

# Decision Notice



Decision 190/2013 Ms Barbara Ramsden and Highland Council

Contaminated land at Fort Augustus Abbey

Reference No: 201301082

Decision Date: 22 August 2013

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

On 26 November 2012, Mrs Ramsden asked Highland Council (the Council) for communications within the Council on legal issues relating to contaminated land, flooding and mitigation measures at Fort Augustus Abbey. The Council provided information, subject to redaction of information the Council considered subject to legal professional privilege. Following an investigation, the Commissioner accepted that the Council was entitled to withhold this information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (paragraphs (a) and (c) of definition of “environmental information”); 4(1) (Active dissemination of environmental information); 5(1) and (2)(b)(Duty to make environmental information available on request); 10(1), (2) and 5(d) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 26 November 2012, following previous communications with the Council relating to a property there, Ms Ramsden wrote to the Council requesting communications with the Council’s Legal Services relating to contaminated land, flood issues and mitigation issues at Fort Augustus Abbey (as referred to in another Council communication she had received).
2. The Council responded on 18 January 2013, informing Ms Ramsden that it was processing her request under the EIRs. The Council confirmed that it held two emails falling within the scope of her request. The Council supplied one email in full and the other with redactions made under regulation 10(5)(d) of the EIRs.
3. On 13 March 2013, Mrs Ramsden wrote to the Council requesting a review of its decision.



4. The Council notified Mrs Ramsden of the outcome of its review on 15 April 2013, upholding its decision to withhold the information under regulation 10(5)(d).
5. On 6 May 2013, solicitors acting on behalf of Mrs Ramsden wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications.
6. Subsequent references in this decision to Mrs Ramsden should be read as including solicitors acting on her behalf.
7. The application was validated by establishing that Mrs Ramsden made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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8. On 21 May 2013, the Council was notified in writing that an application had been received from Mrs Ramsden and was asked to provide the Commissioner with any information withheld from her. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on regulation 10(5)(d) in withholding the information redacted from the email.

## Commissioner's analysis and findings

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10. 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 her by both Mrs Ramsden and the Council. She is satisfied that no matter of relevance has been overlooked.
11. In this case, the Council responded to Mrs Ramsden's information request solely in terms of the EIRs. In its submissions to the Commissioner, the Council confirmed that it did so having judged that the information requested was environmental information, as defined in the EIRs, and so exempt from disclosure in terms of section 39(2) of FOISA.
12. For this exemption to apply, the information under consideration must be environmental information as defined in regulation 2(1) of the EIRs. The relevant parts of that definition are reproduced in the Appendix to this decision.



13. The Commissioner agrees with the Council that the information under consideration in this case is environmental information. The information in question consists of legal advice relating to the developer's and the Council's responsibilities surrounding contamination issues at Fort Augustus Abbey. The Commissioner therefore considers it to be information on measures and activities affecting, or likely to affect, the elements of the environment, in particular soil, land and landscape. As such, the Commissioner is satisfied that it falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a) and (c) of that definition.
14. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. She has consequently considered this case in what follows solely in terms of the EIRs.

#### **Regulation 5(1) of the EIRs**

16. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
17. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
18. In its response and following its review, the Council notified Mrs Ramsden that it was redacting certain of the information she had requested from an email dated 15 December 2008, on the basis that it was excepted from disclosure under regulations 10(5)(d) of the EIRs.

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

19. Regulation 10(5)(d) states that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.



20. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
21. The first matter to be addressed by the Commissioner, therefore, is whether the information relates to proceedings of the Council, the confidentiality of which is protected by law. She must then consider whether disclosure of the information would, or would be likely to, prejudice that confidentiality substantially.
22. In its publication "The Aarhus Convention: an implementation guide"<sup>1</sup>, the Economic Commission for Europe notes at page 81 that the Convention does not comprehensively define "proceedings of public authorities", but suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
23. In many cases where this exception applies, there exists a specific statutory provision prohibiting the release of the information. However, there will also be cases where the common law of confidence will protect the confidentiality of the proceedings. One aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege.
24. The Council submitted that the withheld information comprised legal advice, which, if disclosed, would reveal the nature of the advice likely to be received. The solicitor who provided the legal advice, the Council explained, was acting in their professional capacity and the communication occurred in the context of a professional relationship with an officer of the Council who was seeking a legal view at the time.
25. The Council submitted that it was relying on legal advice privilege, stating that the substance of the excepted information had not been disclosed. Consequently, in the Council's view, the confidentiality of the advice could be maintained in legal proceedings.
26. The Commissioner is satisfied that the withheld information is a record of legal advice requested from, and provided by, a legal adviser, all within the context of a professional relationship in circumstances in which legal professional privilege could apply. The Commissioner takes the view that a claim to confidentiality of communications could be maintained in legal proceedings in respect of the withheld information. The substance of the legal advice has not been disclosed, so that confidentiality has been maintained.

