

Decision Notice

Decision 036/2015: Firm A and Fife Council

Report on Dunfermline Flood Prevention Scheme

Reference No: 201402552

Decision Date: 25 March 2015



Scottish Information
Commissioner

Summary

On 1 September 2014, Firm A asked Fife Council (the Council) for a report on the Dunfermline Flood Prevention Scheme.

The Council failed to respond to this request but, following a request for review, the Council provided Firm A with a redacted version of the report, withholding some information. Firm A remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had correctly withheld information under regulations 10(4)(e) and 10(5)(b) of the EIRs, but partially failed to respond to Firm A's request for information in accordance with the EIRs by failing to provide some information which it later disclosed. She did not require the Council to take any action in relation to this failure.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (c) and (f) of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2), (4)(e) and (5)(b) (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

1. In 2004, the Council commissioned Atkins Consulting Engineers to design and supervise the on-site construction of the Dunfermline Flood Protection Scheme (DFPS). Tenders were issued in late 2006 and Byzak was selected as the main contractor in February/March 2007. Work on the DFPS began in 2007 and was expected to take two years to complete, but it is still unfinished and is significantly over budget. There have been various legal disputes between the parties during the lifetime of the project.
2. On 1 September 2014, Firm A made a request for information to the Council, asking for a copy of the report on the DFPS referred to in the minutes of the Council Management Team meeting of 8 January 2014.
3. The Council failed to respond to this request.
4. On 2 October 2014, Firm A wrote to the Council requesting a review of its decision on the basis that it had failed to provide a response.
5. The Council notified Firm A of the outcome of its review on 28 October 2014. The Council acknowledged that it had failed to meet the statutory timescales for response. It provided FIRM A with a redacted version of the report, noting that it was withholding information under regulations 10(4)(e) and 10(5)(b) of the EIRs.
6. On 31 October 2014, Firm A wrote to the Commissioner. Firm A 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.

7. Firm A stated that they were dissatisfied with the outcome of the Council's review because they did not accept the redactions made by the Council. Nor had the Council provided them with any of the appendices to the report, or given them any reason why the appendices were being withheld.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Firm A 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.
9. On 10 November 2014, the Council was notified in writing that Firm A had made a valid application. The Council was asked to send the Commissioner the information withheld from Firm A. The Council provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested. The Council was also asked questions about the six appendices to the report that had not been provided to Firm A.

Commissioner's analysis and findings

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 Firm A and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

12. It is clear from the Council's correspondence with Firm A that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to a flood protection scheme and, as such, the Commissioner is satisfied that it would fall within either paragraph (a), (b) or (f) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision). Firm A has not disputed the application of the EIRs in this case and the Commissioner will consider her decision in what follows solely in terms of that regime.

Withheld Information

13. In this case, the withheld information comprises information redacted from the report on the DFPS, along with five appendices. Appendix 6 and the first sentence of paragraph 2.8 in the report were disclosed to Firm A during the investigation and will not be considered in this decision, beyond noting that in failing to provide this information at the time of its response, the Council failed to comply with regulation 5(1) of the EIRs.

Regulation 10(5)(b)

14. Regulation 10(5)(b) 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 to, prejudice substantially the course of justice, the ability of an individual to receive a fair trial or the ability of any public authority to conduct an inquiry or a criminal or disciplinary nature. As with all exceptions in regulation 10, it is subject to the public interest test in regulation

10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure. The Council applied this exception on the basis that some of the information withheld was subject to litigation privilege and some was subject to legal advice privilege.

15. The Commissioner notes that, unlike section 36(1) of FOISA, the wording of regulation 10(5)(b) does not explicitly except from disclosure information in relation to which a claim to confidentiality of communications could be maintained in legal proceedings (subject to the public interest test). However, in the Commissioner's view, this particular exception will often be applicable to information which is covered by legal professional privilege. The Commissioner will consider the Council's reliance on litigation privilege first.

