

Decision Notice

Decision 049/2016: Mr Victor F J Jordan and the Scottish Environment Protection Agency

Changes to the Indicative Flood Map for Ballater

Reference No: 201402835

Decision Date: 03 March 2016



Scottish Information
Commissioner

Summary

On 16 April 2014, Mr Jordan asked the Scottish Environment Protection Agency (SEPA) for the information that led it to make changes to the Indicative Flood Map for Ballater. In response, SEPA provided an explanation of the changes that had been made. Following a review, Mr Jordan remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that SEPA had partially failed to respond to Mr Jordan's request for information in accordance with the EIRs: it failed to disclose some information which was later provided, and therefore failed to comply with regulation 5 of the EIRs.

The Commissioner accepted that SEPA was entitled to withhold information under regulation 10(5)(c) of the EIRs, but by failing to apply this exception when responding to the request, failed to comply with regulation 13(b).

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (f) "environmental information"); 5(1) and (3) (Duty to make available environmental information on request); 9(1) (Duty to provide advice and assistance); 10(1), (2), (3), (5)(c) (Exceptions from duty to make environmental information available); 13(b) (Refusal to make information available)

Copyright, Designs and Patents Act 1988 (CDPA) section 46 (Royal Commissions and statutory inquiries)

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.

Abbreviations used in this decision

Abbreviation	Explanation
CDPA	Copyright, Designs and Patents Act 1988
CEH	Centre for Ecology and Hydrology
Commissioner	Scottish Information Commissioner
CRDR	Copyright and Rights in Databases Regulations 1997
DTM	Digital Terrain Model
EIR	Environmental Information Regulations 2004
EIRs	Environmental Information (Scotland) Regulations 2004
FOI	FOISA and the EIRs
FOISA	Freedom of Information (Scotland) Act 2002
FRA	Flood Risk Assessment
ICO	(UK) Information Commissioner
IFTS	Information Fair Trader Scheme
IP	Intellectual property
IRCFM	Indicative River and Coastal Flood Map
LiDAR	Light Detection and Ranging
MPD	Morphology Pressures Database
NERC	Natural Environment Research Council

Abbreviation	Explanation
OS	Ordnance Survey
OSMA	One Scotland Mapping Agreement
RPSI 2015	Re-use of Public Sector Information Regulations 2015
SEPA	Scottish Environment Protection Agency
SFDAD	Scottish Flood Defence and Asset Database

Background

1. On 16 April 2014, Mr Jordan made a request for information to SEPA. He entitled his letter “*Request for information as to changes to the Indicative Flood Map for Ballater*”. Among other requests which are not the subject of this decision, he asked for:
 - (a) a copy of all the information that led SEPA to change the extent and limits of the areas of medium to high risk of flooding shown on SEPA’s indicative maps of flood risk from what was shown on the Indicative River & Coastal Flood Map on SEPA’s website at 1 July 2013 to what was shown on the Indicative Flood Map currently displayed on the web site;
 - (b) the grounds for the relevant conclusions drawn by SEPA from that information so far as those grounds may be recorded.

The remainder of the request specified the geographical area Mr Jordan was referring to and detailed his particular concerns.

2. SEPA responded on 1 May 2014 under the EIRs. In the response, SEPA’s Strategic Flood Risk Team explained the changes in flood hazard and flood risk; the changes in modelling techniques introduced to implement legislative duties¹; and new data and modelling techniques. SEPA also explained how it assessed whether flooding events were high, medium or low probability. SEPA explained that the changes observed in the flood map for Ballater were largely a result of the changed modelling approach. In terms of regulation 9 of the EIRs, SEPA provided an email address and telephone number so Mr Jordan could discuss any aspect of its response.
3. On 23 May 2014, Mr Jordan wrote to SEPA requesting a review of its decision on the basis that SEPA had failed to make available the bulk of the information he had requested. Mr Jordan commented that the response had given SEPA’s conclusions, rather than the evidence from which the conclusions were drawn. He referred to the lack of “salient statistics”. Mr Jordan specifically asked that information to which SEPA had referred in its response should be provided to him.
4. SEPA notified Mr Jordan of the outcome of its review on 30 June 2014. It confirmed that the Flood Risk Assessment to which it had referred in its response was the same “WSP Flood Risk Assessment” which had previously been disclosed to Mr Jordan (on 13 September 2013). SEPA stated that an overall technical report had been prepared for the Flood Map project which had detailed the general approach to map the whole country. This report contained no specific information about the Ballater area. SEPA explained that this report was designed for “flood risk practitioners working on the project”. SEPA disclosed to Mr

¹ The Flood Risk Management (Scotland) Act 2009

Jordan the summary report (*River Flooding Summary: Methodology and Mapping*²) for non-flood risk practitioners. This report outlined the key facts, modelling assumptions and datasets which underpinned the flood mapping process. SEPA referred to data relating to the Ballater area, which had been collated and analysed during the flood mapping project, but it took the view that this would not materially assist Mr Jordan. SEPA also provided a link to other Flood Risk Management publications on its website.

5. On 11 December 2014, Mr Jordan applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Jordan was dissatisfied with the outcome of SEPA's review because it had not provided him with the information he had requested. Mr Jordan referred to the information supplied to him by SEPA ("River flood summary: Methodology and mapping") and he pointed to categories of information referred to in Appendix A, which he thought would have fallen within his request: that is, gauged data; DTM; and hydraulic structures. Mr Jordan also stated that the "raw data" referred to by SEPA would clearly constitute at least some of the information requested by him.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Jordan made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 18 December 2014, SEPA was notified in writing that Mr Jordan had made a valid application. SEPA was asked to send the Commissioner the information withheld from him. Following a meeting between staff from the Commissioner's office and SEPA, SEPA provided examples of the information.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested.
9. The Commissioner's staff met with SEPA on 3 March 2015 and again on 6 July 2015 to view the information being withheld and to understand better the data and modelling used to create the flood map.
10. SEPA offered to allow Mr Jordan to view the information (the flood maps and data elements) in its premises. This solution was proposed in order to protect the intellectual property (IP) rights of the data providers. On 21 August 2015, Mr Jordan met with SEPA in order to view the mapping information and to put questions to one of SEPA's flood risk experts about the information. A member of the Commissioner's staff attended this meeting.
11. On 16 September 2015, SEPA decided to disclose some of the data sets it had withheld. SEPA provided Mr Jordan with the LiDAR (Light detection and ranging survey) data for Ballater (on CD and as a hardcopy) and an Excel spreadsheet containing bridge data submitted to SEPA by Aberdeenshire Council.

