

# Decision Notice

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**Decision 164/2016: Friends of Loch Etive and Argyll and Bute Council**

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## **Section 75 agreement**

Reference No: 201600059

Decision Date: 20 July 2016



Scottish Information  
Commissioner

## Summary

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On 28 October 2015, Friends of Loch Etive (FoLE) asked Argyll and Bute Council (the Council) for information relating to a section 75 planning agreement for a fish farming development at Loch Etive.

The Council withheld the information under regulations 10(4)(e) (internal communications) and 10(5)(e) (commercial confidentiality) of the EIRs.

The Commissioner investigated and found that the information was not excepted from disclosure. She ordered the Council to disclose the information to FoLE.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (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), (4)(e) and (5)(e) (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. In this decision, all references to FoLE should be read as including FoLE’s solicitors, acting on its behalf.
2. On 30 January 2014, FoLE asked the Council for information. The information requested related to a planning application for a fish farm at Loch Etive. Part of this request sought all correspondence to or from any party and any other information held by the Council, concerning the proposed section 75 agreement. This request was appealed to the Commissioner, resulting in *Decision 242/2014 Friends of Loch Etive and Argyll and Bute Council*<sup>1</sup>. This decision concluded that the Council was entitled to withhold information under regulation 10(5)(e) of the EIRs.
3. On 24 November 2014, FoLE made another request for information to the Council. On this occasion, FoLE sought the same information as requested in January 2014 and, in addition, all information held by the Council concerning the proposed section 75 agreement, covering the period 30 January 2014 to the date of completion of the agreement. This request was also appealed to the Commissioner, resulting in *Decision 159/2015 Friends of Loch Etive and Argyll and Bute Council*<sup>2</sup>. This decision concluded that the Council was entitled to withhold the information under regulations 10(4)(e) and 10(5)(e) of the EIRs.
4. On 28 October 2015, FoLE made a further request for information to the Council. The information requested was identical to that requested on 24 November 2014 (although the circumstances had changed).

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400694.aspx>

<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201500282.aspx>

5. The Council responded on 25 November 2015. The Council withheld the information under the exceptions in regulation 10(4)(e) and regulation 10(5)(e) of the EIRs.
6. On 30 November 2015, FoLE wrote to the Council requesting a review of its decision. In FoLE's view, the exception in regulation 10(5)(e) was not engaged. In relation to regulation 10(4)(e), FoLE submitted that the Council had not applied the public interest test correctly.
7. The Council notified FoLE of the outcome of its review on 22 December 2015. The Council upheld its previous decision. In relation to the public interest test for regulation 10(4)(e), the Council stated that its public interest arguments were the same as those provided previously for regulation 10(5)(e).
8. On 11 January 2016, FoLE wrote to the Commissioner. FoLE 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. FoLE stated that it was dissatisfied with the outcome of the Council's review as it did not consider the exception in regulation 10(5)(e) was engaged. In relation to both exceptions, FoLE submitted that the public interest favoured making the information available.

## **Investigation**

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9. The application was accepted as valid. The Commissioner confirmed that FoLE 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.
10. On 1 February 2016, the Council was notified in writing that FoLE had made a valid application. The Council was not required to send the Commissioner the information withheld from FoLE as it was still in the Commissioner's possession following the previous decision issued in October 2015.
11. 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, focusing on the application of the exceptions cited by the Council when responding to FoLE.
12. The Council subsequently responded, stating that it wished to rely on the explanations provided in its responses to FoLE and (in relation to the public interest) those provided to the Commissioner in relation to FoLE's previous applications.

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

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13. 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 FoLE and the Council. She is satisfied that no matter of relevance has been overlooked.
14. 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>3</sup>.
15. The Council's decision to grant planning permission was subject to judicial review proceedings raised by FoLE. The Court of Session issued its opinion on 27 May 2015<sup>4</sup>.

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<sup>3</sup> Section 75 of the Town and Country Planning (Scotland) Act 1997

16. The Council responded to FoLE's request under the EIRs. FoLE did not challenge this in its application. Having considered the withheld information, the Commissioner is satisfied that it falls within the definition of "environmental information" contained in regulation 2(1)(a), (b) and (c) of the EIRs. In what follows, the Commissioner will consider the handling of the request solely in terms of the EIRs.

