has identified all of the information it holds, and which falls within the scope of requests (i) and (ii).

Regulation 10(5)(d) of the EIRs

29. 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.

30. As with all 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)).

31. The Authority is withholding the entirety of documents 57b, 115, 136, 137, 144 and 145 under regulation 10(5)(d) of the EIRs.

32. The Aarhus Convention: An Implementation Guide[1] 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.

33. The first matter to consider is whether the information relates to proceedings of the Authority, the confidentiality of which is provided for 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.

34. In many cases where this exception applies, there is a specific provision prohibiting the disclosure of the information. However, there will also be cases where the common law of confidence will protect the confidentiality of the proceedings.

Authority's comments on regulation 10(5)(d)

35. The Authority argued that the "proceedings" in question were the requirement to obtain Crown consent in accordance with the Scotland Act (schedule 3 paragraph 7)[2] and in compliance with rule 9.11 of the Standing Orders of the Scottish Parliament which relates to public bill procedures[3] and the administrative process whereby the Scottish Ministers seek Crown consent. It submitted that this administrative process is formally set out in the publicly available Scottish Government: Bill Handbook (see paragraph 9.10.2)[4].

36. The Authority also submitted that the Scottish Parliament website also explains the process and refers to Westminster guidance[5] which is based on rules similar to the Scottish Parliament, and this guidance may be taken into account by the Scottish Government.

37. The Authority referred to a decision issued by the Information Commissioner's Office[6] (the ICO) which considered the applicability of an exemption from disclosure in the English equivalent regulation 12(5)(d) of the Environmental Information Regulations 2004 to correspondence between DEFRA with the Duchy of Cornwall seeking Crown consent in connection with a UK Marine and Coastal Access Bill. The Authority submitted that at paragraph 14 of the ICO decision, the ICO noted his view that "proceedings" suggests a certain level of formality and is unlikely to cover all activities of a public authority. However, the Authority further noted that the ICO went on to specifically state that;
Making legislation is perhaps the most important function of a government and is clearly a formal process. In these circumstances the Commissioner is satisfied that the obtaining of

[1] https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

[2] https://www.legislation.gov.uk/ukpga/1998/46/schedule/3

[3] https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-9-public-bill-procedures#Rule9.11

[4] https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2022/07/foi-202200306018/documents/foi-202200306018---information-released/foi-202200306018---information-released/govscot:document/FOI%2B202200306018%2B-%2BInformation%2Breleased.pdf

[5] https://www.gov.uk/government/publications/kings-or-princes-consent/kings-and-princes-consent

[6] https://ico.org.uk/media/action-weve-taken/decision-notices/2012/695606/FER_0380352.pdf

Prince's consent in preparation for the introduction of a government bill can be said to be "proceedings" for the purposes of this exception.

38. In this case, the Authority argued that an obligation of confidence at common law exists in respect of correspondence between the Scottish Government and the Sovereign, including their representatives, in relation to the parliamentary process of obtaining Crown consent.

39. The Authority explained that there existed an obligation of confidentiality at common law by convention, reflected in section 41 of FOISA. It argued that there was a long-standing convention and expectation that communications between the Sovereign and their Ministers should remain confidential. It further argued that this convention included the proceedings described above, namely correspondence between the Scottish Government and Her Majesty, including Her representatives, in relation to obtaining Crown consent.

40. The Authority noted that section 41 of FOISA exempts communications with the Sovereign or their representative. It submitted that that Convention, as reflected in FOISA, was subject to the Public Interest test: in the context of FOISA, it operates subject to the principles of FOISA, meaning that final decisions on what can be disclosed are determined by public interest tests. The Authority argued that whilst this case was being dealt with under the EIRS, that did not detract from the existence of a long-established convention and expectation between Government and the Sovereign that communications between the Sovereign and their Ministers, including through their respective representatives, should remain confidential, subject to the public interest test.

41. The Authority submitted that the need for confidentiality under this convention was particularly important for the legal advisers to Her Majesty and for other legal advisers that they corresponded with. It contended that in order to receive full legal advice within the context of maintaining the monarch's political neutrality, it was important that legal advisers could communicate with other legal advisers in confidence, to enable positions to be explored and advice to be given to their respective clients.

42. In relation to the points made by the Applicant, the Authority submitted that it was not trying to argue that common law had a superior status, merely that it was one source of law. It commented that it was not the case that statutes prevailed over common law, including conventions. The Authority noted that in this case, the common law convention creating the obligation of confidentiality was overridden, but only to the extent that a public interest test applied through statute.

Applicant's comments on regulation 10(5)(d)

43. In his application to the Scottish Information Commissioner, the Applicant acknowledged that Crown consent was a convention whereby the monarch was consulted about the effects of legislation on Crown bodies, assets and land, generally run on their behalf by a government department or quango, and also its effects on their private property. He submitted that Crown consent routinely gives the monarch, both as head of state and separately as a private landowner, wide (or in some cases carefully defined) exemptions from legislation. He acknowledged the incorporation of the convention in the Scotland Act 1999 and the Standing Orders of the Scottish Parliament.