² https://www.sepa.org.uk/media/163406/river_flooding_summary.pdf

12. Mr Jordan was asked if he wished the Commissioner to decide on all the information that fell within his request or solely on the information that was still withheld. Mr Jordan replied on 9 October 2015 that he was content for the Commissioner to issue a decision solely on the information that continued to be withheld, although he did make several points about the information he had been supplied with and how it related to his request. The Commissioner will also address these as they relate to his dissatisfaction with the way SEPA has handled this request.
13. Mr Jordan acknowledged that the advice and information supplied to him by SEPA during the investigation had gone a long way towards fulfilling SEPA's duty to provide advice and assistance in terms of regulation 9 of the EIRs.

Commissioner's analysis and findings

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

Application of the EIRs

15. "Environmental information" is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in Appendix 1). Where information falls within the scope of this definition, a person has a right to access it under regulation 5(1) the EIRs, subject to various restrictions and exceptions contained in the EIRs. SEPA responded to Mr Jordan's request initially, and at review, in terms of the EIRs. Mr Jordan did not express any dissatisfaction that his request had been dealt under the EIRs.
16. The first question for the Commissioner is whether this is a request for environmental information in terms of the EIRs.
17. During the investigation, SEPA sought comments from Ordnance Survey (OS), one of the IP right holders to a data set that SEPA had withheld. OS questioned whether the information it had provided to SEPA fell within the definition of environmental information under the EIRs. OS said that its mapping states the location of an object within the environment and what that object might constitute; it does not provide information on "the state of the elements of the environment" or "factors, such as substances, energy, noise, radiation or waste". For example, an OS map will show the position of a river, but will not state whether it is polluted. By contrast, an OS licensee may create environmental information (such as whether a river is polluted) using OS base data as a reference. OS took the view that a request for OS base data under the EIRs will not usually fall within the scope of the legislation, and should be refused.
18. The Commissioner has considered the views put forward by OS through SEPA, but she is satisfied that the information covered by Mr Jordan's request comprises environmental information as defined in regulation 2(1) of the EIRs. The withheld information and the information disclosed during the Commissioner's investigation are covered by paragraphs (a) and (f) of the definition of environmental information, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition.
19. In relation to the data supplied by OS, the Commissioner disagrees with the position taken by OS and finds that the information falls within the terms of the definition of environmental

information in the EIRs. "Environmental information" includes any information in written, visual, aural, electronic or any other material form on the state of the elements of the environment, such as water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, and the interaction among these elements. The OS describes its Mastermap as containing "450 million geographic features found in the real world, from individual addresses to roads and buildings"³. The OS Mastermap topography layer (the data set containing data withheld from Mr Jordan), provides data which enables users to "understand their proximity and exposure to risks such as crime and floods"⁴. The Commissioner considers that the data from the OS Mastermap is information which describes the elements of the environment in a particular locality, and that it falls within the definition of environmental information in paragraph (a) of regulation 2(1) of the EIRs.

20. SEPA's initial response of 1 May 2014 and its review of 30 June 2014 referred to the exemption in section 39(2) of FOISA which 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.
21. The exemption in section 39(2) of FOISA is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Mr Jordan in this case, the Commissioner has concluded that the public interest in maintaining this exemption, and dealing with the request in line with the requirements of the EIRs, outweighs the public interest in disclosure of the information under FOISA. The Commissioner will therefore consider this case in what follows solely in terms of the EIRs.

Information requested

22. In his request, Mr Jordan asked for the information that led SEPA to change the extent and limits of the areas of medium to high risk of flooding shown on SEPA's indicative maps of flood risk for the Ballater area, between the flood map versions available on SEPA's website at certain dates. He also asked for the grounds for the conclusions drawn by SEPA from that information (i.e. the information that led SEPA to change the extent and limits) where those grounds were recorded. Mr Jordan was aware of differences in the published information and, in essence, wished to know what information had led to, and justified, that change.
23. Unfortunately, it was not possible for SEPA to carry out a simple comparison of the data used in the different versions of the flood risk map, as the maps of 2006 and 2014 were based on different models so would not be comparing like with like.
24. By way of background, the Indicative River and Coastal Flood Map (IRCFM) was issued by SEPA in 2006 and had three updates by 2009. The SEPA Flood Map was issued on 15 January 2014, and was based on new modelling of new data inputs. SEPA explained that this new flood map was not an update of the IRCFM, but a completely new assessment of flood risk carried out on a national basis to produce the new map. The methodology in creating the 2014 flood map was set out in *River Flooding Summary: Methodology and Mapping*. The data input to the river flood map are listed in Appendix A Table 1 to the document.