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

17. 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 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. As with all 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 disclosed 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)).
19. The Aarhus Convention: an Implementation Guide<sup>5</sup>, which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (at page 88) 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.
20. 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:
- (i) Is the information commercial or industrial in nature?
  - (ii) Does a legally binding duty of confidence exist in relation to the information?
  - (iii) Is the information publicly available?
  - (iv) 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?*

21. The Council referred the Commissioner to its response of 25 November 2015, and its review response of 22 December 2015, to FoLE. These stated that the withheld information related to discussions/negotiations between the parties and their solicitors regarding the assumption of obligations/undertakings that would affect the parties' ability to undertake commercial activities on Loch Etive.
22. The Commissioner has considered the information and is satisfied that it represents a single negotiating process, relating to a commercial enterprise, which continued until the section 75

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<sup>4</sup> <https://www.scotcourts.gov.uk/search-judgments/judgment?id=4743d9a6-8980-69d2-b500-ff0000d74aa7>

<sup>5</sup>

[http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

agreement had been entered into. Therefore, she accepts that all of the information is commercial in nature

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

23. 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.
24. The Council asserted that the information remained – and should remain – confidential.
25. In the circumstances, having considered the Council's submissions and the withheld information, the Commissioner accepts that an implied duty of confidence existed in relation to these exchanges. The Council's submissions on this point are insubstantial, but the Commissioner acknowledges that the exchanges to which this exception has been applied are negotiations about the section 75 agreement, which would have been conducted under a reasonable expectation of confidentiality. The Commissioner is satisfied that the information was not publicly available at the time the Council responded to FoLE's request (and has not become so subsequently).

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

26. 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.
27. The Council submitted that the third party developer continued to undertake commercial activities upon Loch Etive and noted that obligations had been placed on the developer by the section 75 agreement. The Council stated that the developer had implemented the planning permission to which the section 75 agreement related and in doing so would have made a considerable financial investment.
28. The Council stated that it remained open to the developer to make further planning applications to the planning authority in respect of the fish farms operated by them on Loch Etive and/or to deal with their interests on other Loch Etive sites. The Council argued that disclosure of the information requested might affect the ability of the developer to enter into future negotiations regarding such planning applications and to deal with their interests upon Loch Etive as a tenant of the Crown Estate.
29. In the Council's view, therefore, the developer had a legitimate interest in the information remaining confidential. The Council submitted that there was a real risk of harm to the developer should it be prejudiced in any future negotiations regarding the operation of its sites across Loch Etive. The Council stated that the developer would be so prejudiced if the information did not remain confidential.
30. The Council noted that consolidation and rationalisation of sites in the developer's control might be required in the future to enable the developer to either develop new sites, or modify existing sites in accordance with planning policy. The Council stated that negotiation and agreement between the developer, the Council and the Crown Estate Commissioners might be required to achieve this. In the Council's view, disclosure of the withheld information might substantially prejudice the developer's ability to enter into such negotiations and might prohibit the proper functioning of the planning process.

31. The Council also argued that its own ability to determine future planning applications in respect of marine fish farms might well be inhibited by opening up the matters discussed in the withheld information to public scrutiny.
32. The Council did not consider the conclusion of the judicial review to affect its position, submitting that the existence the judicial review was not the sole reason why disclosure would cause substantial prejudice in the case which led to *Decision 159/2015*.
33. FoLE stated that previous decisions issued by the Commissioner had noted that the overall effect of any legally binding duty of confidence declined over time. FoLE referred to *Decision 159/2015* and noted that the decision focussed on the fact that judicial review proceedings were ongoing at the time of the previous request.
34. FoLE noted that the withheld information did not relate to any future planning applications on Loch Etive which might, or might not, be made by the developer, but to discussions regarding the section 75 agreement, which had been made and against which no legal challenge was now possible.
35. FoLE considered the Council's application of regulation 10(5)(e) failed in relating to some future, as yet unknown, planning application. FoLE pointed out that the Council had stated that disclosure of the information might cause substantial prejudice and this failed to meet the test for the exception.
36. The Commissioner has considered the arguments presented by both FoLE and the Council carefully.
37. The Commissioner acknowledges that the Council's submissions refer to planning applications which might be made in the future, and to discussions and negotiations which might take place as a result. In her view, these submissions are essentially hypothetical and are predicated on conjecture as to events that could happen at some indeterminate point in the future. The language used by the Council in its submissions is entirely speculative, with no reference to why the events in question could be considered likely.
38. For the exception to apply, disclosure must be at least likely to cause substantial prejudice to a legitimate economic interest. The Commissioner acknowledges that the developer has such an interest in its activities on Loch Etive, and potentially in relation to future negotiations affecting them, but the Commissioner is not satisfied that the Council has demonstrated how disclosure of the specific information withheld in this case would impact upon its ability to pursue and defend these interests. As indicated above, it has provided nothing to suggest that future applications and negotiations are even likely, never mind explain how substantial prejudice would (or would be likely to) be caused to them by disclosure of the withheld information.
39. The Commissioner must be satisfied that any harm to the economic interest caused by disclosure would be substantial, in other words and of real and demonstrable significance. It must be at least likely, so there must be at least a significant probability of it occurring. It is not enough that it might, possibly, occur at some unspecified time in the future.
40. Having taken all of the Council's submissions into consideration, and those received from FoLE, the Commissioner is not persuaded that disclosure of the information would, or would be likely to, result in the harm the Council has claimed. The Council has referred to the commercial sensitivity and confidentiality of the information, but has provided no evidence as to why this should be considered an actual or likely consequence of disclosure.