44. The Applicant noted that questions had been raised, however, about whether the application of this convention by ministers was unnecessarily opaque. He argued that it had been extended to cover The Queen's private property, land and business interests in Scotland (that is, property and businesses which the monarch owns as an individual rather than in

right of the Crown, and which the monarch can pass onto their successor). The Applicant submitted that, in some cases, existing legislation had been retrospectively amended to exempt The Queen in her private capacity. He argued that in many, if not all, cases, these exemptions were unique to The Queen, and the relevant Duchies, and uniquely applied to her private property and businesses. He further argued that the effects of Crown consent, and its use to amend legislation, was very rarely explained in detail to Parliament during the passage of legislation, and was very rarely debated.

45. The Applicant queried the Authority's view that The Queen has a common law expectation of privacy (described here as an "obligation of confidence") in relation to Crown consent which is equal or superior to the government's statutory obligations to disclose information.

46. He also questioned whether it was correct that a common law expectation existed, and could either equal or trump a statutory duty set out in legislation. The Applicant argued that there was no mention of a common law right to privacy in FOISA or the EIRs. He submitted that if it were to be accepted that common law could equal or surpass a statutory duty, then it would undermine the basis of the UK's freedom of information regime, including its enforcement by the Commissioner. He argued that common law is based on case law and judicial interpretation, not on statutory definitions and tests. He contended that if common law was deemed superior to FOISA, and the Commissioner could not adjudicate, then a decision by Ministers to apply a common law test, a decision to use that test to withhold information could only be challenged in court, at great expense to an applicant. It was therefore not open to all.

47. The Applicant argued that this would also mean that a public body seeking to withhold documents could apply a statutory exemption under legislation with one set of documents but then use a common law exemption in another set, if the statutory powers did not work in its favour. He submitted that in this case, the Authority had not specified how this apparent common law test had been applied and to what. He argued that this increased the risks of an unjustified non-disclosure of material and confused applicants.

48. The Applicant submitted that it was also unclear why a common law entitlement to privacy would only affect Crown consent, which was the clear implication of the wording of the Authority's claim.

Commissioner's view on regulation 10(5)(d) of the EIRs

49. As noted above, 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.

50. As also noted above, the first matter for the Commissioner to consider is whether the information relates to proceedings of the Authority, the confidentiality of which is provided for 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.

51. The Commissioner notes that "proceedings", in the context of this regulation, will cover a range of activities, but will usually be confined to internal deliberations in some form or another, although they may, as in this case, require communications with third parties. The matter under consideration here is the Authority's requirement to seek Crown consent, in accordance with the Scotland Act 1998 and in compliance with Rule 9.11 of the Standing Orders of the Scottish Parliament. Having considered the Authority's submissions on this

point, the Commissioner accepts that communicating with representatives of the monarch, seeking Crown consent for legislation, falls within the intended meaning of "proceedings".

52. As indicated earlier, the Commissioner accepts that the "confidentiality" in regulation 10(5)(d) may either arise from a specific statutory provision or, as the Authority has argued here, from the common law of confidence. The Commissioner notes the Applicant's concerns in this regard, but would emphasise that he still has to be satisfied that a binding obligation of confidentiality exists in every given case, whether created by statute, common law or any other means (and, for that matter, that disclosure would, or would be likely to, prejudice that confidentiality substantially).

53. For information to be confidential under the common law, two main requirements must be met. These are:

    (i) the information must have the necessary quality of confidence about it. 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. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties.

Does the information have the necessary quality of confidence?

54. The Authority has submitted that there is a longstanding convention and expectation that communications between the Sovereign and Ministers should remain confidential. It has argued that the need for confidentiality under this convention is particularly important for the legal advisers to Her Majesty and for other legal advisers they correspond with.

55. The Commissioner notes that the correspondence in this case, is either from or to the Authority's legal advisors, and he is satisfied that the information was only shared between the Authority and representatives of the monarch; it has not been disclosed to the wider public. In the circumstances, he accepts that the information has the necessary quality of confidence.

Was the information communicated in circumstances importing an obligation of confidentiality?

56. As noted above, the Authority has claimed that communications between representatives of the monarch and the Scottish Government are subject to a long-standing convention and expectation that they should remain confidential. The Authority has also explained that in order to receive full legal advice within the context of maintaining the Monarch's political neutrality, it is important that legal advisers can communicate with other legal advisers in confidence to enable positions to be explored and advice to be given to their respective clients.

57. The Commissioner notes that in this case there was a requirement on the part of the Authority to seek Crown consent, and this was specifically recognised by Parliament in its enactment of the Scotland Act, as set out in schedule 3 paragraph 7 and reflected in rule 9.11 of the Parliament's Standing Orders)[7]. This provision does appear to reflect a long-standing constitutional convention. Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament (25th Edition, 2019)* (also referred to in the Ministers' submissions) describes the scope of consent required in respect of the monarch's interest at

[7] https://www.legislation.gov.uk/ukpga/1998/46/schedule/3

paragraph 30.80[8], from which it is apparent that it extends to any bill affecting the whole range of their personal interests, including their personal estates.

58. The Commissioner considers that the formal nature of the consent process (being one required by statute and reflecting a constitutional convention) makes it more amenable to the application of the constitutional convention of confidentiality of communications between the Sovereign and their Ministers. The Commissioner accepts, in the circumstances, that there is a common law duty of confidentiality between the Authority and the monarch.

