

# Decision Notice

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**Decision 242/2014: Friends of Loch Etive and Argyll and Bute Council**

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## **Section 75 agreement**

Reference No: 201400694

Decision Date: 19 November 2014



Scottish Information  
Commissioner

## Summary

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On 30 January 2014, Friends of Loch Etive (FLE) asked Argyll and Bute Council (the Council) for a copy of, and correspondence relating to, a proposed section 75 planning agreement.

The Council responded by stating that it did not hold the draft section 75 agreement and that correspondence relating to the agreement was excepted from disclosure under the EIRs. The Commissioner investigated and found that the Council had properly responded to FLE's request for information in accordance with the EIRs.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), 5(e) and (6) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 30 January 2014, FLE (through their solicitor) asked the Council for information. The information requested related to a planning application for a fish farm at Loch Etive, specifically:
  - a copy of the draft section 75 agreement and
  - all correspondence to or from any party and any other information held by the Council, concerning the proposed section 75 agreement.
2. In this decision, all references to communications with FLE should be read as including communications with FLE's solicitor acting on their behalf.
3. The Council responded on 27 February 2014. It stated that it did not hold the draft section 75 agreement, citing regulation 10(4)(a) of the EIRs. In relation to the correspondence, the Council refused the request on the basis that regulations 10(4)(e) and 10(5)(e) applied.
4. On 27 February 2014, FLE wrote to the Council requesting a review of its decision. FLE claimed the Council had applied regulation 10(5)(e) incorrectly. They did not accept that disclosure would cause substantial harm to a legitimate economic interest, and argued that the information related to information on emissions (so regulation 10(6) applied and the exception could not).
5. The Council notified FLE of the outcome of its review on 27 March 2014. The Council maintained that it had been correct in saying it did not hold the draft agreement on receiving the request: the agreement had now been completed and the Council provided FLE with website link to a copy. In relation to the correspondence, the Council maintained its position that regulations 10(4)(e) and 10(5)(e) applied to the information. With regard to regulation

10(6), the Council stated that there was no information relating to emissions in the withheld information.

6. On 31 March 2014, FLE wrote to the Commissioner. They 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. FLE stated they were dissatisfied with the outcome of the Council's review, claiming the Council had applied an incorrect test in addressing whether regulation 10(6) was engaged.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that FLE 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.
8. On 3 April 2014, the Council was notified in writing that FLE had made a valid application. The Council was asked to send the Commissioner the withheld information. The Council provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give Scottish public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. Particular reference was made to the application of regulation 10(6) of the EIRs, as highlighted in FLE's application.
10. During the investigation some information (consisting of administrative correspondence) was disclosed to FLE by the Council.

## **Commissioner's analysis and findings**

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11. 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 FLE and the Council. She is satisfied that no matter of relevance has been overlooked.
12. Planning permission for a new fish farm on Loch Etive was granted by the Council in January 2014, conditional on a section 75 planning agreement<sup>1</sup> that impacted upon two other fish farms.

### **Regulation 10(5)(e)**

13. FLE's application to the Commissioner focussed on whether the Council had taken proper account of regulation 10(6) of the EIRs when applying this exception to the withheld information rather than on the application of 10(5)(e) itself. Given that the application also included the more general request that the Commissioner consider the Council's refusal to disclose the requested information, the Commissioner will first consider the Council's application of the exception in regulation 10(5)(e).
14. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely

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<sup>1</sup> Section 75 of the Town and Country Planning (Scotland) Act 1997

to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.

15. 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)).
16. The Aarhus Convention: an Implementation Guide<sup>2</sup>, which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (page 82) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law 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.
17. Having taken this guidance into consideration, the Commissioner’s 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?*

18. The Council explained that the withheld information was commercial in nature as it related to discussions/negotiations between the parties and the parties’ solicitors regarding the assumption of obligations/undertakings that would affect the parties’ ability to undertake commercial activities upon Loch Etive.
19. Having considered the withheld information, the Commissioner accepts that the information is commercial in nature, for the reasons argued by the Council.

*Does a legally binding duty of confidence exist in relation to the information, and is the information publicly available?*

20. In the Commissioner’s view, confidentiality “provided for by law” will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
21. The Council submitted that there was a legally binding duty of confidence between the parties involved in the discussions/negotiations relating to the formation of any contract. In this case, it argued, the information in the withheld correspondence, which related to these discussions/negotiations, should remain confidential.

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<sup>2</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)

22. The Commissioner has considered this information in detail, taking account of the nature and context of these exchanges. She notes that the exchanges are about negotiation of the specific terms of the section 75 agreement.
23. In the circumstances, the Commissioner is satisfied that an implied duty of confidence existed in relation to these exchanges. The Commissioner is also satisfied that the information was not publicly available at the time the Council responded to FLE's request and requirement for review.

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

24. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
25. The Council explained that at the time of responding to the request and requirement for review, there was a real threat that FLE were going to apply for Judicial Review of the Council's decision to grant the planning application subject to the section 75 agreement. They explained why they considered disclosure in this context would have been likely to cause material harm to the economic interests of the fish farm operator and other interested parties.
26. Having considered these submissions, and in the absence of any arguments to the contrary from FLE, the Commissioner is satisfied that disclosure of the withheld information, in response to FLE's request for review, would have been likely to cause substantial harm to a legitimate economic interest.
27. The Commissioner is satisfied, therefore, that the Council was entitled to apply the exception in regulation 10(5)(e) to the information requested.