Litigation privilege

16. The Council has argued that the entirety of the report as well as appendices 1, 2 and 3 are subject to litigation privilege.
17. The Commissioner recognises that the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The principle, derived from the adversarial nature of litigation, is that no party can recover material which another party has made in preparing its own case. Disclosure of information covered by litigation privilege will in many cases lead to substantial prejudice relevant to the exception in regulation 10(5)(b).
18. However, the Commissioner would also note that, even where information is subject to litigation privilege, an authority still must be satisfied that disclosure would, or would be likely to, cause substantial prejudice to the relevant interests before applying regulation 10(5)(b). Whether relevant harm is likely to occur will depend on the circumstances of the particular case under consideration; and the likelihood of substantial prejudice may fade over time.
19. Communications *post litem motam* (i.e. those subject to litigation privilege) are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s or prospective opponent/s will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact. The key question is whether litigation was actually in contemplation at a particular time.
20. For information to be covered by litigation privilege, it must have been created for the "dominant purpose" of obtaining legal advice on the litigation or for lawyers to use in preparing the case. Information created for another purpose before the litigation was anticipated may sometimes still be covered if brought together for the purpose of the litigation. This may be the case if pre-existing documents are relevant to the case and the lawyer has exercised skill and judgement in selecting and compiling them, particularly if the selection of documents reveals the trend of the advice on the case. However, pre-existing documents will not become privileged just by being passed over to a lawyer.
21. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.

22. The Council argued that the entirety of the report and appendices 1, 2, and 3 are exempt from disclosure as they were created in anticipation of litigation. The Council submitted that the report was created with the purpose of advising the Council's Corporate Management Team of the current position regarding contractual disputes relating to the DFPS, as well as setting out the Council's options in relation to current and possible future legal proceedings.
23. The Council submitted that appendices 1 and 2 were prepared by the Council's external agents in order to provide it with specialised advice (legal and other) to enable it to assess how to progress matters. With regard to appendix 3, the Council submitted that this is an internal document which was prepared in contemplation of litigation and to enable internal discussions to take place.
24. Firm A has acknowledged that some of the information redacted from the report may be privileged, but they do not accept that all of the redacted information falls into this category. Firm A consider that the Council has made excessive redactions and they require disclosure of the full report and accompanying appendices.
25. Due to the sensitivity and complexity of the existing legal situation, the Commissioner is not able to reproduce all of the Council's submissions in this decision notice, but she has taken account of all of them. The Commissioner has also considered the content of the withheld information (namely, the report and appendices 1, 2 and 3) and she accepts that the character of the withheld information brings it within the scope of litigation privilege.
26. The information cannot be privileged unless it is also confidential. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conduct of review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the information. Where confidentiality has been lost in respect of part of or all of the information under consideration, any privilege associated with that information is also effectively lost.
27. The Council has argued that it does not consider that legal professional privilege has been waived as the information redacted from the report and the entirety of the accompanying appendices have not been placed in the public domain. The Council noted that the information that it disclosed to Firm A is information that was already in the public domain.
28. Having considered the withheld information in light of the information available in the public domain, the Commissioner is satisfied that privilege has not been waived.
29. Given the confidentiality afforded to these communications, the Commissioner accepts the withheld information was (and remains) subject to litigation privilege. The course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The Commissioner is satisfied that litigation was expected at the time the information was created and accepts that disclosure of this information would, or would be likely to, prejudice substantially the course of justice. She has reached this conclusion bearing in mind the general importance attached by the courts to maintaining confidentiality of communications on administration of justice grounds, and also the specific issues presented by the prospect of litigation in this particular case.
30. Consequently, the Commissioner is satisfied that the Council was entitled to apply the exception in regulation 10(5)(b) of the EIRs to this information.

Legal advice privilege

31. As indicated above, while regulation 10(5)(b) of the EIRS does not specifically except information in relation to which a claim to confidentiality of communications could be maintained in legal proceedings, the Commissioner considers that this exception can apply to information covered by legal professional privilege, including that covered by legal advice privilege.
32. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal adviser, such as a lawyer (including, in most cases, an in-house lawyer) or an advocate. The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client. Privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
33. The Council has submitted that appendix 4 is subject to legal advice privilege. The Council has argued that appendix 4 is a report prepared by its external advisers (a firm of solicitors) on the advantages and disadvantages of various contractual resolutions; that it comprises legal advice from a solicitor to their client; and that legal privilege has not been waived.
34. Having considered the content of the withheld document and the circumstances under which it was obtained (i.e. in the context of a professional relationship between a legal adviser and their client, in the course of which confidential legal advice was requested and provided) the Commissioner is satisfied that the entirety of the information in appendix 4 meets all of the conditions set out in the above paragraph and is subject to legal advice privilege.
35. The Commissioner is satisfied that the Council was entitled to apply the exception in regulation 10(5)(b) to this information.