59. Having considered in full the submissions from the Authority, the Commissioner takes the view that the information was communicated in circumstances importing an obligation of confidentiality. The information is clearly seeking to obtain Crown consent in respect of two pieces of legislation, and as noted previously, the Commissioner has already accepted that there is a common law expectation of confidentiality for this purpose. The Commissioner has received no evidence to suggest the contents of the communications have been disclosed publicly and he therefore accepts that the confidentiality of the correspondence has been maintained.

60. Given this, the Commissioner is satisfied that, in this case, the confidentiality of the Authority's proceedings is provided for by law. The Commissioner must now consider whether disclosure would, or would be likely to, prejudice those proceedings substantially.

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

61. The Authority commented that it was required to formally seek Crown consent, as specified in the Scotland Act 1998. The Authority argued that disclosure of the information would cause substantial prejudice to the expectation of confidentiality as it would prevent legal advisers of the Government and the monarch from being able to have full and frank conversations with each other on behalf of their clients and explore positions and options.

62. The Commissioner is clear that the test of substantial prejudice requires a real risk of actual, significant harm. Having taking full account of the Authority's arguments and the information itself, the Commissioner accepts that making this information available would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the Authority's proceedings. He notes that the Authority is legally required to consult the monarch in order to obtain Crown consent, and accepts that disclosure of confidential communications in these circumstances could prevent the frank exchange of views and advice and, if this occurred, it would prejudice substantially the proceedings related to (and required for) seeking and obtaining Crown consent. He therefore accepts that the exception in regulation 10(5)(d) is engaged.

Public interest test

63. Having accepted that the exception in regulation 10(5)(d) applies to the information in documents 57b, 115, 136, 137, 144 and 145, 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.

[8] https://erskinemay.parliament.uk/section/5603/queens-consent-in-respect-of-her-interest

The Authority's submissions on the public interest

64. The Authority acknowledged a public interest in disclosing information as part of open, transparent, and accountable government, and to inform public debate. It noted that disclosure of the information would also facilitate further understanding of the mechanism by which Crown consent is obtained in relation to Scottish Parliament Bills.

65. However, the Authority also commented that if a Bill is introduced into the Scottish Parliament, the public interests identified above would be satisfied, at least in part by the following factors:

- The provision of further information about the Bill in its accompanying documents
- The fact that it is publicly acknowledged that the Scottish Law Officers advise on the legislative competence of all Scottish Government Bills
- The process of Parliamentary scrutiny itself

66. In addition, the Authority submitted that the way in which legislation applies to the Crown could be scrutinised by Parliament during the passage of the Bill. It submitted that the question of Crown Consent and Crown application to the legislation in question is a matter of public record and is a procedural matter depending on the content of the Bill. The Authority noted that publicly available guidance explains the circumstances when Crown consent is required for legislation and the circumstances in which legislation might need to be adapted in its application to the Crown.

67. The Authority argued that there was a very strong public interest in maintaining the exception. It submitted that the public interest was best served by maintaining good relations between the Scottish Government and the Royal Household, in protecting the free exchange of information, and in protecting a channel of communication between the Scottish Government and the Royal Household. The Authority argued that it was important that there was the ability to have full and frank discussions on behalf of the Head of State and the Scottish Government about the issues relating to Crown consent, including how the legislation applies to the Crown, to enable this constitutional process to work in an effective way.

68. It argued that disclosing the content of such communications was likely to mean that future communications would be less open and less frequent, with less exchange of information, which would negatively affect the process of obtaining Crown consent in future. The Authority contended that there could be no public interest in the disclosure of information which would damage that relationship and disrupt future communications. It maintained that there was no overriding public interest in disclosing information relating to discussions between itself and the monarch's representatives.

69. The Authority argued that there was a strong public interest in maintaining the longstanding constitutional convention that correspondence between the Sovereign and her Government is confidential in nature. It noted that the Sovereign has the right and the duty to counsel, encourage and warn the Government, but is constitutionally bound to accept and act on the advice of Ministers. Any communications which have preceded the giving of that advice must remain confidential to maintain and protect the political neutrality of the Sovereign in public affairs.

70. The Authority submitted that whether Crown consent is required is decided by Parliament, independently from the Royal Household. If consent is required, draft legislation is put to the

Sovereign solely on the advice of Ministers and as a matter of public record. It stated that the Sovereign remains strictly politically neutral at all times, including with regard to consent and Crown application.

71. The Authority contended that in this case, on balance, the public interest lay in favour of upholding the exception.

The Applicant's submissions about the public interest

72. The Applicant argued that this application was a significant test of the extent to which the monarch is able to, and is allowed to, secretly influence the drafting of every piece of applicable legislation, in order to protect their considerable private financial and property interests; to also subsequently direct the rewriting of existing legislation affecting those private interests; and then to approve or otherwise the finalised bill as it about to be tabled and finally get to sign off on it before it reaches the statute book.

73. The Applicant argued that no other external organisation or individual has that degree of power. He noted that while other stakeholders in a given area of policy can propose and influence legislation, they are far more subject to freedom of information rules and policies which open that influence up to public scrutiny. He further argued that none of those outside stakeholders have the degree of influence and access at every single stage of the process the Royal Household is allowed, or the protection of government policies specifically designed to conceal that influence.