*The public interest*

28. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from FLE, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This 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.
29. The Council concluded that it was not in the public interest for the information to be disclosed. It acknowledged a public interest in being open and transparent in relation to the planning process and the implementation of planning decisions. However, this was outweighed by public interest in maintaining confidentiality and ensuring that a legitimate economic interest was not harmed substantially.
30. FLE's focus was on regulation 10(6) and it provided few arguments applicable to the public interest in relation to regulation 10(5)(e). In correspondence with the Council, they did not accept that disclosure of the information would necessarily cause substantial harm to a legitimate economic interest.
31. The Commissioner has already concluded that disclosure of this information would be likely to cause substantial harm to a legitimate economic interest, and also that there is an implied

duty of confidence exists in relation to this information. As she has recognised in previous cases, there is a strong public interest in maintaining confidentiality.

32. The Commissioner also recognises a strong public interest in a transparent and accountable planning process. In this connection, she has taken account of the generally transparent nature of the process, to which negotiations of this kind are a significant exception. She notes that the agreement itself has been made available to FLE.
33. The Commissioner considered carefully all the public interest arguments presented by both parties. She must consider the actual circumstances of each case, taking into account the arguments actually presented to her.
34. In all of the circumstances of this case, including the arguments from both parties, the Commissioner finds that the public interest in maintaining the exception outweighed that in making the information available, at the time the Council dealt with FLE's request and requirement for review.
35. The Commissioner concludes that the Council was entitled to withhold this information under regulation 10(5)(e), assuming regulation 10(6) did not apply to the information.

### **Regulation 10(6) of the EIRs**

36. Regulation 10(6) of the EIRs states that a Scottish public authority is not entitled to refuse to make information available under a number of exceptions (including that in regulation 10(5)(e)) to the extent that it relates to information on emissions.
37. FLE argued that the operation of marine-cage fish farm always involves the discharge of waste food, faeces, chemical therapeutants, escapee fish and other emissions into the wider sea-loch environment. They submitted that the three farms under consideration here were no different.
38. FLE argued that how the section 75 agreement was negotiated, and whether or not the section 75 agreement was valid, had a very real and significant influence on where and at what magnitude those discharges and emissions occurred within Loch Etive.
39. In FLE's view, the Council applied the wrong test in addressing whether regulation 10(6) was engaged. They submitted that the correct test was whether anything requested was "information relating to information on emissions". In their view, this was a considerably wider test than whether the information related to emissions (the test the Council applied).
40. FLE argued that correspondence on the implementation of a planning condition, which in effect dictated the number, size and location of fish-farms on Loch Etive, was caught by that wider test.
41. The Council's position was that the withheld information did not meet either test. It stated that the section 75 agreement did not seek to regulate the discharge of waste food, faeces, chemical therapeutants, escaped fish or other emissions in respect of the proposed development. It explained that such emissions were regulated by the Scottish Environment Protection Agency (SEPA), which had already granted a Controlled Activities Regulations (CAR) licence prior to the decision of the Council.
42. The term "emissions" is not explicitly defined in the EIRs, or in the European Directive on access to environmental information (2003/4/EC) which they are intended to implement. The

Aarhus Convention: An Implementation Guide (2013) refers to the definition of “emissions” contained in the Industrial Emissions Directive<sup>3</sup> as:

*“direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water, or land”*

43. When considering the definition of emissions, the Commissioner has also taken account of a recent ruling of the EU General Court<sup>4</sup> (*T-545/11, Stichting Greenpeace Nederland and PAN Europe v European Commission*) which required the European Commission to disclose environmental pesticide information to NGOs. The Court rejected the Commission’s claim that the notion of emissions into the environment should be interpreted restrictively. It ruled that:

*“...in order for the disclosure to be lawful, it suffices that the information requested relate in a sufficiently direct manner to emissions into the environment”*

44. On the other hand, the Commissioner can find no basis for attaching any weight to the double reference to “information” in regulation 10(6). The equivalent provision in Directive 2003/4/EC (applied by the ECJ in case T-545/11) simply refers to “information on emissions into the environment” and the Commissioner is satisfied in the circumstances that the phrasing of the regulation is simply an error in transposition. She does not believe “information relating to information”, in this context, has any wider import than “information”. She believes the approach taken by the ECJ should be followed in interpreting the EIRs in this case.
45. The Commissioner must therefore consider whether the withheld information can be considered to relate in a sufficiently direct manner to emissions into the environment. She must consider the actual information withheld and the actual arguments she has received.
46. The Commissioner understands the reasoning given by FLE (summarised from paragraph 37 above) about the operations of fish-farms, but she must take into account the actual information withheld, not the expectation of what is held. Having considered the withheld information, the Commissioner is satisfied that it does not relate in a sufficiently direct manner to emissions into the environment.
47. Consequently, the Commissioner concludes that the Council was correct in its application of regulation 10(5)(e) to the information requested, there being no basis for applying regulation 10(6).

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<sup>3</sup> Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), article 3, para. 4

<sup>4</sup>

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d671c7e3e0c90443968f16e40894707f60.e34KaxiLc3gMb40Rch0SaxuObhn0?text=&docid=142701&pageIndex=0&doclang=EN&mode=Ist&dir=&occ=first&part=1&cid=207688>

## **Decision**

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The Commissioner finds that Argyll and Bute Council complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Friends of Loch Etive.

## **Appeal**

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Should either Friends of Loch Etive or Argyll and Bute Council 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**

**19 November 2014**



### 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;
- (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;

...

(6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**