Public interest test

36. Having found that the Council correctly applied the exception in regulation 10(5)(b) to the information redacted from the report and appendices 1, 2, 3 and 4, the Commissioner is required to consider the public interest test in regulation 10(1)(b). This specifies that a 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.

Arguments from Firm A

37. Firm A has argued that information regarding the decision to terminate a contract for a public project, using public funds, should be made available to, and subject to scrutiny by, the public whose taxes at a local and national level have contributed to the funding of the DFPS. Firm A submitted that the Council has disclosed similar reports (on the DFPS) in the past and that this report should also be made available to the public without redactions.
38. Firm A argued that the DFPS is a project which has exceeded its budget costs and expected timescale by significant margins. Firm A noted that the Council has previously stated that the project is £11 million over budget with a further £2.6 million being invested. Initially scheduled to take two years, the Council reported that it would complete in autumn 2014, some five and a half years late. Firm A noted that these facts are a matter of public record. Firm A also submitted that the DFPS and its problems directly affect the local Dunfermline population as

the works it covers involve road closures and closures to local parks and public spaces as well as works to the gardens of local inhabitants.

39. Firm A argued that it is strongly in the interests of the public for the full unredacted report and appendices to be publicly available so as to understand how the additional public funds that have had to be allocated to the DFPS are being spent, and why, so that the Council can be accountable to, and scrutinised by, the public for its actions.
40. Firm A argued that there is no competing public interest in withholding the information, and that the report and appendices ought to be disclosed.

Arguments from the Council

41. The Council acknowledged that any exception must be interpreted in a restrictive way and that the Council's starting point in assessing the public interest test is a presumption in favour of disclosure. The Council accepted that the DFPS has attracted a significant amount of public interest via the media and, accordingly, there is a strong public interest in ensuring openness and transparency in any decision-making affecting this project, and the expenditure of any additional public funds. The Council also argued that it has been instrumental in providing information to the public to ensure that the public are aware of the current issues.
42. The Council submitted that it is essential that it can communicate with legal advisers and obtain legal advice in confidence in relation to proposed and ongoing actions. The Council argued that it is also essential that it is able to fulfil its functions by defending or pursuing legal actions in the most efficient and informed manner possible, through the provision of legal advice and documents prepared in contemplation of litigation. The Council asserted that it must be able to instruct and/or prepare documents in preparation for litigation safe in the knowledge that this information will not be disclosed to the other party in the legal proceedings until the relevant time. The Council argued that if this was not the case, then a public authority would be placed at a disadvantage in defending or raising legal proceedings and obtaining legal advice.
43. The Council acknowledged that there is undoubtedly a strong public interest in disclosing information concerning the DFPS in general. However, the Council argued that given the likelihood of legal action being taken against the Council, disclosing this information at this time would be detrimental to its ability to defend or raise court proceedings and would place it, as a public authority subject to the EIRs, at a significant disadvantage in legal proceedings and in obtaining legal advice.

Considerations of the Commissioner

44. In determining where the balance of the public interest lies, the Commissioner must take into account the significant weight to be attached, on administration of justice grounds, to the public interest in maintaining confidentiality between legal adviser and client.
45. There may be occasions where this significant public interest is outweighed by the public interest in disclosing the information: where, for example:
 - the requirement for disclosure is overwhelming
 - the privileged material discloses wrongdoing by or within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice

- a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
46. The Commissioner has considered the public interest arguments advanced by both parties, against the considerations set out in the preceding paragraph. The Commissioner notes that the public interest in providing information about the DFPS is considerable, given the substantial increase in its cost and the disruption caused by the excessive delays. In the circumstances, the Commissioner would expect the Council to have clear channels of communication with the public, to ensure that the issues affecting the DFPS are widely known and understood. The Commissioner has considered media coverage regarding the DFPS and it is evident that the Council has been proactive in keeping the public up-to-date with developments affecting the DFPS, and that it has already disclosed a lot of information about the project and the problems affecting it.
47. The Commissioner has considered the report disclosed to Firm A. She is satisfied that the Council has kept its redactions to a minimum and has disclosed a substantial amount of information about the DFPS and the contractual issues affecting the project. The Commissioner is satisfied that the withheld appendices and the information redacted from the report is either subject to litigation privilege or legal advice privilege.
48. The Commissioner acknowledges that disclosing the detailed legal advice and information created in anticipation of litigation would be of some interest to the public, but she does not accept that it would further public understanding of the issues associated with the DFPS to any significant extent, given the wealth of information already disclosed by the Council. The Commissioner considers that disclosure of the withheld information would have a detrimental effect on the Council's ability to defend itself in any future court action and this, in turn, would have a detrimental effect on local taxpayers who would have to fund any financial losses incurred by the Council.
49. On balance, having weighed up the arguments advanced by Firm A and the Council, the Commissioner finds that, in all the circumstances of this case, the public interest in making this information available to Firm A is outweighed by that in maintaining the exception in regulation 10(5)(b) of the EIRs. The Commissioner finds that the acknowledged public interest in transparency and accountability, in relation to the actions and decisions of the Council, is outweighed by the public interest in ensuring that any future court action relating to the DFPS is not prejudiced by disclosure of information which would show the Council's likely position in such legal proceedings. Therefore, although there are good reasons why disclosure of the information might be in the public interest, the Commissioner accepts that there is a greater public interest in withholding the information.
50. Consequently, the Commissioner accepts that the Council correctly withheld the information to which it applied the exception in regulation 10(5)(b) of the EIRs.

Regulation 10(4)(e)

51. The Council applied the exception in regulation 10(4)(e) of the EIRs to the information withheld from the report, along with appendices 3 and 5. As the Commissioner has already found that the information redacted from the report, and the information contained in appendix 3, is excepted from disclosure under regulation 10(5)(b) of the EIRs, she will only consider the application of regulation 10(4)(e) to appendix 5.
52. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal

communications. For information to fall within the scope of the exception, it need only be established that the information is an internal communication.

53. The Commissioner notes that the information contained in appendix 5 was created by Council staff to facilitate internal discussion on the legal advice provided and the options available to the Council. She is satisfied that appendix 5 can be described as an internal communication, and that the exception in regulation 10(4)(e) of the EIRs was correctly applied to this information.
54. The exception in regulation 10(4)(e) is subject to the public interest test in regulation 10(1)(b), which the Commissioner will now consider.

Public interest test

55. 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.
56. The Council argued that it is essential that its staff are able to brief senior officers on matters of major significance to the Council. The Council submitted that these briefings enable discussions to take place freely and frankly at a senior level in order for decisions to be made on the best way forward for the Council and, ultimately, the tax payers of Fife. The Council notes that appendix 5 involves discussions about the Council's legal position in relation to current legal negotiations and ongoing and possible legal actions.
57. The Council acknowledged that there is a general public interest in making information available to the public concerning the DFPS, especially where this helps to ensure a transparent and accountable decision-making process. However, the Council considered that any benefit to the public interest must be balanced against any detriment to the public interest as a consequence of disclosure. The Council maintained that the public interest in withholding appendix 5, and in allowing senior management within the Council to fully discuss in private the legal options available to the Council, particularly when legal matters were still ongoing, outweighed any public interest in the information being disclosed.
58. The Council noted that the information contained in appendix 5 relates to ongoing legal matters. It took the view that disclosure of that information to the public (and therefore to the other party or parties to the legal actions) would be contrary to the course of justice and place a Scottish public authority at a significant disadvantage in any ongoing or future legal proceedings or negotiations.
59. Firm A's arguments for disclosure of appendix 5 mirror their public interest arguments for disclosure of the information withheld under regulation 10(5)(b). Firm A noted that the DFPS is a project which is currently £11 million over budget and is running more than five and a half years late. Firm A stated that the DFPS is a project which is funded by taxpayers; therefore the taxpayers/public should have access to all information in relation to the project.
60. Firm A also noted that when authorities choose to rely on an exception to withhold information, regulation 10(2)(b) of the EIRS requires them to apply a presumption in favour of disclosure. Firm A referred to guidance issued by the Scottish Information Commissioner which states:

“...the starting position is, therefore that there is a public interest in disclosure of environmental information... and that only if there is a stronger competing public interest in withholding the information should the exception be applied”.