74. The Applicant referred to the Authority's submissions on the monarch's common law expectation of confidentiality, and acknowledged that he had identified a small number of cases where a common law expectation of privacy was found to be valid under the EIRs. He maintained, however, that this expectation must have very limited application when it comes to freedom of information law, particularly given that that law is underpinned by statutory legislation. If this was not the case, the Applicant submitted that it would dilute and undermine the core purpose of that legislation: to ensure the fullest possible transparency around government decision-making.

75. The Applicant asked the Scottish Information Commissioner to determine whether that common law expectation was justified in this case, given the subject matter of this request and the overall significance of this issue. The Applicant referred to the Authority's response and commented that it was clear that the Authority had given a very significant degree of weight to an effectively unique degree of privacy it attached to Royal correspondence and decision-making.

76. The Applicant asked the Commissioner to take account of the Scottish Government's record of applying uniquely generous privacy and non-disclosure tests to Royal communications in its internal policies on handling requests involving the Royal Family. He noted that in 2016, the then Scottish Information Commissioner, Rosemary Agnew, criticised the Scottish Government's internal rules regarding the handling of information requests concerning the Royal Family.

77. In her letter to the Scottish government dated 23 November 2016 (the Commissioner's response to revised s60 Code of Practice[9]) Ms Agnew stated:

9 https://webarchive.nrscotland.gov.uk/20210717023555/https://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?lID=10442&sID=12898

I am supportive of the Ministers' intention to provide clear guidance to Scottish public authorities, but am concerned that the approach is inconsistent: the Code, as it stands, recognises that consultation with third parties will not always be appropriate, but the new text suggests that the Royal Household should always be consulted. This is not a requirement under FOISA and the suggested text could misleadingly create the impression that it is.

78. The Applicant questioned whether that mindset continued to unjustifiably influence the Authority's willingness to release documents affecting The Queen, leading to a misapplication of the regulations and an unjustified weighting against disclosure in the public interest, in a way that would not be applied to another topic, institution or person.

The Commissioner's view on the public interest - Regulation 10(5)(d)

79. The Commissioner has considered carefully all the public interest arguments he has received, alongside the withheld information he has accepted as capable of being withheld under regulation 10(5)(d).

80. The Commissioner cannot ignore the real presence of Crown consent and the associated obligation of confidentiality. In that context, he recognises the strong public interest in ensuring that the Monarch and the Scottish Government can communicate in confidence, to ensure that Crown consent is properly sought and obtained and that all relevant legal issues are raised, discussed and resolved.

81. On the other hand, 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, particularly in relation to the development and enacting of legislation. He acknowledges that disclosure of this information would help fulfil a public interest in understanding how the Authority obtained Crown consent for a specific piece of legislation, and what input the monarch (or representatives of the monarch) had in this process.

82. The Commissioner has carefully reviewed all of the information withheld under regulation 10(5)(d) of the EIRs, and he considers that disclosure of some of the information could adversely impact on the openness and frankness of the parties involved in seeking and obtaining Crown consent, if they believed that advice or views given might be disclosed, and this would not be in the public interest.

83. However, the Commissioner finds that in some instances, the public interest favours disclosure of the information withheld under 10(5)(d) of the EIRs. He considers that disclosure of some of the information would shed light on a mechanism that is not often publicised, i.e. the obligation to seek and obtain Crown consent. In particular, he considers disclosure of the formal elements of the process, that is the formal notifications and requests, should be disclosed to show the correct application of the process and to demonstrate how the process is undertaken in practice. He finds that disclosure of this information is in the public interest – and can be achieved without undue countervailing harm to the public interest – and he requires the Authority to provide this to the Applicant.

84. However, the Commissioner is not satisfied that disclosure of the detail of the particular discussions is in the public interest. While he would not diminish the public interest in disclosure and thus understanding the substance of what was discussed (and while he must not discount the possibility of there being circumstances in which that public interest should prevail), the public interest in maintaining this constitutional convention of confidential communication between the monarch and their Ministers is substantial and, in this case, he

is satisfied that it outweighs the public interest in knowing the detail of what was discussed. He therefore concludes that the Authority was entitled to withhold this particular information under regulation 10(5)(d) of the EIRs.

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

85. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.

86. 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)).

The Authority's submissions

87. The Authority submitted that it was applying this exception to documents 8, 8a, 10, 125, 126, 150 (in part) and 154. It argued that the exception applied because these documents were internal communications in the form of Ministerial briefings prepared by Scottish Government officials (documents 8, 8a, 10, 125, 150 and 154), and a note and email between Scottish Government Ministers (document 126) about the development and processing of the Aquaculture and Fisheries (Scotland) Act 2013 and the Regulatory Reform (Scotland) Act 2014, which had not, at any time, been shared with anyone outwith the Scottish Government.

88. The Authority also submitted that it was withholding documents 5, 9, 11, 15-19, 21, 22, 24, 25, 27-29, 31, 37, 39 (attachment to 31), 41-44, 46-55, 57, 59-68, 71-76, 78-79, 86-90, 92, 93, 95-97, 99, 101, 102, 104-114, 116-121, 123, 124, 127, 130-133, 135, 138, 139, 143, 146-147, 153, 157,159-161 and 163-165 under this exception, as they comprised internal communications between officers and legal advisers.

