

Decision Notice



Decision 244/2011 Association for the Conservation of Energy and the
Scottish Ministers

Heat Pump Field Trial - Technical Report for Project Funders

Reference No: 201100341
Decision Date: 9 December 2011

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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Summary

The Association for the Conservation of Energy (the Association) requested from the Scottish Ministers (the Ministers) a copy of a report on heat pump field trials. The Ministers responded by withholding the information under section 33(1)(b) of FOISA. Following a review, as a result of which the Ministers provided part of the Report, but withheld some information under section 33(1)(b) of FOISA, the Association remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to deal with the Association's request for information in accordance with Environmental Information (Scotland) Regulations 2004 (the EIRs), and in particular regulation 5(1), by failing to identify the information requested as environmental information and deal with the request accordingly under the EIRs.

The Commissioner also found that the Ministers were not entitled to apply the exceptions in regulations 10(5)(e) and (f) to the withheld information, and consequently that they had also failed to comply with regulation 5(1) in refusing to disclose this information. He required the Ministers to provide the Association with the information which had been withheld.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition (a) to (c) of environmental information); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), 5(e) and (f) (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

1. On 16 November 2010, the Association wrote to the Ministers requesting the following information:
a copy of the "Heat Pump Field Trial - Technical Report for Project Funders" [the Report] into the work undertaken during 2010 by the Energy Saving Trust [the EST] for the Scottish Government and others.
The Association stated that it was requesting the funders' version of the Report, and not the condensed version publicly available on the EST's website¹. The Association stated that it would prefer the Report in electronic format.
2. The Ministers responded on 15 December 2010, stating that they were refusing to make the information available because section 33(1)(b) of FOISA (substantial prejudice to commercial interests) applied.
3. On 21 December 2010, the Association wrote to the Ministers requesting a review of their decision. In particular, the Association submitted that the Ministers had failed to demonstrate that the requisite level of harm for section 33(1)(b) of FOISA to apply would result from disclosure of the information: even if it would, the Association argued, any such information should be redacted and the remainder provided. The Association also considered it unclear whether the Ministers had applied the public interest test to the request, and submitted that it considered the public interest in disclosing the information to outweigh the public interest in withholding it.
4. The Ministers notified the Association of the outcome of their review on 20 January 2011. The Ministers provided the Association with a redacted version of the Report, with the individual trial results and certain other information removed. The Ministers confirmed that this redacted information was withheld under section 33(1)(b) of FOISA.
5. On 22 February 2011, the Association wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers' 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. The application was validated by establishing that the Association had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

¹ http://www.energysavingtrust.org.uk/Media/node_1422/Getting-warmer-a-field-trial-of-heat-pumps-PDF



Investigation

7. On 7 March 2011, the Ministers were notified in writing that an application had been received from the Association and asked to provide the Commissioner with any information withheld from it. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked whether they should have dealt with the request under the EIRs, and also to justify their reliance on any provisions of FOISA or the EIRs they considered applicable to the information requested.
9. The Ministers responded on 12 May 2011, confirming that they considered the information requested to be environmental information and therefore accepting that the request should have been dealt with under the EIRs. The Ministers advised that they were relying upon the exemption in section 39(2) of FOISA and the exceptions in regulation 10(5)(e) and (f) of the EIRs to refuse to make the information available, with arguments and evidence in support of their position.
10. During the investigation the Association was invited to make comments on the application of these exceptions and the Ministers were invited to respond to these points. The submissions received, insofar as relevant, will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 39(2) of FOISA – environmental information

12. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*² and need not repeat it here.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



13. In their submissions to the Commissioner, the Ministers acknowledged that the Association's request should have been dealt with under the EIRs and stated that they wished to rely on the exemption in section 39(2) of FOISA in relation to all the withheld information. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below. The Ministers considered the information to be environmental information because it related to heat pump field trials, which involved the testing of alternative heat sources and would therefore have environmental implications.
14. Having considered the terms of the request, the withheld information and the Ministers' submissions on this point, the Commissioner accepts in this case that the information would fall within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition.
15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. The Commissioner accepts that the Ministers were entitled to apply the exemption to the withheld information, given his conclusion that it is environmental information.
16. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. In this case, as there is a separate statutory right of access to environmental information available to the applicant, 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. The Commissioner is therefore satisfied that the Ministers were entitled to withhold the information under section 39(2) of FOISA and he has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(5)(e)

17. The Ministers argued that the information could be withheld under regulation 10(5)(e) of the EIRs, which provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
18. *The Aarhus Convention: an Implementation Guide*³ (which offers guidance on the interpretation of the Convention, from which the EIRs are derived) notes, at page 60, that the first requirement of this exception is that national law must expressly protect the confidentiality of the withheld information: it must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a legitimate economic interest. This term is not defined in the Convention, but its meaning is considered further below.

