



Note on the interplay between s36 of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill and the Environmental Information (Scotland) Regulations 2004

Submitted to the Environment, Climate Change and Land Reform Committee

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SUBMISSION FROM DAREN FITZHENRY, SCOTTISH INFORMATION COMMISSIONER

1. The Scottish Information Commissioner is the public official appointed to enforce and promote Scotland's freedom of information legislation. The Commissioner's remit includes enforcement of the Environmental Information (Scotland) Regulations 2004 (the EIRs).
2. The purpose of this note is to draw the Committee's attention to a discrete point in relation to the interplay between section 36 of the Bill and regulation 5(3) of the EIRs, as set out below.
3. Section 36 of the Bill (Confidentiality of proceedings) appears to introduce prohibitions on disclosure of information.
4. Those prohibitions, if enacted, will prevent non-environmental information being disclosed in response to a request under the Freedom of Information (Scotland) Act 2002 (section 26(1)). No doubt the Committee will come to a view on the appropriateness of such a restriction on the right to freedom of information being imposed. As the Committee might expect, I would ask that very careful consideration be given as to whether it considers such a restriction to be justified. The impact of the section 36 prohibitions, if enacted, on environmental information¹ is more complex, as a result of the application of regulation 5(3) of the EIRs.
5. Regulation 5(3) of the EIRs states: "any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply." This means that, even if other legislation says environmental information should not be disclosed, the information can still be disclosed under the EIRs. (It might be subject to an exception, of course.)
6. Section 36(7) of the Bill tries to address this by stating that any environmental information caught by the prohibitions the section introduces will be information held in connection with confidential proceedings.
7. Regulation 10(5)(c) of the EIRs does contain an exception for "confidential proceedings", but the exception will only apply if disclosure would, or would be likely to, prejudice substantially

¹ I would highlight to the Committee the very broad definition of environmental information contained in regulation 2(1).

those proceedings and the public interest in maintaining the exception is not outweighed by the public interest in making the information available. So, despite section 36 of the Bill, I am of the view that it would still be within the power of the Commissioner to order disclosure of environmental information in some circumstances (or, indeed, to find the environmental information to be excepted from disclosure under other exceptions in the EIRs).

8. It is also a requirement of regulation 10(2)(a) of the EIRs (and the Aarhus Convention on which they are based), that the exceptions to accessing environmental information be interpreted in a restrictive way, and regulation 10(2)(b) of the EIRs expressly introduce a presumption in favour of disclosure of environmental information.
9. I would ask the Committee to consider how section 36 of the Bill and regulations 5(3) and 10 of the EIRs will work in practice, and whether it considers that any amendment should be made in light of the points set out in this note.

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