89. The Authority argued that legal advice privilege applied to all of the documents listed in paragraph 88 above. It submitted that all of the information related to communications with, or references to communications with, in-house legal advisers acting in their professional capacity and the Scottish Government as their client, in which legal advice was being sought and provided, including material evidencing the substance of those communications. It submitted that all of the material was either made or affected for the principal or dominant purpose of seeking or giving legal advice or evidenced those communications.

90. The Authority argued that disclosure of the material would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged up for further consideration. It contended that all of the necessary conditions for legal advice privilege to apply were satisfied.

91. The Authority argued that a claim to confidentiality could be maintained in legal proceedings, because the correspondence in question was only shared between the Scottish Government and its legal advisers. It noted that apart from being provided to the Commissioner as part of his investigation (in relation to this case) the advice had not, at any time, been shared with anyone outwith the Scottish Government. As such, the Authority argued that the information was confidential at the time it responded to the Applicant's request and requirement for

review, and it remained so now. The Authority submitted that legal professional privilege had not been waived.

The Commissioner's view

92. Under the EIRs, provided the information comprises internal communications, the exception will apply.

93. Having considered the information withheld by the Authority under this exception, the Commissioner is satisfied that all of this information comprises internal communication and is therefore subject to the exception in regulation 10(4)(e). Much of the information is, as the Authority describes, internal legal advice. This information comprises communications between the Authority and its legal advisors, as well as communications between the Authority's legal advisors. It is clear that the information either relates to the seeking and obtaining of legal advice between lawyer and client, or it relates to the formulation of legal advice to which privilege also applies. The Commissioner is satisfied that all of these communications are subject to legal advice privilege.

94. The remaining documents that do not comprise legal advice, are clearly internal documents which have not been shared with a third party. Again, the Commissioner is satisfied that these documents fall under the definition of internal communications.

95. He must, therefore, go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The public interest

96. Although the information has been found to be excepted from disclosure, it must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintain the exception (regulation 10(1)).

97. In reaching a finding on the public interest, it is not correct simply to consider what is of interest to the Applicant. In applying this test, it is necessary to consider what is in the interests of the public as a whole.

98. Regulation 10(2)(b) builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed.

The Applicant's comments on the public interest

99. The Applicant argued that it was in the public interest to know when and how Crown Consent is used, and specifically when the monarch is being consulted because proposed legislation will affect their private property, rather than just the rights of the Crown. The Applicant argued that as Crown Consent is rarely raised or debated in Parliament, it is unclear how much parliamentarians or the general public understand about this process and how it is used. He argued that disclosure of the withheld information would address this concern and meet that public interest.

The Authority's comments on the public interest

100. The Authority accepted that there was a public interest in disclosing the information to promote openness and transparency. It also acknowledged that releasing this information could help greater public understanding of the process for developing and introducing legislation, including, where appropriate, obtaining Crown consent to a Bill.

101. The Authority commented that if a Bill is introduced into the Scottish Parliament the public interests identified above will be satisfied, at least in part, by the provision of further information about the Bill in its accompanying documents and the process of Parliamentary scrutiny itself.

102. The Authority argued that there was a greater public interest in allowing Ministers and officials a private space within which issues and policy positions could be explored and refined, until the Government as a whole reached a decision that was sound and likely to be effective.

103. The Authority also argued that this private thinking space allowed for all options to be properly considered, so that good decisions could be taken. It commented that premature disclosure was likely to undermine the full and frank discussion of issues between Ministers and officials which, in turn, would undermine the quality of the decision-making process and, if this occurred, it would not be in the public interest.

104. With regard to the legal communications withheld under this exception, the Authority stated that there was a very strong public interest in maintaining the exception in order to ensure confidentiality of communications.

105. The Authority argued that it was important that lawyers could provide free and frank legal advice which considered and discussed all issues and options, without fear that the advice might be disclosed and, as a result, potentially taken out of context. It argued that there was a public interest in ensuring that the Government's position on any issue was not undermined by the disclosure of legal advice. The Authority submitted that legal advisers need to be able to present the full picture to their clients. It noted that legal advice often sets out the possible arguments both for and against a particular view, weighing up their relative merits.

106. In preparing legislation, in particular, the Authority argued that it was vital that lawyers, officials and Ministers had a private space to fully and frankly consider legislative proposals. The Authority submitted that it was crucial for this information to be exchanged to ensure that the Bill gave effect to the policy. It argued that policy and legal issues need to be identified and explored in an environment that enables, fosters, and protects a free and frank exchange of legal views, to enable final decisions to be taken about how and whether to take forward Bill proposals.

107. The Authority submitted that there was a strong public interest in protecting the confidentiality of this information, in order to ensure that the Scottish Government was able to discuss and take policy decisions in full possession of thorough and candid legal advice. This ensured that the Scottish Government couid take decisions in a fully informed legal context, having received legal advice in confidence as any other client would.

108. On balance, the Authority contended that, in this instance, the public interest in maintaining the exception outweighed that in disclosure, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients and the public interest in allowing for full and detailed internal consideration of the legislative process, ensuring laws of the highest quality.