<sup>1</sup> [http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus\\_Implementation\\_Guide\\_second\\_edition\\_text\\_only.pdf](http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_text_only.pdf)



27. The Commissioner will therefore go on to consider whether disclosure of the privileged information would have prejudiced substantially, or would have been likely to prejudice substantially, the confidentiality of the proceedings of the Council in terms of regulation 10(5)(d) of the EIRs. In this connection the Commissioner accepts, as she has in previous similar cases, that the process of obtaining legal advice in this case can be accepted as relevant proceedings for the purposes of regulation 10(5)(d).
28. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. The Council submitted that the email exchange in question was marked by candour and represented legal advice sought at an early stage where officers wish to discuss the possible legal ramifications of policy. The Council submitted that the solicitor felt able to make wide ranging remarks about the risks to the Council (which could be substantial if liability were established). The release of such information, the Council submitted, would be likely to inhibit officers substantially from seeking and giving legal advice in this manner, thus affecting the Council's decision-making.
29. In the circumstances, the Commissioner accepts that disclosure would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the Council's proceedings and that the exception in regulation 10(5)(d) therefore applied to that information at the time the Council dealt with Mrs Ramsden's information request and requirement for review.
30. The Commissioner must now consider, as required by regulation 10(1)(b), whether the public interest in making the information available is outweighed by the public interest in maintaining the exception.

*The public interest test*

31. Mrs Ramsden submitted that the sections of the email which were disclosed to her dealt with, amongst other things, the requirement upon the Council relating to the active dissemination of environmental information (under regulation 4 of the EIRs). She argued that the issue being advised upon was not a general commercial issue for the Council, but the Council's obligations in relation to environmental information itself and its active dissemination by the Council.
32. Mrs Ramsden stated that there was a clear public interest in disclosure of information which would promote a greater awareness of environmental matters, more effective participation by the public in environmental decision-making and a better environment.
33. Given the context of the Council's duty of active dissemination, Mrs Ramsden argued that it would be in the public interest if local authorities generally were in the habit of explaining where contamination existed and what had been done by way of remediation. This, she argued, would assist in raising the public's awareness of these issues, and encouraging their informed participation. She also submitted that it would be in the public interest to disclose information shedding light on any misunderstanding of the position in relation to active dissemination.



34. The Council submitted, in line with its arguments as set out in paragraph 28 above, that it was in the public interest that Council officers were able to seek such advice in this manner to assist the Council's decision-making process. In its response to Mrs Ramsden of 15 April 2013, the Council explained that the information which was not disclosed represented further discussions regarding the topic which the Council believed was not in the public interest to disclose. It argued that it is important for Council staff to be able to send and receive legal advice in private, in order that officers could consider all actions which are open to them and all possible implications. The Council stated that when considering the disclosure of legal advice, it must ensure that it did not put its own interests at risk. The Council concluded that there is a strong public interest in maintaining the right to confidentiality of communication between legal adviser and client.
35. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
36. The Commissioner has considered carefully the submissions provided by both parties. In particular, she has noted the weight Mrs Ramsden attaches to the email's focus on whether there is a "general duty to disclose" certain information (which Mrs Ramsden takes to be a reference to the Council's responsibilities under regulation 4 of the EIRs – see Appendix). While acknowledging the relevance of this issue to consideration of the public interest in this case, the Commissioner does not believe it follows that disclosure of the withheld information will necessarily be in the public interest. Here, specifically, she is not satisfied that all of the concerns identified by Mrs Ramsden are necessarily borne out by the advice read as a whole.
37. Having examined content of the withheld information, the Commissioner is not satisfied that the public interest arguments in favour of disclosure presented by Mrs Ramsden are so strong as to outweigh the strong public interest arguments in favour of maintaining the exception and maintaining legal advice privilege. Consequently, she finds that the public interest in maintaining the exception outweighs the public interest in disclosure.

## DECISION

The Commissioner finds that Highland Council complied with Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mrs Ramsden.



## Appeal

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Should either Mrs Ramsden or Highland Council wish to appeal against this decision, there is an 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.

**Margaret Keyse**  
**Head of Enforcement**  
**22 August 2013**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (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

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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;

...

(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;

...

### 4 Active dissemination of environmental information

(1) A Scottish public authority shall take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds and at least the types of information listed in paragraph (2), with a view to the active and systematic dissemination of that information to the public and shall make that information progressively available to the public by electronic means unless it was collected before 14th February 2003 and is not available in electronic form.

...

### 5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.



...

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

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

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

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

...