

# Decision Notice 029/2022

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## Ramsar Policy

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**Applicant: the Applicant**

**Public authority: the Scottish Ministers**

**Case Ref: 202101016**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked about their published Ramsar Policy. They disclosed some information, and withheld the remaining information on the basis that it comprised internal communications and was excepted from disclosure (regulation 10(4)(e) of the EIRs). The Commissioner agreed that the information was excepted from disclosure.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 7(1)(a) (Extension of time); 10(1), (2), (4)(e) (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. The Ramsar Convention on Wetlands of International Importance is an international treaty established in 1971 by UNESCO for conservation and sustainable use of wetlands. Ramsar is not devolved and the Department for Environment, Food and Rural Affairs is the government department responsible for managing Ramsar sites within the UK.
2. The Applicant submitted a request to the Ministers on 26 February 2019 about their policy with regard to Ramsar sites. The Commissioner issued *Decision 042/2021*<sup>1</sup> in relation to this request. In that decision, the Commissioner agreed that information was excepted from disclosure under regulation 10(4)(e) of the EIRs.
3. On 13 May 2021, the Applicant made a request for information to the Ministers for:  
(Part 1): An unredacted version of “Document 2”<sup>2</sup>  
(Part 2): Documents recording the process of drafting “Document 2” and/or paragraphs 8 and 9 of the “Ramsar guidance” dated 22 January 2019 (Annex A footnote 2) which have not been previously disclosed.
4. The Ministers wrote to the Applicant on 11 June 2021, extending the timescale to respond under regulation 7(1) (Extension of time) of the EIRs.
5. The Ministers responded on 14 July 2021. They told the Applicant that, despite the passage of time, the exceptions they had previously applied to the redactions made to Document 2 (part 1 of the request), i.e. regulations 10(4)(e) (internal communications) and 11(2) (third party personal data) of the EIRs, still applied. The Ministers disclosed some information in response to part 2 of the request, but withheld other information under regulations 10(4)(e) and 11(2).
6. On 15 July 2021, the Applicant wrote to the Ministers requesting a review of their decision. He argued that circumstances had changed since his 2019 request and that there was a

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<sup>1</sup> [Decision 042/2021 \(itspublicknowledge.info\)](https://itspublicknowledge.info)

<sup>2</sup> [FoI-19-00577+-+17+March+2020+doc+2.pdf \(www.gov.scot\)](https://www.gov.scot/FoI-19-00577+-+17+March+2020+doc+2.pdf)

strong public interest in disclosure of the withheld information given that it related to environmental planning policy. He considered, in line with the Commissioner's guidance on the EIRs public interest test,<sup>3</sup> that a fresh "balancing exercise" should be undertaken. He submitted that the information disclosed made a stronger case for disclosure in the public interest as senior officials had been involved in the discussion of the Ramsar policy before publication.

7. The Applicant also stated that he was content for personal data to be withheld.
8. The Ministers notified the Applicant of the outcome of their review on 12 August 2021. They upheld their response to part 1 of the request, disclosed additional information in relation to part 2 of the request, and continued to withhold the remainder under regulation 10(4)(e) of the EIRs.
9. On 13 August 2021, the Applicant applied 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. The Applicant stated he was dissatisfied with the outcome of the Ministers' review and reiterated the points made in his request for review, specifically that the public interest test should be subject to a fresh "balancing exercise". The Applicant recognised that legal privilege would continue to be a key consideration for the Commissioner.

## Investigation

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10. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
11. On 2 September 2021, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 7 December 2021, the Ministers were invited to comment on this application and to answer specific questions. These questions focussed on the searches conducted, the reasons for applying the exception and the public interest in disclosure of (and in withholding) the information.
13. The Ministers provided their submissions on 20 January 2021.

## Commissioner's analysis and findings

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

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<sup>3</sup> [The Public Interest Test - EIRs \(itspublicknowledge.info\)](https://itspublicknowledge.info)

## Application of the EIRs

15. The Commissioner is satisfied that the information covered by this request (discussion of Ramsar Policy) is environmental information, as defined in regulation 2(1) of the EIRs. In reaching this conclusion, the Commissioner has considered the information in question, along with paragraphs (a), (b) and (c) of the definition of environmental information (reproduced in Appendix 1).
16. The Applicant has not challenged the Ministers' decision to deal with the information as environmental information. The Commissioner will therefore consider the handling of the request in what follows solely in terms of the EIRs.

## Regulation 5(1) of the EIRs

17. 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.
18. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.

## Background to request

19. The Applicant's request relates to the drafting and publication of two paragraphs of Scottish Government guidance on the protection of Ramsar sites. The need for clarification was brought into focus by the Coul Links planning application which impacts upon a designated Ramsar site. In the face of an objection by a statutory consultee (Scottish Natural Heritage), the Coul Links application was called in by the Ministers for determination at national level. The application was called in on 24 August 2018.
20. Following a Pre-Examination Meeting for the Coul Links in October 2018,<sup>4</sup> it was decided that the Planning and Environmental Appeals Division (DPEA) would ask the Scottish Government to provide guidance on its established policy for the protection of Ramsar sites (paragraph 1 of published briefing note<sup>5</sup>). The advice was sought in December 2018.
21. The Scottish Government published its clarification of Ramsar site policy on 22 January 2019 (see: <https://www.gov.scot/publications/implementation-of-scottish-government-policy-on-protecting-ramsar-sites/>).
22. On 21 February 2020, the DPEA announced that the Coul Links planning application was being refused.<sup>6</sup>