The Commissioner's comments on the public interest

109. The Commissioner has considered all of these submissions carefully, alongside the withheld information (which he has accepted comprises internal communications for the purposes of this exception). He notes that there are two types of internal communications withheld under this exception; there are communications which the Authority has argued are subject to legal

advice privilege, and there are communications exchanged between officials and Ministers in order to enable Ministers to reach an informed view on issues relating to the legislation being developed.

110. The Commissioner will firstly consider the information that the Authority claims to be subject to legal professional privilege.

111. The Commissioner must consider any information which is the subject of legal professional privilege in the light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client.

112. As noted in previous decisions involving both FOISA and the EIRs, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case Three Rivers District Council and others v Governor and Company of the Bank of England [2004] UKHL 48[10] and in Department for Business Enterprise & Regulatory Reform v O'Brien & Anor [2009] EWHC 164 (QB)[11]. The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.

113. The Commissioner accepts that disclosure of the advice would help fulfil a public interest in understanding how the process of seeking and obtaining Crown Consent was carried out in relation to the Aquaculture and Fisheries (Scotland) Act 2013 and the Regulatory Reform (Scotland) Act 2014. He acknowledges the public interest in knowing why the Authority deemed it necessary to seek and obtain Crown Consent in relation to these two pieces of legislation, and what concerns were or were not raised during this process. In the Commissioner's view, there is a clear and strong public interest in understanding how the Authority made decisions in relation to legislation that affects the wider public and the environment and what role, if any, the monarch had in shaping that legislation.

114. On the other hand, the Commissioner recognises the strong public interest in ensuring that the Authority (as any Scottish public authority) can seek and receive legal advice in confidence, to facilitate the discharge of their functions as thoroughly and effectively as possible.

115. The Commissioner accepts that making such advice available could discourage staff in a Scottish public authority from seeking internal legal advice, or would deter frankness and openness by parties involved when seeking advice, if there was knowledge that the advice might be then disclosed. If, for this reason, the Authority was unable to obtain impartial, full and objective legal advice in respect of its actions, this would not be in the public interest.

116. On balance, having examined the withheld information, the Commissioner is not satisfied that the public interest arguments in favour of disclosure presented by the Applicant are so strong as to outweigh the public interest arguments in maintaining the exception. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in disclosure, and accepts that the information was properly withheld under regulation 10(4)(e) of the EIRs.

[10] https://www.bailii.org/uk/cases/UKHL/2004/48.html

[11] https://www.bailii.org/ew/cases/EWHC/QB/2009/164.html

117. The Commissioner will now consider the internal communications that are not subject to legal professional privilege, and which simply involve documents shared internally by the Authority. He has taken account of the Authority's arguments that Ministers and officials require a private space to discuss all options freely and frankly, and to ensure that Ministers can take fully informed decisions based on a thorough consideration of the issues.

118. The Commissioner has also considered the arguments put forward by the Applicant regarding Crown Consent, and he is of the view that it is in the public interest to know when a piece of legislation has been amended as a result of communications with the monarch and what those changes consist of. However, the Commissioner also agrees that it is important for Ministers and officials to be able to communicate confidentially, particularly during the development of legislation. He has carefully considered the information being withheld in these internal communications, and he has weighed up the public interest arguments in each case.

119. On balance, the Commissioner does not uphold the redactions made under 10(4)(e) in documents 8, 8a and 154 (including the attachment entitled "Crown consent"). Furthermore, he considers that some of the redactions made under 10(4)(e) in documents 10, 125, 125a, 126, and 126a have been wrongly applied. He considers that some of the information that has been withheld in these documents is relatively mundane and routine, and he cannot see how its disclosure would cause the harm claimed by the Authority. He requires the Authority to disclose this information to the Applicant.

120. The Commissioner has carefully reviewed the remaining information that is being withheld under 10(4)(e) and he is satisfied that its disclosure would not be in the public interest. He accepts that Ministers and officials do need a private space to discuss key issues, particularly draft legislation and considerations around its enactment, and disclosure could inhibit future discussions and debate between officials and Ministers.

121. As noted above, the Scottish Government is required to seek and obtain Crown consent when passing legislation and, therefore, these types of communications and discussions will need to take place when future legislation is being drafted. The Commissioner accepts that it is important that key issues can be raised by all parties, without fear that views which may be challenging or politically unpalatable would be publicly released. It is the Commissioner's view that, if officials and Ministers were unwilling or unable to fully express their views during internal discussions, this would lead to poorly informed decision-making, which would not be in the public interest. Given this, the Commissioner is satisfied that the public interest favours maintaining the exception contained in 10(4)(e) to the remaining redactions in documents 10, 125, 125a, 126a, and 150.

Regulation 11(2) of the EIRs – personal data

122. The Authority has withheld information in documents 8a, 134, 148, 150, 151, 152, 166, 167 and 168 under regulation 11(2) of the EIRs. In addition, there is personal data in documents 57b, 115, 136, 137, 144 and 145, documents that the Authority was withholding in their entirety under regulation 10(5)(d). The Commissioner will consider the application of regulation 11(2) to personal data in all of the above numbered documents.