³ <https://www.ordnancesurvey.co.uk/business-and-government/products/mastermap-products.html>

⁴ <https://www.ordnancesurvey.co.uk/business-and-government/products/topography-layer.html>

25. SEPA's initial response to Mr Jordan provided explanations of the differences between the flood maps: e.g.:
 - "new modelling techniques";
 - a change from a one-dimensional modelling approach to a two-dimensional modelling approach to generate parameters such as "flood depth and velocity which were not previously available";
 - "a more refined digital representation of the ground surface".
26. In its response to Mr Jordan's request for review, SEPA explained that the flood maps had been developed as strategic community level tools to provide a first indication of those areas of Scotland potentially at flood risk. SEPA commented that the national scale modelling and mapping was not designed to provide a detailed assessment at specific locations such as Ballater. Although the mapping was a good overall representation of flood processes in the Ballater area, SEPA had not produced a detailed report specifically for the town.
27. SEPA confirmed it would be possible to extract data specifically relating to the Ballater area from the data collated and analysed during the flood mapping project. SEPA believed that Mr Jordan already had the most comprehensive data for Ballater from information he had received in response to an earlier information request (the local Flood Risk Assessment (FRA) previously undertaken on behalf of Scotia Homes in 2012).
28. Mr Jordan may have already received comprehensive hydrological data relating to the Ballater area, but he wanted SEPA to provide the information that informed the new flood map, and the information that had resulted in changes to the risk assessment. In terms of interpreting and responding to his request under the EIRs, it does not matter that the requested data may not be the most comprehensive data available. Mr Jordan's correspondence to SEPA, including his request and requirement for review, indicates that he has a technical awareness of what he is seeking. SEPA was wrong to impose its own view of what information would or would not be useful to Mr Jordan.
29. In its submissions to the Commissioner, SEPA confirmed that its flood map of 2014 was based on a new modelling process, and data from nine datasets. The model was developed by SEPA, using proprietary modelling software. The flood map in this context is the graphical representation of the data analysis produced by the modelling software. SEPA confirmed to the investigating officer that it had interpreted the request to refer to all the data held within the new model, on the basis that the new model had resulted in a different flood status.
30. After discussions with SEPA and Mr Jordan, it was established that the withheld information in this case was the data from some of the datasets used to compile the 2014 flood map.
31. SEPA stated that the "raw data elements cannot be read or processed without specific proprietary software." To supply such raw data, SEPA would disclose it in electronic format via CD or DVD. SEPA said that:

"...the exact extent of the data coverage would be dependent on the extent of the modelling domains in relation to the area specified by Mr Jordan in his request."
32. SEPA also confirmed that there were underlying assumptions and equations in the modelling software (which is commercially available). SEPA commented that it could not provide such

software as it held this on a licensed basis. SEPA explained that the modelling software was called ISIS, now re-named Flood Modeller Pro⁵.

33. Mr Jordan has made it clear that he has not asked for the specific proprietary software: he only wishes to receive the data that was used in the modelling process.
34. The Commissioner discussed with SEPA whether it is still possible to capture and provide the data upon which the 2014 flood map for Ballater was based. SEPA has confirmed that it is possible. SEPA explained that, were it required to disclose such information, that could be done on a CD or DVD depending on the size of the data. The Commissioner accepts SEPA's expert reassurances that the information requested by Mr Jordan is recorded information which it holds for the purposes of the EIRs and as such could be made available in response to an information request.

OS Mastermap Topography layer

35. SEPA was asked whether OS data led SEPA to change the flood risk at Ballater: i.e. was the OS data used in the previous version of the flood risk map different from the OS data used in the more recent flood map?
36. SEPA told the Commissioner that no OS data directly changed the flood risk. SEPA explained that they used OS Mastermap data from which the channel/floodplain roughness was derived. SEPA said:

"The influence this one dataset had on the degree to which the Maps changed cannot be determined precisely for this location, but our judgement is that this would have had minimal effect, in comparison to the changes in overall methods (and assumptions) and the use of other updated datasets (i.e. the use of LiDAR as opposed to NextMap)."
37. SEPA withheld the OS Mastermap data under regulation 10(5)(c) of the EIRs, which the Commissioner considers below.
38. The Commissioner accepts that, technically, SEPA is correct to find that the information falls within Mr Jordan's request. However, it is evident that Mr Jordan wants to receive the data that informed the changes to the flood risk map.

Regulation 10(5)(c) – Intellectual Property (IP) rights

39. The datasets used to compile the flood map are listed in Appendix A to the *River Flooding Summary: Methodology and Mapping* for non-flood risk practitioners:
 - Centre for Ecology and Hydrology (CEH) Flow Grid
 - HiFlows UK
 - Gauged data
 - Coastal boundaries
 - CEH Digital Terrain Model (DTM)
 - Hydraulic structures
 - Scottish Flood Defence Asset Database (SFDAD)
 - Indicative River and Coastal Flood Map (Scotland)

⁵ <https://www.floodmodeller.com/en-gb/isis/>

- OS Mastermap Topography layer
 - Climate change
40. As noted, SEPA originally considered that providing Mr Jordan with the data from these datasets would not assist him. During the Commissioner’s investigation, SEPA disclosed data from all but three of the datasets. It continued to withhold information from the following datasets:
- CEH Flow Grid
 - CEH Digital Terrain Model (DTM)
 - OS Mastermap Topography layer
41. SEPA argued that the data from these datasets was excepted from disclosure under regulation 10(5)(c) of the EIRs. This exception allows a Scottish public authority to refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially intellectual property rights. SEPA submitted that the exception in regulation 10(5)(c) applied to the information because it was covered by intellectual property (IP) rights (specifically, database rights).
42. Mr Jordan correctly pointed out that the burden of showing that the exception applies rests with the SEPA, and that there is a presumption in favour of disclosure, in terms of regulation 10(2)(b) of the EIRs.
43. SEPA explained that each of the datasets in question had been obtained under licence, and provided the Commissioner with copies of the relevant licences. These are discussed in detail later.
44. In deciding to withhold information from these datasets under regulation 10(5)(c) of the EIRs, SEPA had considered guidance issued by the Commissioner as well as guidance from the UK information Commissioner (“the ICO”)⁶ on the equivalent provision (regulation 12(5)(c) of the Environmental Information Regulations 2004 (the EIR)). SEPA submitted that:
- “...the exception is applicable to the extracts from the datasets, in that each of the datasets is protected by intellectual property rights as defined in the applicable licence.”*
45. In interpreting the exception in regulation 10(5)(c) of the EIRs, the Commissioner agrees with the principles and guidance⁷ produced by the ICO on IP rights. The EIR and the EIRs both give effect to Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information. The law in respect of IP is also UK-wide.
46. In order to establish that disclosure would, or would be likely to, prejudice substantially IP rights, a public authority must demonstrate that:
- (i) the material is protected by IP rights;
 - (ii) the IP right holder would, or would be likely to, suffer substantial prejudice as a result of the disclosure (it is not sufficient to show that IP rights have merely been infringed);

⁶ https://ico.org.uk/media/for-organisations/documents/1150/intellectual_property_rights_and_disclosures_under_the_foia.pdf

⁷ https://ico.org.uk/media/for-organisations/documents/1632/eir_intellectual_property_rights.pdf

- (iii) the prejudice, or likely prejudice, would be a consequence of the infringement or loss of control over the use of the information; and
- (iv) the potential harm or loss could not be prevented by enforcing the IP rights.