³ <http://www.unece.org/env/pp/acig.pdf>



19. The Commissioner has taken this guidance into account when considering the exception. His view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

20. The Ministers submitted that the information withheld was commercial and industrial. They explained that the heat pump field trials were funded by the EST and a consortium predominantly of private companies, as well as the Department for Energy and Climate Change (DECC), the Scottish Government and the NW Regional Development Agency. They explained that many commercial bodies had taken part in the trial to help inform the Report on the prospects and viability of alternative heat sources.
21. For information to be commercial or industrial in nature it should relate to a commercial activity, either of the public authority or a third party. "Industrial" in this context can be taken to refer to any business activity or commercial enterprise, and is unlikely to expand the scope of the exception to encompass non-commercial information.
22. That commercial bodies took part in this trial does not necessarily mean that the information in the Report is commercial in nature, at least in the sense required by the exception. Similarly, that the Report relates to products (heat pumps) which are sold in a commercial environment does not necessarily mean that the information is commercial. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit.
23. In this case, the information withheld could be described as data or information about the performance of specific heat pumps at specific locations. Each type of heat pump is obviously manufactured for sale by a commercial entity. The sale of such heat pumps occurs in a competitive environment, and the performance of brands of pumps, particularly relative to their publicised specifications, could be regarded as relevant to how the individual heat pumps perform in a commercial environment: for example, the volume of sales and to whom the specific brands sell.
24. Having studied the information in the Report, and in particular the information still being withheld, the Commissioner is satisfied that the withheld information could be described as commercial and industrial in character, and therefore that this requirement of the exception is met.



Does a legally binding duty of confidence exist?

25. The Commissioner considers that “provided by law” in terms of regulation 10(5)(e) will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute.
26. The Ministers explained that the EST and the partner organisations (excluding the public authorities mentioned) had signed a confidentiality agreement in respect of this project, and consequently the Ministers considered that there was a legally binding duty of confidence in this case. Given the existence of this agreement, the Ministers argued that they could be open to legal action for an actionable breach of confidence if the information were to be released. Explaining why they had not agreed to sign the confidentiality agreement, the Ministers submitted that Part 4 of their Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA (the Section 60 Code) made clear that public authorities should not agree to give guarantees that information would be held in confidence.
27. The Commissioner notes that the Report indicates that its content is confidential. Provision of information under confidential cover, however, will not necessarily mean that a binding duty of confidence exists in relation to that information. In this case, the information was provided to the Ministers, who had indicated that they would not be bound by a confidentiality agreement in relation to it – a position he has no reason to believe those providing the information did not understand. In addition, the confidential marking applies to the whole Report. The Ministers have, however, disclosed substantial parts of the Report to the Association, following their review of their handling of the information request. In their submissions, the Ministers indicated that they had reconsidered the information in the full body of the Report at that point, and withheld only information they believed was commercial, financial or industrial in nature and which they considered it would be in the public interest to withhold: no mention was made of why the disclosed information should not be considered subject to a binding duty of confidence.
28. The Commissioner has given particular consideration to the Ministers’ comments in respect of the Section 60 Code. Although they have referred to the current Code of Practice, approved on 15 December 2010, it is clear that this was not the version in force at any time between the project commencing and the information being provided to the Ministers. In any event, the Commissioner does not consider either the current or the previous version to exclude altogether the acceptance of confidentiality clauses in respect of information provided to Scottish public authorities: in both cases (and, for that matter, under the pre-2010 Code of Practice in respect of the EIRs), the intention was rather to restrict the use of such clauses to appropriate circumstances, in respect of information genuinely confidential in nature and in all other respects meeting the requisite legal tests. Given that both FOISA and the associated Codes of Practice have been in force since 1 January 2005, the Commissioner finds it difficult to accept that an informed Scottish public authority in the Ministers’ position would have declined to accept a confidentiality agreement – in some form – unless it believed (having considered the nature of the information and all other relevant circumstances) such protection to be inappropriate.