123. Regulation 10(3) of the EIRs provides that a Scottish public authority can only make personal data in environmental information available in accordance with regulation 11. Regulation 11(2) provides that personal data shall not be made available where the applicant is not the data subject and other specified conditions apply. These include where disclosure would

contravene any of the data protection principles in the UK GDPR or in the DPA 2018 (regulation 11(3)(A)(a)).

124. The Authority submitted that disclosure would breach the data protection principle in Article 5(1)(a) of the UK GDPR.

Is the withheld information personal data?

125. The first question the Commissioner must address is whether the withheld information is personal data for the purposes of section 3(2) of the DPA 2018, i.e. any information relating to an identified or identifiable living individual. "Identifiable living individual" is defined in section 3(3) of the DPA 2018 - see Appendix 1.

126. Information that could identify individuals will only be personal data if it relates to those individuals. Information will "relate to" a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

127. The Authority submitted that the information it had redacted under this exception was third party personal data, as it comprised the names, contact details and signatures of individuals. It argued that this information was considered excepted from disclosure under regulation 11(2) of the EIRs. The Commissioner notes that the information in documents 57b, 115, 136, 137, 144 and 145 also comprises names, contact details and signatures of individuals.

128. The Commissioner is satisfied that all of the information which falls within scope and which has been, or could be, excepted under regulation 11(2) of the EIRs, is the personal data of either junior or senior members of staff. In either case, the information relates to identified (or identifiable) individuals. He is therefore satisfied that the information is personal data as defined in section 3(2) of the DPA 2018.

Would disclosure contravene one of the data protection principles?

129. The Authority submitted that disclosure of all of the withheld data would breach Article 5(1)(a) of the UK GDPR, which requires personal data to be processed "lawfully, fairly and in a transparent manner in relation to the data subject". The definition of "processing" is wide and includes "disclosure by transmission, dissemination or otherwise making available" (section 3(4)(d) of the DPA 2018).

130. In the case of the EIRs, personal data are processed when disclosed in response to a request. Personal data can only be disclosed if disclosure would be both lawful (i.e. if it would meet one of the conditions of lawful processing listed in Article 6(1) of the UK GDPR) and fair.

131. The Commissioner will first consider whether any of the conditions in Article 6(1) can be met. Generally, when considering whether personal data can lawfully be disclosed under FOISA, only condition (f) (legitimate interests) is likely to be relevant.

Condition (f): legitimate interests

132. Condition (f) states that processing will be lawful if it "…is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data …"

133. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, regulation 11(7) of the EIRs (see Appendix 1)

makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.

134. The tests which must be met before Article 6(1)(f) can be met are as follows:

- Does the Applicant have a legitimate interest in obtaining the personal data?
- If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
- Even if the processing would be necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

135. The Authority submitted that the Applicant does not have a legitimate interest in obtaining the information. It argued that it was not aware of any legitimate interests that the Applicant has in the names, direct contact details and signatures of officials, or that identifying the individuals would aid in the understanding of the withheld information. The Authority submitted that even if the Applicant did have legitimate interests, it did not believe these would outweigh the individuals' interests in protecting their privacy.

136. The Applicant argued that senior officials should be named as they are senior decision makers who have greater power and authority than middle or lower-ranking officials, and whose names and duties are already in the public domain. He has also argued that there is an enormous difference between the personal data of an ordinary individual or lower-level civil servant and that of the head of state acting in their constitutional role and/or The Queen acting in her private capacity, given the fact the monarch is a public figure and they are able to exercise powers and influence over legislation and public policy not open to any other person. The Applicant argued that this necessitates much greater scrutiny and transparency over their involvement in the framing of legislation, and policy, and the use of their power.

137. The Commissioner has reviewed the personal data, and he notes that the names and contact details that have been redacted are those of junior staff. He also notes that the personal data includes the signatures of senior staff and senior officials, including officials that are not employed by the Ministers.

138. While the Applicant has argued that he is seeking the names of senior staff, he has also acknowledged that he does not know whether or not staff have a senior role and he is relying on the Commissioner to assess the data, and reach an informed decision. The Commissioner is satisfied that the Applicant does also have a legitimate interest in the names of junior members of staff in order to fully understand who had sight of specific documents and who was involved in preparing certain papers in relation to seeking or obtaining Crown consent of both Acts.

139. However, the Commissioner is not satisfied that the Applicant has a legitimate interest in obtaining the signatures of officials in documents 57b,148, 151, 152, 167 and 178. In all documents, apart from document 57b, he notes that the names of senior officials have been disclosed to the Applicant, it is only the signatures that have been withheld. He does not accept that the Applicant has a legitimate interest in obtaining the signatures, when he already knows who signed the documents. He has already ordered disclosure of parts of document 57b, including the name of the senior individual who signed the document.

140. In the absence of a legitimate interest in that information, the Commissioner must find that disclosure of official's signatures would contravene the data protection principles and that disclosure would be contrary to regulation 11(2) of the EIRs.

141. He will now consider the junior names and contact details that have been redacted from documents 8a, 57b, 115, 134, 136, 137, 144, 145, 150 and 166.

Is disclosure of the personal data necessary?

142. Having accepted that the Applicant has a legitimate interest in some of the personal data, the Commissioner must consider whether disclosure of that personal data is necessary to meet that legitimate interest.

143. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities must consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subject.