Is the material is protected by IP rights?

- 47. IP rights arise when owners are granted exclusive rights to certain intangible assets. There are many forms of IP rights, but those most relevant to requests under the EIRs will be copyright, database rights, and copyright in databases. Copyright covers a wide range of recorded information, including computer programs and databases.
- 48. Databases contain information that has been collated and presented in a way that makes it more useful. As well as the actual contents of the database attracting copyright, databases are capable of attracting two additional forms of IP rights: database rights and copyright in databases. Database rights protect the significant work that goes into gathering the material to be included in a database, verifying and presenting that information in the database, and then maintaining the database. Copyright in databases protects the creative process of designing the database: selecting the best material to include in a database and deciding how to organise that material in order to make the best use of it.
- 49. Mr Jordan submitted that IP arguments could not apply to raw data. He explained that he sought the data that led SEPA to change the extent and limits of areas at medium to high risk of flooding in the Ballater area. Mr Jordan referred to the information at issue being “purely factual” and stated that, as such, it would not be copyright. He referred to case of *Fraser v Evans* [1969] QB at 362F-G where Lord Denning commented:

“...copyright does not subsist in the information contained in the report. It exists only in the literary form in which the information is dressed”.
- 50. Mr Jordan argued that if the three “compilations” (i.e. the three datasets) were not put directly into SEPA’s model, but, instead, SEPA had selected or extracted data from the compilations, the information entered would not be subject to copyright. He submitted that a “mere contractual prohibition on passing the information on” would not constitute IP. Similarly, he submitted that none of the three compilations could be defined as a database in terms of the statutory definition in the Copyright and Rights in Databases Regulations 1997 (CRDR).
- 51. SEPA submitted that raw data do have IP rights attached, as evidenced by the licences to use the data. SEPA submitted that the information was protected by IP rights as follows:
 - CEH’s IHDTM - Copyright, including Crown Copyright and Database right
 - CEH’s Flow Grids - Copyright, including Crown Copyright and Database right
 - OS Mastermap - Copyright, including Crown Copyright and Database right.
- 52. SEPA supplied the Commissioner with a letter from CEH which stated that the Natural Environment Research Council (NERC), as represented by CEH, asserted copyright in the artistic works comprising the “Information Products” it had made available to SEPA under licence, and asserted a database right in the product. CEH indicated that its licensing process follows the NERC Policy on licensing and charging for Environmental Data and Information Products: it considered that its licensing process was therefore compliant with Government legislation and should be applied in a consistent manner.

53. In relation to data from the CEH Flow Grid and IHDTM, the Commissioner was provided with the Licence agreement which SEPA (as licensee) has with the NERC acting through CEH (the licensor). The Commissioner has received evidence that this licence was in force at the time of Mr Jordan's request. The licence covers SEPA's use of licensed data for specific purposes, including the flood map at issue. It specifies SEPA's obligations, as licensee, in respect of those data. Under the terms of the licence, it is clear that ownership of any copyright, database rights and any other IP rights in the licensed data remains with the licensor.
54. In relation to the data from OS Mastermap Topography layer, SEPA explained that, (together with other public sector bodies in Scotland) it is licensed to use data from a number of OS datasets under an agreement called the One Scotland Mapping Agreement Member Licence (OSMA Member Licence). The OSMA Member Licence sits under a framework agreement, known as the One Scotland Mapping Agreement (OSMA), between OS and the Scottish Ministers, under which OS is paid for licensing data to the Scottish public sector. The permitted use of the data was laid out in the licence.
55. The Commissioner accepts that, in relation to each dataset, SEPA's use of the data was limited by the relevant licence, and that the licensing body (the licensor) has asserted IP rights over the data provided under the licence. The Commissioner accepts that the information withheld by SEPA is information protected by IP rights.

Would the IP right holder suffer substantial prejudice because of the infringement of their IP rights?

56. The next question is whether the IP rights holders would, or would be likely to, suffer substantial prejudice, if SEPA disclosed the data into the public domain (which would be the effect of disclosing the information to Mr Jordan under the EIRs). In this context, it is the harm (if any) to NERC acting through CEH and the harm (if any) to OS that must be considered: these bodies are the IP rights holders in relation to the withheld data. SEPA is not the IP rights holder.
57. During the investigation, SEPA stated that, as it is not the IP right holder for these datasets, it could not make any further comment on the substantial prejudice that would be suffered by the IP rights holders.
58. In general terms, IP rights exist to reward either the creativity or significant work or both that goes into producing the material. They give the rights holder control over how the information is used, and by whom. It follows that, when considering whether the exception in regulation 10(5)(c) applies, the Commissioner must consider what harm would, or would be likely to, result from the right holder losing that control.
59. The Commissioner takes the view that a technical infringement of IP rights is not sufficient to engage the "harm" test in the exception. There must be some real loss suffered by the owner of the IP right, such as a monetary loss.
60. The equivalent exception in the EIR, regulation 12(5)(c), has a lower harm test than regulation 10(5)(c) in the EIRs, in only requiring the public authority to show that disclosure would adversely affect intellectual property rights. The Information Tribunal stated (in *Ofcom v Information Commissioner & T-Mobile (UK) Limited* (EA/2006/0078)⁸

⁸ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i104/Ofcom.pdf>

“... we believe that, interpreting the exception restrictively requires us to conclude that it was intended that the exception would only apply if infringement was more than just a technical infringement, (which in other circumstances might have led to a court awarding nominal damages, or even exercising its discretion to refuse to grant the injunction that would normally follow a finding of infringement). It must be one that would result in some degree of loss or harm to the right holder.”