29. The Commissioner must take account of the fact that in this case the information was provided to the Ministers after it had been made clear that an explicit obligation of confidentiality would not be accepted in relation to it. No attempt appears to have been made to renegotiate that obligation, for example to restrict its application to appropriate information only. An explicit obligation having been rejected by the Ministers, the Commissioner does not believe that it would be appropriate to find a similar obligation to exist by necessary implication, albeit in respect of a more restricted set of information, by virtue of the nature of that information or the fact that the other parties had accepted the confidentiality agreement. Having considered all the relevant circumstances, therefore, the Commissioner cannot accept that a legally binding duty of confidence existed in respect of the withheld information, as held by the Ministers at the time they dealt with the Association's request.

Is the information publicly available?

30. The Ministers explained that the EST and the individual companies funding the project were not subject to FOISA. The information had been shared with the Ministers as a partner organisation in the project and had not been shared outwith the partner organisations.
31. Although the Association argued that the EST should be regarded as a Scottish public authority under the EIRs, the Commissioner does not regard this as relevant in considering whether the information is publicly available. Having considered all relevant submissions, the Commissioner accepts that the information redacted from the Report and withheld from the Association is not (and was not at the time the Ministers dealt with the Association's request) publicly available.

Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?

32. The term "legitimate economic interest" is not defined within the EIRs. In the Commissioner's view, the interest in question will be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be substantial, and therefore of real and demonstrable significance.
33. The Ministers submitted that release of the withheld information would cause substantial harm to the legitimate economic interests of the partner organisations involved in this project. They explained that, as the project had been undertaken in multiple locations and not under laboratory conditions, the results could not be taken in isolation as they could be easily misconstrued. Disclosure of the information could damage the individual companies whose products were being tested as part of the project, if any negative results were construed as a definitive finding on their product's viability. The Ministers commented that the EST had stated that it did not intend to provide any detail with regard to this project, in addition to that already in the public domain before January 2012.



34. The Association had submitted arguments in respect of section 33(1)(b) of FOISA, which the Commissioner accepts as relevant to the application of this regulation. It argued that the Ministers had failed to demonstrate that the requisite level of harm would result from disclosure of the information. Challenging the Ministers' arguments in relation to negative results, the Association submitted that the Report would set out the context in which the equipment was installed, and therefore whether any underperformance was due to incorrect installation, poor equipment performance or any other reason. Where the Report did not make this clear, the Association contended, the equipment manufacturers would be at liberty to respond to any information in the public domain, setting out their explanation for any underperformance.
35. The Association argued that the only companies likely to suffer any commercial harm would be those who had over-stated the performance of their equipment in customer-facing materials. This, the Association contended, will only be a small proportion of those installers and suppliers who took part in the study, and the harm would be unlikely to be at the level of substantial prejudice.
36. Similarly, the Association argued that the Ministers had not taken account of the likelihood of the effect of disclosure of commercial information diminishing over time. It noted that the field trial had occurred in 2008, since when many heat pump manufacturers would have upgraded or changed the models available on the market, and most installers would have refined and perfected their installation methods. Consequently, the Association submitted, the data contained in the full, unexpurgated version of the Report was, in many respects, a historical document and highly unlikely to cause commercial harm to any organisation today.
37. The Commissioner notes that the Report (page 12) indicates the field trial ran for a 12-month period from 31 March 2009 to 31 March 2010), but the Executive Summary (page 9) also refers to an extension of the trial through June 2011 to undertake additional study. However, neither the Report itself nor the Ministers' submissions refer to any extension of the project. The Association's request was made on 16 November 2010 and responded to on 15 December 2010: this was followed by a request for review submitted on 21 December 2011 and responded to on 20 January 2011.
38. In respect of the effect of disclosure of the redacted information, the Commissioner would comment that the Report itself carefully explains its remit and its findings. For example, at 9.2.1 (which was released) it states:
- The COPs [coefficients of performance] reported by manufacturers (and, by inference, those that householders might reasonably expect) are only measured at very limited points (laboratory conditions) ... In "real world" operation a much wider range of conditions is encountered.***