144. In the circumstances, the Commissioner accepts that disclosure of the withheld information would be necessary in order to satisfy the legitimate interests identified. He can identify no other way of meeting the Applicant's legitimate interests.

Interests of the data subjects

145. The Commissioner has acknowledged that disclosure of the information in question would be necessary to achieve the Applicant's legitimate interests. This must be balanced against the interests or fundamental rights and freedoms of the third parties. Only if the legitimate interests of the Applicant outweigh those of the data subjects could personal data be disclosed without breaching the first data protection principle.

146. As noted above, the information that is being considered here are the names of junior members of staff. The Authority has argued that it would be unfair to release the information because the individuals in question who are more junior members of staff who would not expect their personal data to be processed in this way and it does not consider the processing necessary for the purpose of meeting the request. The Authority has also argued that it does not consider it has a lawful basis under which to process the personal data for the purposes of answering the request.

147. After carefully balancing the legitimate interests of the Applicant against the interests or fundamental rights and freedoms of the third parties, the Commissioner finds that the legitimate interests of the Applicant are overridden by the interests or fundamental rights and freedoms of the third parties. The Commissioner is satisfied that the names relate to junior members of staff who do not have senior powers of decision-making, and who have little expectation that their names and, in one case, contact details, would be disclosed. Accordingly, he accepts that making their personal data available would be unlawful.

148. In all the circumstances, the Commissioner must conclude that making the personal data available would breach the data protection principle in Article 5(1)(a) of the UK GDPR. Consequently, he is satisfied that regulation 11(2) of the EIRs does not allow the Authority to make the personal data available.

Guidance to the authority on disclosure

149. Where the Commissioner has decided that further information should be disclosed to the Applicant, guidance will be provided to the Authority to assist in its preparation of the information for disclosure.

Decision

The Commissioner finds that the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that by correctly withholding information under regulations 10(4)(e), 10(5)(d) and 11(2), the Authority complied with the EIRs.

However, by wrongly withholding some information under regulation 10(4)(e), 10(5)(d) and 11(2), the Authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner requires the Authority to provide the Applicant with the information that was wrongly withheld under regulation 10(5)(d) of the EIRs by 18 April 2024.

Appeal

Should either the Applicant or the Authority 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

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

David Hamilton
Scottish Information Commissioner

04 March 2024

Appendix 1: 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.

(2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the "applicant."

…

(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.

…

47 Application for decision by Commissioner

(1) A person who is dissatisfied with -

(a) a notice under section 21(5) or (9); or

(b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

(2) An application under subsection (1) must -

(a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

(b) state the name of the applicant and an address for correspondence; and

(c) specify –

(i) the request for information to which the requirement for review relates;

(ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and

(iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

"the Act" means the Freedom of Information (Scotland) Act 2002;

"applicant" means any person who requests that environmental information be made available;

"the Commissioner" means the Scottish Information Commissioner constituted by section 42 of the Act;

"the data protection principles" means the principles set out in –

(a) Article 5(1) of the UK GDPR, and

(b) section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section of that Act):

"the Directive" means Directive 2003/4/EC of the European Parliament and of the Authority on public access to environmental information and repealing Authority Directive 90/313/EEC;

"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;

…

"personal data" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2) and (14) of that Act);

"the UK GDPR" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act); and

…

(3A) In these Regulations, references to the UK GDPR and the Data Protection Act 2018 have effect as if in Article 2 of the UK GDPR and Chapter 3 of Part 2 of that Act (exemptions for manual unstructured processing and for national security and defence purposes) -

(a) the references to an FOI public authority were references to a Scottish public authority as defined in these Regulations, and

(b) the references to personal data held by such an authority were to be interpreted in accordance with paragraph (2) of this regulation.

…

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.

(3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.

(4) A Scottish public authority may refuse to make environmental information available to the extent that

…

(e) the request involves making available internal communications.

(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;

…

11 Personal data

(1) To the extent that environmental information requested includes personal data of which the applicant is the data subject then the duty under regulation 5(1) to make it available shall not apply to those personal data.

(2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject, a Scottish public authority must not make the personal data available if -

(a) the first condition set out in paragraph (3A) is satisfied, or

...

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations –

(a) would contravene any of the data protection principles, or

…

(7) In determining for the purposes of this regulation whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

…

17 Enforcement and appeal provisions

(1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).

(2) In the application of any provision of the Act by paragraph (1) any reference to -

(a) the Act is deemed to be a reference to these Regulations;

(b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

…

(f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

…

UK General Data Protection Regulation

Article 5 Principles relating to processing of personal data

1 Personal data shall be:

a. processed lawfully, fairly and in a transparent manner in relation to the data subject (“lawfulness, fairness and transparency”)

…

Article 6 Lawfulness of processing

1 Processing shall be lawful only if and to the extent that at least one of the following applies:

…

f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

…

Data Protection Act 2018

3 Terms relating to the processing of personal data

…

(2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).

(3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –

(a) an identifier such as a name, an identification number, location data or an online identifier, or

(b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

(4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –

…

(d) disclosure by transmission, dissemination or otherwise making available,

…

(5) "Data subject" means the identified or identifiable living individual to whom the data relates.

…

(10) “The UK GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Authority of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4)).

…