61. The *Ofcom* case was appealed as far as the Supreme Court on a general point of law relating to the public interest test, and was eventually remitted for a new Tribunal decision on the public interest test. However, the Information Tribunal’s decision about the exception being dependent on there being loss or harm to the owner of the IP right remains intact under FOIA and was endorsed by the English Court of Appeal (see *Ofcom v Information Commissioner* [2009] EWCA Civ 90⁹).
62. The Commissioner is not bound by this decision, but finds it persuasive and agrees with its conclusions, which have relevance to the application of regulation 10(5)(c) of the EIRs.
63. In relation to harm suffered by the public authority responding to the request (rather than the IP right holder), the Commissioner accepts that this may have a bearing when considering the public interest test required by regulation 10(1) of the EIRs. Again, only harm which is a direct consequence of the IP right holder suffering loss of the protection afforded by their IP rights would be relevant to consider. For example, the affected IP right holder might refuse to provide IP protected material to the public authority in the future because they anticipate that this would lead to their rights being infringed again, causing harm to the public authority. The Commissioner will consider this in more detail later in relation to the public interest test.
64. In the *Ofcom* case (quoted above), the Information Tribunal found at paragraph 50 that:
“This category of harm involves a direct loss of the ability to exploit the relevant intellectual property through licensing and therefore goes to the heart of the right as an element of property”.
65. SEPA provided the Commissioner with a letter from CEH which stated that disclosing data in response to Mr Jordan’s request would damage CEH’s ability to exploit its IP rights by charging licence fees for the information products, and would breach its contractual rights. CEH stated that charging for the information products generates revenue which helps support the sustainability of UK science and reduces the burden on the public purse.
66. During the Commissioner’s investigation, SEPA again contacted the IP right holders to obtain their view on substantial harm, and then supplied their comments to the Commissioner.
67. Whilst OS disputed that its information fell within the EIRs (see above), it submitted that release of its data in response to an information request would substantially prejudice its IP rights. If release of its base data under the EIRs were to be permitted, this would constitute a serious threat to its licensing model, and to its continued viability as a Government-owned company.
68. OS explained that it complies with the Re-use of Public Sector Information Regulations 2015 (the RPSI 2015), and is also regulated under the Information Fair Trader Scheme (IFTS). As a wholly owned Government company, OS is required to generate revenue from its commercial activities in order to fund its operations (including its public task). As such, it is

⁹ <http://www.bailii.org/ew/cases/EWCA/Civ/2009/90.html>

not subject to marginal pricing under the RPSI 2015 (regulation 15(3)(a) of the RPSI 2015). Instead, in making available data covered by RPSI 2015, OS is entitled to recover direct costs, a reasonable apportionment of indirect and overhead costs attributable to the activity, together with a reasonable return on investment (regulation 15(6) of the RPSI 2015).

69. Further to this, and to ensure it complies with the rest of the RPSI, the IFTS and competition law, OS makes data available under a standard licensing model. If either OS or its public sector licensees were obliged to make OS base data available under the EIRs, this would be inconsistent with the licensing model. OS argued that this would place it in breach of the RPSI 2015 and IFTS, as it would be making data available on a marginal costs basis in response to information requests, but making the same data available at higher prices under its standard licensing model.
70. Although OS's submissions refer to RPSI 2015, the regulations only came into force on 18 July 2015, some months after Mr Jordan made his application to the Commissioner. However, RPSI 2015 were preceded by the Re-use of Public Sector Information Regulations 2005. These also allowed OS to charge the cost of collection, production, reproduction and dissemination and a reasonable return on investment (regulation 15(3)).
71. CEH stressed that CEH/NERC has no objection to its IP rights being accessed, it was rather the route through which access is enabled that caused it concern. CEH stressed that it is committed to making information available, "...including the Information Products that are the subject of this EIR request", but in order to protect and exploit its IP, it argued that it was necessary for CEH Information Products to be supplied through the approved and established CEH licensing process.
72. CEH argued that CEH/NERC would suffer real loss if its data were released outside the established licensing process, as this would set a precedent in abandoning established policy to exploit IP rights in the information through charging licence fees. It stated that charging for information products generates revenue to help support the sustainability of the UK science base and reduce the burden on the public purse. CEH informed SEPA that evidence of the financial impact of the risk identified would be the amount in the last complete financial year it had received as a revenue stream from all data licence fees (a figure of several hundred thousand pounds). CEH stated that if this income stream was removed through undermining its ability to charge consistent licence fees it would suffer significant and ongoing financial harm.
73. In the light of the above submissions, the Commissioner accepts that both OS and CEH/NERC would be likely to suffer financial harm if the data held by SEPA was provided in response to Mr Jordan's EIRs request and outside the established licensing process. The Commissioner accepts that SEPA, by obtaining and supplying the above comments from OS and CEH, has discharged its burden of proof in showing that – at the time of the request - the respective IP rights holder would suffer substantial prejudice following disclosure of the data because of the infringement of their IP rights.

Whether potential harm or loss could not be prevented by enforcing the IP rights

74. It is important to note that disclosing information under the EIR does not extinguish any IP rights in the material. Therefore, if the rights holder becomes aware of uses of the information that infringe those rights, either by the original requester or by anyone else who had received the information, the rights holder could take action to prevent harm arising from that infringement. The Commissioner will take account of the ability of the rights holder to

enforce their IP rights when considering whether harm would actually arise from disclosure of the data covered by Mr Jordan's request.