Firm A argued that there was no competing public interest in withholding the information and that the withheld information should be disclosed.

61. Having considered the submissions from the Council and Firm A carefully, the Commissioner recognises that there is a public interest in ensuring that the Council is accountable and transparent in the actions taken and decisions it makes, particularly in relation to the DFPS, which has cost a significant amount of public money and which has been subject to many delays.
62. On the other hand, the Commissioner also accepts that there is strong public interest in the Council making the best possible decision for the residents of Fife. She accepts that this should be a fully informed decision, and one which may require the free and frank deliberation of the options contained in legal advice. The Commissioner notes that contractual disputes or disagreements can be complicated and expensive, and she considers that, in the circumstances surrounding this case, there are good reasons why it was in the public interest for the Council to be able to discuss its contractual options in privacy, and good reasons why its views should remain private while legal action is still anticipated.
63. The Commissioner notes that appendix 5 is an internal document, produced by the Council for discussion by the Council, but the focus of that document is the content of the legal advice provided to the Council in appendix 4. Appendix 5 contains the Council’s comments and views on the recommendations of that legal advice, and the Commissioner cannot see how she can order disclosure of any part of appendix 5, without the Council also disclosing part of the content of appendix 4 (which she has already found to be excepted from disclosure in terms of regulation 10(5)(b) of the EIRS).
64. In all the circumstances, therefore, the Commissioner finds that the public interest in making the information in appendix 5 available is outweighed by that in maintaining the exception in regulation 10(4)(e). The Council was therefore entitled to withhold appendix 5 under this exception.

Cumulative public interest test

65. The Council applied the exceptions contained in regulation 10(4)(e) and 10(5)(b) to all of the information redacted from the report, and the entirety of appendix 3. In cases where authorities apply more than one exception to information the Commissioner must have regard to the judgement of the European Court of Justice (ECJ) in the case of *OFCOM v the Information Commissioner*¹.
66. In that judgement, the ECJ considered how the public interest test should be addressed under the EIRs, in cases where more than one exception has been found to apply to the same information. The ECJ concluded that, in such cases, a two stage public interest test should be carried out.

¹ <http://www.bailii.org/eu/cases/EUECJ/2011/C7110.html>

- (i) The first step (undertaken above) is to consider, in relation to each exception judged to apply, whether the public interest in disclosing that information is outweighed by the public interest in maintaining the exception.
- (ii) The second test is then to cumulatively weigh all grounds for refusing to disclose the information against all of the public interests served by disclosure, and to come to a decision as to whether the information should be disclosed.

67. The Commissioner obtained submissions from both the Council and Firm A on the cumulative public interest test. The arguments provided by both parties in this respect reflect the arguments already provided. Having considered the submissions, the Commissioner is satisfied that the cumulative public interest favours maintaining the exception.

68. The Commissioner therefore finds that the Council was correct to withhold information from Firm A in terms of regulations 10(4)(e) and 10(5)(b) of the EIRs.

Decision

The Commissioner finds that Fife Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Firm A.

The Commissioner finds that the Council correctly withheld the entirety of appendices 1, 2, 3, and 4 along with information redacted from the report under regulation 10(5)(b), and correctly withheld the information in appendix 5 under regulation 10(4)(e).

The Council's response failed to comply fully with regulation 5(1) of the EIRs, in failing to provide information which was later disclosed during the investigation.

Given that this information has now been provided, the Commissioner does not require the Council to take any further action in respect of Firm A's application.

Appeal

Should either Firm A or Fife 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

25 March 2015

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;

...

(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;

...

(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.

(2) The duty under paragraph (1)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(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.

...

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

...

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

- (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-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

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