39. The Ministers emphasised that there would be damage to the companies if “any negative results were construed as a definitive finding on their products viability”. The Report puts its research and its findings into context and the Commissioner agrees with the Association that it sets out the context in which the equipment was installed, and therefore whether any underperformance was, or might be, due to incorrect installation, poor equipment performance or any other reason. This context, the Commissioner recognises, tends to diminish any potential harm as described by the Ministers. That is, a relatively poor performance (or alternatively, a good performance) by a certain heat pump, cannot be unequivocally attributed to the quality of the pump, it being acknowledged that other factors may operate. The Commissioner would also observe, as he has in previous decisions, that it is always open to authorities to provide such context when responding to requests for information.
40. The Commissioner notes also that the Report in full has been made available to partner organisations. These organisations, inasmuch as commercial, will be operating in an environment where they would be in competition with each other. The Commissioner would take it that in these circumstances such organisations would be reluctant to share data amongst themselves which would confer an advantage on any of them individually.
41. The Commissioner has also taken account of the Association’s submissions about the passage of time. While the time which elapsed between the field trial and the Ministers’ review of the Association’s request might not have been as long as the Association suggested, the Commissioner acknowledges that the trials were carried out on products which must have been extant not much less than two years before the outcome of the review. In a developing market, at least some relevance must therefore be accorded to this factor.
42. Having considered the above submissions, the Commissioner is not satisfied that the Ministers have supplied sufficient argument or evidence to show that disclosure of the remaining withheld information (in response to the Association’s information request or its request for review) would have caused, or would have been likely to cause, substantial prejudice to a legitimate economic interest. Having considered all the relevant tests, therefore, he does not accept that the Ministers were entitled to apply the exception in regulation 10(5)(e) to that information.
43. Having not upheld the use of the exception in regulation 10(5)(e), the Commissioner is not required to go on to consider the public interest test required by regulation 10(1)(b) of the EIRs.

Regulation 10(5)(f)

44. Regulation 10(5)(f) of the EIRs 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 interests of the person who provided the information where that person -
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;



- (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure.
45. The Commissioner's briefing⁴ on regulation 10(5)(f) states that certain points should be addressed in considering whether this exception applies. These are:
- Was the information provided by a third party?
 - Was the third party under a legal obligation to provide the information?
 - Could the provider be required by law to provide it?
 - Would release of the information cause substantial harm to the interests of the information provider?
 - Is the information otherwise publicly available?
 - Has the information provider consented to disclosure?

Was the information provided by a third party?

46. The Ministers explained that the information was provided to them by the EST, and was shared only with project partner organisations and not with any third parties. The Report is titled a Report for Funders.
47. It may even be argued (not that it was) that certain information was provided to the EST by the project partners themselves as part of the trial, and that this information was in turn provided by it (via the Report) to the Ministers.
48. The Association argued that the EST should be regarded as a Scottish public authority under the EIRs, in terms of paragraph (d) of the definition outlined in regulation 2, and the Ministers' reliance on regulation 10(5)(f) of the EIRs therefore should not apply. In dealing with this application, however, the Commissioner is not required to decide if the EST falls within the definition of a Scottish public authority under the EIRs: the request under consideration was not made to the EST, but to the Ministers. He must, therefore, consider whether the information was supplied to the Ministers by a third party. From the submissions he has received, the Commissioner accepts that the EST is such a third party, that is a separate limited company, and that the information was provided by that third party to the Ministers.

Was the third party under a legal obligation to provide the information?

49. Or could the provider be required by law to provide it? The Association suggested this did apply, i.e. that the EST was under a legal obligation to provide a copy of the Report to the Ministers. This was put to the Ministers.

⁴ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2583&SID=123>



50. The Ministers had initially argued that there was no legal obligation to supply the information. Having been asked to clarify this point in response to the Association's comments, the Ministers confirmed that as a funder of the project they would be provided with access to the Report. They supplied the Commissioner with a copy of the Proposal for funding, which indicates that, as funders, the Ministers would receive "specific benefits", include "full access to the final data for all sites included in the trial and a final report". No further information was provided, however, on why this should be considered to create an obligation to supply the information.
51. The Commissioner's understanding of the information provided to him is that there is (and was at the time the Ministers dealt with the Association's request) no legal obligation on the EST of the kind envisaged by regulation 10(5)(f), whether in terms of any legislation or otherwise. Even if it could be argued that the funding arrangement created an enforceable obligation to provide the information (and that such an obligation assumed voluntarily fell within the scope of the exception – both assumptions the Commissioner would question), the Commissioner has been provided with no basis for finding that the Ministers could have put the EST (or anyone else) under an obligation to provide the information. He cannot accept that an obligation assumed voluntarily, under contract – even if one existed in these circumstances – could be said to fall into that category.

Is the information otherwise publicly available?

52. This question has been considered above in relation to regulation 10(5)(e). As indicated in paragraph 31, the Commissioner is satisfied that the withheld information is not (and was not at the time the Ministers dealt with the Association's request) publicly available.