75. In general, the owner of the IP rights has exclusive control over how the asset is used. However, there are exemptions which permit some uses of protected material. Importantly, the different pieces of legislation that collectively provide IP rights contain provisions which mean that any act carried out under statutory authority will not infringe those IP rights. Therefore, a Scottish public authority will not infringe IP rights when it discloses information in response to an information request under the EIRs, because such disclosure is authorised by statute. This does not remove the difficulty that an infringement of IP rights may be caused by the actions of the person who receives the information.
76. Mr Jordan pointed out that regulation 5(3) of the EIRs expressly provides that any enactment or rule of law which would prevent the making available of information in accordance with the EIRs shall not apply. Therefore, even if the Copyright Design and Patents Act 1988 (CDPA) or the CRDR did not allow the disclosure of material when authorised by statute, regulation 5(3) of the EIRs would remove this barrier.
77. The Commissioner accepts this. However, while Scottish public authorities may be able to disclose information protected by IP rights, the IP rights continue to exist after disclosure. Therefore, the requester will be limited in what they can do with the information they receive in response to their request because it is still protected.
78. There are other permitted uses of which the requester can take advantage. These "fair dealing provisions" allow information to be used for limited purposes so long as the holder of the IP right is credited. For example, copyright material can be used for non-commercial research or private study. The permitted uses differ for different forms of IP rights. In relation to database rights, a database can only be used for non-commercial research if the database has already been made public. Importantly, however, none of the three IP rights will be infringed where the information is used for criticism, review or news reporting. Therefore, once disclosed, such material can still be used to feed public debate and satisfy the public interest in transparency and holding public authorities to account.
79. Mr Jordan indicated that he had requested the information in order to prepare for a possible statutory inquiry relating to a site allocated for housing. He referred, in this context, to section 46 of the CDPA. Section 46 of the CDPA is set out in full in Appendix 1. It states that things done in connection with a statutory inquiry do not infringe copyright. Mr Jordan considers that copyright would not be infringed if he uses the information to prepare for a statutory inquiry.
80. The Commissioner understands that no such inquiry has been instituted. (In any event, no inquiry had been instituted when SEPA was considering Mr Jordan's request and request for review.) Mr Jordan does not have a duty or power to conduct a statutory inquiry. In the absence of such a duty or power, and in the absence of an inquiry having been instituted at the relevant time, the Commissioner cannot accept that section 46 of the CDPA would apply.
81. SEPA provided the Commissioner with comments from both OS and CEH/NERC on whether enforcing their IP rights would prevent substantial harm. OS submitted that relying on copyright/database right protection alone would not provide a realistic prospect of preventing the substantial harm it had outlined (see paragraphs 68 and 69 above). OS said it would expect "large numbers of organisations and consumers to take advantage of any ruling that [its] data had to be made available in response to requests under the EIRs".

82. OS argued that while Crown and Ordnance Survey copyright and database rights would still be asserted over such data, in practice it would be extremely difficult and costly to monitor the usage of such large numbers of organisations and consumers accessing OS data via EIRs requests. Many of these bodies and individuals would not have a contract with OS. OS would be required to undertake pro-active monitoring of all those who had received its data pursuant to an EIRs request, and to issue large numbers of “cease and desist” letters, followed by infringement proceedings. In addition, the use made by many of such users may well not be in breach of copyright (for example, most consumer uses, or potentially even certain uses within an organisation). OS said that any decision by the Commissioner is likely to have repercussions outside of Scotland.
83. CEH commented that requiring the disclosure of CEH data outside its established licensing process would prevent it from enforcing IP rights, but it identified two solutions through which harm to CEH could be prevented by allowing CEH to enforcing IP rights.
- (i) The first option was for SEPA to pass relevant details of the information request to CEH so that it might consider direct supply of the information in a manner consistent with its established and approved licensing practise. CEH said that once it had done this, it would be content for SEPA to supply its derived datasets to Mr Jordan.
 - (ii) The second option was for SEPA to provide Mr Jordan with read only access to the CEH Information Products at one of SEPA’s premises, with access limited to that required to evaluate the flood maps. It would be the responsibility of SEPA to ensure that the respondent did not remove any part of the CEH Information Products from the SEPA premises.
84. The Commissioner has considered the solutions put forward which would allow CEH to enforce its rights while providing access to its data to Mr Jordan. CEH has not indicated how much it would charge Mr Jordan to obtain the data under licence, which is a key consideration in assessing whether this proposal is, in fact, a realistic solution. In relation to the offer to provide Mr Jordan with view-only access to the data, the Commissioner is aware that this will not meet Mr Jordan’s needs. He has already had view-only access to the data, as presented by SEPA through the modelling software. Mr Jordan wishes to use the data, not simply view it.
85. The Commissioner accepts the arguments put forward by OS, to the effect that disclosure in this case would set a precedent for disclosure in other cases, leading to a situation in which it would be difficult for OS to enforce its IP rights. (The Commissioner also accepts that CEH would be in the same position.) The Commissioner does not comment on whether OS data should be made more widely available without commercial licence; she accepts that, in the circumstances currently existing, OS operates on a commercial model which requires it to raise income by licensing the use of its data.
86. The Commissioner therefore does not accept that potential loss or damage to OS or CEH could be prevented through enforcement of their IP rights, in relation to the information requested by Mr Jordan.
87. Having found that all three tests are met, the Commissioner has concluded that the exception in regulation 10(5)(c) is engaged. She will go on to consider whether the public interest in disclosing the information is outweighed by the public interest in withholding it under this exception.

Public interest test

88. The public interest test in regulation 10(1)(b) 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. Both SEPA and Mr Jordan provided submissions on the balancing of the public interest.
89. A factor in determining whether the public interest in maintaining regulation 10(5)(c) outweighs the public interest in disclosure of the information is the severity of the loss suffered when the holder of the IP rights loses control over the use of the information, i.e. their asset. Where the information has a commercial value (as argued by OS in this case) it may be possible to estimate the loss in monetary terms. To remove the protection afforded by IP rights could see the loss of control over information which an organisation intended to exploit, perhaps by producing other information products. Similarly, if an academic institute lost control over a database it had developed for research purposes, it could lose the potential to earn the credit for the research and impact on its ability to attract both funding and leading academics to the institute. It is clearly against the public interest to undermine innovation and progress in this way.
90. If the IP rights of a third party are adversely affected by the disclosure of information in response to an FOI request, this may also affect its relationship with the public authority, to the detriment of the public authority. For example, third parties may no longer be prepared to provide the public authority with their intellectual property on a voluntary or licensed basis, because they have suffered loss, thus impacting on the authority's ability to carry out its statutory functions.