## Information held - searches

23. The Ministers explained that, in searching for the information held in relation to this request, they assessed the information which had been collated in response to the previous request (resulting in *Decision 042/2021*). The Ministers explained that they were satisfied that all relevant information fell within scope of the previous request, as the Scottish Government

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<sup>4</sup> [http://tainfieldclub.org.uk/PublicNotices/2018-10-31\\_NoteOfCoulPreEnquiryMeeting.pdf](http://tainfieldclub.org.uk/PublicNotices/2018-10-31_NoteOfCoulPreEnquiryMeeting.pdf)

<sup>5</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2019/05/foi-19-00577--review/documents/foi-review-19-00577-information-released-2/foi-review-19-00577-information-released-2/govscot%3Adocument/FoI-19-00577%2B-%2BDocument%2B2.pdf>

<sup>6</sup> <https://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=119883>

Ramsar policy was published 22 January 2019, and was developed during internal communications through December 2018 to January 2019, ahead of publication.

24. The Ministers stated that the policy team had confirmed that no further review of the policy had taken place following its publication on 22 January 2019.
25. However, on reviewing the information held in relation to this application, the Ministers identified a further three documents falling in scope, which they provided to the Commissioner together with their submissions.

#### *The Commissioner's conclusions*

26. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out. He will also consider, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
27. The Commissioner has considered in detail the information falling within the scope of the request, including that disclosed and withheld. He has considered the information identified in light of the scope of the request and the submissions provided by the Ministers as to why they are satisfied that all relevant information has been identified.
28. Having considered all the relevant submissions, the Commissioner is satisfied that the Ministers have now taken adequate and proportionate steps to establish the information they held that fell within the scope of the Applicant's request.

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

29. Under regulation 10(4)(e) of the EIRs, a 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.
30. However, as with all of the exceptions in regulation 10, regulation 10(4)(e) must be interpreted in a restrictive way (regulation 10(2)(a)) and a presumption in favour of disclosure must be applied (regulation 10(2)(b)). The exception is also subject to the public interest test in regulation 10(1)(b) of the EIRs.
31. Having considered the information withheld by the Ministers under this exception, the Commissioner is satisfied that all of the information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). The Commissioner notes that the majority of the information withheld, as the Applicant had recognised, is subject to legal professional privilege.

#### *The public interest*

32. The Commissioner must now 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.
33. In considering the public interest, the Commissioner must focus on what is in the interests of the public as a whole, rather than on the interests of the Applicant.



43. The Ministers considered that there is a strong public interest in maintaining the integrity of the process of exchanging views for the purposes of deliberation and of the provision of free and frank advice in the development of policy responses to arising situations without the fear that disclosure would limit discussions and provision of advice and result in information being taken out of context or being subject to undue pressures from political or public spheres.
44. The Ministers also considered that the public interest has been met, at least in part, by making a redacted version of the final submission in relation to Ramsar policy and a redacted version of Document 2 available.
45. On balance, in the Ministers' view, the public interest in this case lies in favour of maintaining the exception in regulation 10(4)(e).

#### *The Commissioner's view*

46. As the Applicant has noted, the public interest must be assessed in the light of the situation when he made his May 2021 request. This may be different than the assessment made in relation to his request of February 2019.
47. The Commissioner recognises that the situation is different from that considered in *Decision 042/2021*: at the time of the 2021 request, planning permission for the golf course had been refused but support was being sought in relation to a new planning application.<sup>9</sup>

#### Legally privileged information

48. The Commissioner is satisfied that most of the information which has been withheld is subject to legal privilege. 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.
49. 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 – see, for example, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48<sup>10</sup> and *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB).<sup>11</sup> The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
50. In the Commissioner's view, disclosing the legally privileged information in question would discourage Scottish Government staff from seeking internal legal advice in future and would deter frankness and openness by parties involved when seeking advice if there was knowledge that the advice may be then disclosed. If, for this reason, the Ministers were unable to obtain impartial, full and objective legal advice in respect of their actions, this would not be in the public interest.

#### Other information

51. With respect to the small amount of correspondence which is not legally privileged, the Commissioner is satisfied, having considered the submissions from both parties and the timing of the request, that there is a strong public interest in allowing Ministers private space

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<sup>9</sup> [Coul Links: New plans for golf course in Sutherland - BBC News](#)

<sup>10</sup> <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

<sup>11</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

to discuss such matters and offer opinions without the concern that such discussions would be published.

52. The Commissioner is aware the Applicant considers that the Ministers' interpretation of the Ramsar Policy is flawed, but, on balance, the Commissioner is satisfied that, in the circumstances of this case and, having considered the withheld information in question, that the public interest in making the information available is outweighed by that in maintaining the exception.

#### *Outcome*

53. On balance, having examined the withheld information and the circumstances of the request, the Commissioner is not satisfied that the public interest in favour of making the information available are sufficiently strong as to outweigh the public interest in maintaining the exception. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in making the information available, and accepts that the information was properly withheld under regulation 10(4)(e) of the EIRs.

## **Decision**

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

## **Appeal**

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Should either the Applicant or the Ministers 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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**8 March 2022**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

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"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

#### 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.

...

#### 7 Interpretation

(1) The period of 20 working days referred to in -

(a) regulations 5(2)(a)

...

may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.

...

## **10 Exceptions from duty to make environmental information available–**

- (1) A Scottish public authority may refuse a request to make environmental information available if-
  - (a) there is an exception to disclosure under paragraphs (4) or (5); and
  - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.

...

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

...

- (e) the request involves making available internal communications.

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