Has the information provider consented to disclosure?

53. The Ministers have indicated that the EST has not consented to further disclosure, in addition to the information provided following the review. Indeed, the Ministers advised the Commissioner that EST had indicated that it would consider it to be an actionable breach of confidence if the withheld information were to be released by the Ministers. There is no evidence that any other partner organisation has consented to disclosure of the remaining withheld information.
54. In the circumstances, the Commissioner acknowledges that the information provider has not consented to disclosure.

Would release of the information cause substantial harm to the interests of the information provider?

55. The remaining question, therefore, is whether disclosure of the withheld information would prejudice substantially the interests of the person who provided the information (i.e. EST).

Decision 244/2011
Association for the Conservation of Energy
and the Scottish Ministers



56. The Ministers submitted that substantial harm could be caused to the interests of the EST if this information were to be released. They explained that the EST was required to engage with companies manufacturing and designing alternative heat sources and products in order to assess efficacy and suitability prior to supporting usage, and also in order to help inform policy and advice on energy alternatives.
57. The Ministers explained that EST was a significant partner of the Ministers in the assessment and promotion of environmental solutions which might help to meet environmental targets set by the European Union. If other commercial organisations felt that they could not share their commercial and financial information in confidence with the EST, it was likely that this would result in the EST being unable to conduct surveys and assessments in support of this work, or to provide definitive advice to the public on alternative heat sources and their effectiveness and implementation costs. The Ministers considered that this would be of great detriment to the economy of Scotland and the pursuit of energy alternatives (which they were keen to support).
58. The Commissioner is not persuaded by the Ministers' submissions on this point.
59. The Commissioner has not accepted that disclosure would cause the harm envisaged for the purposes of regulation 10(5)(e)(above) to the interests of the partner organisations.
60. Having not accepted that regulation 10(5)(e) is engaged, i.e. finding that disclosure would not have an effect that was argued in respect of the relevant interests of the partner organisations, the Commissioner finds it difficult to accept the submission that commercial companies or other organisations would be reluctant engage with the EST in certain trials, or that they would withdraw from these trials, or from other exercises involving the provision of information of the kind under consideration here.
61. As the Commissioner has said already in numerous decisions, he will approach each case on an individual basis. He acknowledges that there might be trials or other instances where information shared with an entity such as the EST for purposes of some public benefit could, were it to be released, cause substantial detriment to the contributor and have the consequent effect of inhibiting the future provision of information to the EST – to the ultimate prejudice of significant work being carried on by the EST. However, having considered the remaining withheld information and the relative submissions, the Commissioner has been unable to accept that argument for this case. He considers that those supplying heat pumps and the like will continue to identify benefits for their own products and their marketing in being associated with projects such as that under consideration in this case. Taking account of his conclusions in relation to regulation 10(5)(e), he has been able to identify nothing in the remaining withheld information which could reasonably be regarded as capable (by its disclosure) of outweighing the evident advantages of future co-operation with the EST.
62. Having considered all relevant submissions, therefore, the Commissioner is unable to accept that disclosure would have prejudiced substantially, or would have been likely to prejudice substantially, the interests of the EST in the ways described by the Ministers. Consequently, he cannot accept that the Ministers can justify the application of the exception in regulation 10(5)(f) of the EIRs to the remaining withheld information.

Decision 244/2011
Association for the Conservation of Energy
and the Scottish Ministers



63. Having found that the exception was incorrectly applied to the remaining withheld information, the Commissioner has not gone on to consider the public interest test required by regulation 10(1)(b) of the EIRs. Neither exception referred to in the Ministers' submissions applying to the information, the Commissioner requires the Ministers to disclose the remaining withheld information to the Association.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Association for the Conservation of Energy (the Association).

The Commissioner finds that the Ministers failed to comply with the EIRs, and particularly regulation 5(1), by failing to identify the information requested as environmental information and deal with the request accordingly under the EIRs.

The Commissioner also finds that the Ministers were not entitled to apply the exceptions in regulations 10(5)(e) and (f) to the withheld information, and consequently that they also failed to comply with regulation 5(1) in refusing to disclose this information.

The Commissioner requires the Ministers to provide the Association with the withheld information by 31 January 2012.

Appeal

Should either the Association for the Conservation of Energy or the Scottish Ministers 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 notice.

Margaret Keyse
Head of Enforcement
9 December 2011



Appendix

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

-

- (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.

...

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-
- ...
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
 - (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or

...