SEPA's submissions

91. SEPA submitted that CEH would view disclosure of the information from its datasets as a contractual breach. SEPA believed that, if it were to disclose the data, CEH may decide not to supply SEPA with such data in future. SEPA explained that it used the data from CEH to underpin its flood map and argued that it would not be in the public interest for SEPA to be unable to access such data in future.
92. SEPA also submitted that if it was required to disclose the information to Mr Jordan, it would have to respond to consultants seeking bespoke data extracts of its Flood Map. Responding to such requests would divert resources from necessary flood risk tasks, and SEPA submitted that this was not in the public interest.

Mr Jordan's submissions

93. Mr Jordan submitted that there was a public interest in being able to assess the flood risk findings. He noted that the changes in SEPA's map brought it into line with a flood risk assessment done by consultants for a prospective developer of a site at Ballater. He also noted that SEPA had withdrawn its objection to the inclusion of the site in the local plan because it accepted the validity of the flood risk assessment which showed much less of the site subject to risk of flooding than on SEPA's previous map.
94. Mr Jordan highlighted that SEPA's map is "of great significance in planning decisions on sites" and referred to the Scottish Government's Scottish Planning Policy of 2014¹⁰ (at

¹⁰ <http://www.gov.scot/Topics/Built-Environment/planning/Policy>

paragraph 260) which says that development plans should have regard to flood maps prepared by SEPA. He pointed out that paragraph 266¹¹ of this guidance suggests that SEPA's flood maps are the only resource in deciding whether a flood risk assessment is needed.

95. In this context, Mr Jordan argued that the public interest lay in making available data which would allow scrutiny of the accuracy or reliability of the flood risk map. Mr Jordan pointed to contrasting views on the flood data. He also indicated that the only persons able to counter any flaws in the map produced by SEPA would be those who could afford to commission their own flood risk analysis at a cost of approximately £10,000.
96. Mr Jordan argued that there was a public interest in the data on any flood risk being accurate, given that the data was relevant to planning and development in the area. The information was relevant to the granting or refusing of planning rights. Disclosure would increase the reliability of any conclusions about risk by permitting persons to scrutinise the data and assess both its accuracy and the implications that could be drawn from the data.

Commissioner's analysis and findings

97. In every case, the public interest factors favouring disclosure will include both general and specific arguments relating to transparency, accountability, participation in the democratic process and decision-making on environmental issues. Generally, there will always be public interest in the disclosure of information which will promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making; all of which ultimately contribute to a better environment.
98. The Commissioner must also consider the public interest factors relating more specifically to the information in question and the likely effects of its disclosure. She must balance the factors favouring disclosure against those weighing against it.
99. The Commissioner agrees with Mr Jordan that there is a public interest in disclosing the information. Disclosure would permit scrutiny of the flood risk mapping, which could increase reliability or increase public confidence in the mapping process. Such scrutiny would allow persons with sufficient technical knowledge to assess both the model and any decisions taken on the basis of the model. Having access to the data under the EIRs would enable other models to be created and assessed by third parties. Given that the model used by SEPA relates to the flood risk for both established communities and future developments, there is a public interest in ensuring the reliability of that model and achieving public confidence in its reliability.
100. On the other hand, SEPA has made strong arguments to show why it would be in the public interest for the exception to be maintained and the information withheld.
101. SEPA made the compelling argument that if it discloses information which it has received under licence and, in doing so, breaches the IP rights of the licensors, it runs the risk that the licensors will refuse to provide the data to SEPA in future. This would clearly not be in the public interest, given SEPA's role in assessing flood risk and providing expert advice for communities and planners. The Commissioner takes the view that the proper functioning of

¹¹ <http://www.gov.scot/Publications/2014/06/5823/7>

SEPA in respect of flood risk is of vital importance and protecting this is strongly in the public interest.

102. The Commissioner has also taken into account the public interest arguments provided by the two IP right holders (OS and CEH/NERC). These were, essentially, that withholding the information and restricting its provision to licensees is in the public interest in order to allow them to continue with their designated functions, given the funding context in which they operate.
103. Having weighed the competing public interests, the Commissioner believes the public interest in this case favours withholding the information under the exception in regulation 10(5)(c) of the EIRs. The Commissioner accepts that it would be in the public interest for Mr Jordan to have full access to the data upon which the Ballater flood risk mapping was based, for the reasons set out above. However, she also accepts that disclosure of this data would be likely to have implications for the future provision of data under licence from OS and CEH, and would be likely to undermine the model upon which they operate. She accepts that SEPA depends on the data from OS and CEH to create its flood mapping, and that it is in the public interest for this mapping to be based on full access to relevant data. On balance, she believes that the benefits to be gained from disclosure of the data are outweighed by the harm to the data providers.
104. The Commissioner acknowledges SEPA's willingness to meet Mr Jordan and demonstrate the modelling of the data. Mr Jordan has also received written explanations from SEPA on the information. Mr Jordan was informed by the Commissioner that his willingness to attend a meeting with SEPA and view information would not prejudice his application for a decision. The Commissioner has not taken into account the meeting which Mr Jordan had with SEPA when considering the balance of public interest in this case.
105. However, in terms of the general public interest in disclosure, it is relevant to take into account the information which SEPA has provided on its website, to explain how flood maps are developed. While this is not relevant in terms of assessing the particular risk calculated for the Ballater area, it does provide the public, particularly those without access to technical experts, with some understanding of the process used to calculate that risk.
106. On balance, therefore, the Commissioner finds that the public interest lies in maintaining the exception in regulation 10(5)(c) and that SEPA was entitled to withhold the data from the three datasets in question.

Information disclosed during the investigation

107. During the investigation, SEPA decided it could provide Mr Jordan with data from several of the datasets upon which the flood risk map for the Ballater area was based. After having a chance to review the information, Mr Jordan wrote to the Commissioner raising some concerns about the information he had received. The following headings reflect the headings used by Mr Jordan in his letter to the Commissioner.

Hiflows UK

108. Mr Jordan was concerned that SEPA had not identified the data actually used to produce the new flood map. He commented that SEPA had told him that derived statistical peak flows were used to revise the CEH flow grid "where necessary", but had not provided him with the revisions or indicated what data on flows were put into the model. Mr Jordan was also

concerned that SEPA had not supplied the extracted data from the CEH flow grid or the revised and updated flow grid.

109. SEPA confirmed, on 14 December 2015, that the CEH Flow Grid used to derive the Ballater flood maps had not been altered by SEPA gauge data. The HiFlows/SEPA data was used simply as a check to confirm that the CEH Flow Grid data was valid and appropriate for use in the modelling.
110. The Commissioner is satisfied that this information does not fall within the scope of Mr Jordan's request.

Gauged data

111. SEPA disclosed flow data to Mr Jordan from its gauging station on the River Dee at Polhollick Bridge, close to Ballater.
112. Mr Jordan was concerned that SEPA had not clarified which of the measurements from the gauging station were used in the flood map model.
113. SEPA subsequently clarified that that the gauging station based design flow estimates were not used in the modelling at Ballater. The data was used to verify the flow grid data from CEH, and the CEH data was used, without alteration, in the modelling to develop the flood map. The Commissioner is therefore satisfied that the River Dee gauging station data falls outwith the scope of Mr Jordan's request.

Hydraulic Structures

114. SEPA told Mr Jordan that bridge data supplied through its Morphology Pressures Database (MPD) and from local authorities was used to create the SEPA flood map. SEPA disclosed the data it had received from Aberdeenshire Council to Mr Jordan during the investigation.
115. Mr Jordan complained that it was not clear what data relating to the two bridges at Ballater had been extracted or derived from the schedule provided by Aberdeenshire Council. He was also concerned that he had not been provided with the relevant data from SEPA's MPD.
116. One of the main challenges presented by this case (as demonstrated by SEPA in its meeting with the Commissioner and with Mr Jordan) is that the influence which these datasets had on the degree to which the flood maps changed cannot be determined precisely for the location in question. The Commissioner is satisfied that SEPA are unable to provide Mr Jordan with this additional data as it cannot ascertain what information was used to make changes to the flood map.

Climate change

117. SEPA told Mr Jordan that this information was contained in an already published dataset utilised across the whole of Scotland, not specifically in Ballater area. These data were publicly available¹².
118. It was not clear to Mr Jordan whether all of the data relating to Ballater was in this document, or whether the information was simply a summary of the factors used to make changes to the flood map.
119. SEPA has explained that there was no climate change data element added in for the published flood map; however, published information for the climate projection for the

¹² <http://ukclimateprojections.defra.gov.uk>

Ballater area can be found online, using the link it had provided to Mr Jordan. It commented that, as part of the modelling contracts to develop the flood map, SEPA holds unpublished flood maps with a climate change element included. The climate change uplift has been included by appropriate amendments to the CEH Flow Grid.

120. The Commissioner accepts that the information in question was not incorporated directly into the flood map model and is not information covered by the terms of Mr Jordan's request.

Roughness values

121. Mr Jordan referred to the meeting with SEPA on 21 August 2015, and the explanation he had received of the layers of data used in the map model. He stated that while he had received data relating to one of these layers (the Digital Terrain Map), he had not received the imported values from the revised and updated CEH flow grid adjusted to take account of some other data, and he had not received data relating to the roughness of terrain (the two other layers of data).
122. SEPA has explained that roughness values used in the modelling were derived from an analysis of the OS Mastermap layer, which the Commissioner has found to be excepted from disclosure under regulation 10(5)(c) of the EIRs. SEPA confirmed that the roughness value was not based on the content of a specific dataset. The Commissioner accepts SEPA's explanation.

Decision

The Commissioner finds that, in respect of the matters specified in his application, the Scottish Environment Protection Agency (SEPA) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Jordan.

The Commissioner is satisfied that SEPA was entitled to withhold some information under regulation 10(5)(c) of the EIRs.

However, SEPA failed to identify all the information that fell within the terms of the request, when responding to the request, and therefore failed to comply fully with regulation 5(1) of the EIRs. In responding, it also failed to specify that some information covered by the request was excepted from disclosure under regulation 10(5)(c), and therefore failed to comply with regulation 13(b) of the EIRs.

During the investigation, SEPA disclosed to Mr Jordan the information wrongly withheld from him, so the Commissioner does not require SEPA to take any further action in respect of its failures in response to Mr Jordan's application.

Appeal

Should either Mr Jordan or SEPA 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.

Rosemary Agnew
Scottish Information Commissioner

03 March 2016

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.

...

- (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.

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

...

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

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine

areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

- (3) Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

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.

...

- (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-

...

(c) intellectual property rights; ...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

(b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);

...

Copyright, Designs and Patents Act 1988

46 Royal Commissions and statutory inquiries

- (1) Copyright is not infringed by anything done for the purposes of a Royal Commission or statutory inquiry.
- (2) Copyright is not infringed by anything done for the purpose of reporting any such proceedings held in public; but this shall not be construed as authorising the copying of a work which is itself a published report of the proceedings.
- (3) Copyright in a work is not infringed by the issue to the public of copies of the report of a Royal Commission or statutory inquiry containing the work or material from it.
- (4) In this section –

“Royal Commission” includes a Commission appointed for Northern Ireland by the Secretary of State in pursuance of the prerogative powers of Her Majesty delegated to him under section 7(2) of the Northern Ireland Constitution Act 1973; and

“statutory inquiry” means an inquiry held or investigation conducted in pursuance of a duty imposed or power conferred by or under an enactment.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info