41. In the circumstances, having considered the content of the withheld information and the speculative nature of the Council's submissions, it is not evident to the Commissioner that disclosure of the information 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.
42. Consequently, the Commissioner must conclude that the exception in regulation 10(5)(e) of the EIRs is not engaged and the Council was not entitled to withhold information under this exception. As the Commissioner is not satisfied that the exception is engaged, she is not required to consider the public interest test in regulation 10(1)(b).

### **Regulation 10(4)(e)**

43. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. If the Commissioner finds that a document is an internal communication, she will be required to go onto to consider the public interest test.
44. The Council applied this exception to information comprising internal communications between officers of the Council.
45. Having considered the information withheld by the Council under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). She must go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

### *The public interest*

46. The Council did not address the public interest test in relation to regulation 10(4)(e) in its initial response to FoLE. In its review response, the Council informed FoLE that the same public interest arguments as it had applied to regulation 10(5)(e) were applicable also to regulation 10(4)(e).
47. The Council argued that the public interest in disclosure of the information outweighed that in maintaining the exception. The Council acknowledged that there was generally a public interest in transparent and accountable planning processes, and that most aspects of the planning process were open to public scrutiny. It considered negotiations of the kind detailed in the withheld information to be a significant exception.
48. The Council also submitted that its own ability to determine future planning applications in respect of marine fish farms might well be inhibited by opening up the matters discussed in the withheld information to public scrutiny. It did not believe such inhibition would be in the public interest.
49. Additionally, in the Council's view, the conclusion of the judicial review proceedings did not cause the public interest in making the information available to outweigh that in maintaining the exception. It did not consider the judicial review to be the sole reason why the disclosure of the information would, or would be likely to cause, substantial harm to the commercial interest of a third party.
50. In its submissions to the Commissioner, the Council stated that it wished to rely on its public interest arguments submitted previously in the cases which led to *Decision 242/2014* and

*Decision 159/2015.* The Commissioner does not intend to repeat all of those submissions here. In summary, the Council argued that there was a strong public interest in maintaining confidentiality and that the substantial harm which it considered would ensue from disclosure would not be in the public interest.

51. The Council also explained that it had previously disclosed internal documents to FoLE where it considered the public interest in making the information available outweighed that in maintaining the exception.
52. FoLE submitted that it was settled law that across the whole surface of the loch (as with all sea lochs) there was a public right to navigate, bringing with it the right to enjoy the loch surface for recreational purposes. FoLE also stated that there was a public right to fish, allied to which there was a consequent legitimate public interest in the health of the wild fish populations (which, it stated, could be negatively impacted by fish farming operations).
53. FoLE stated that these public rights were interfered with, to a greater or lesser degree, by the positioning of fish farming equipment and the operations of fish farms on a sea loch. FoLE submitted that the accepted method of control, by which this interference was kept within reasonable limits, was the planning process operated by the Council.
54. FoLE argued that there was a very significant public interest in disclosure of information as to how development on sea lochs was permitted and how public legal rights were qualified, curtailed or interfered with by any developments permitted by planning authorities.
55. FoLE also referred to the wording of regulation 10(2) of the EIRs which provide that authorities shall interpret the exceptions in regulation 10(4) and regulation 10(5) in a restrictive way and apply a presumption in favour of disclosure. In FoLE's view, in a case such as this, where there had been a planning dispute, the disclosure of the information was all the more important.
56. The Commissioner has considered all of these submissions carefully, alongside the withheld information (which she has accepted comprises internal discussions among Council officers).
57. As noted above, the Commissioner has accepted previously (in *Decision 159/2015*) that the Council was entitled to withhold this information under this exception. At the time of that decision, judicial review proceedings were ongoing. In *Decision 159/2015*, the Commissioner accepted that the public interest lay in allowing the Court of Session to complete those proceedings and reach a decision. In her view, that task might well have been inhibited by opening the matters under consideration by the Court to additional public scrutiny outwith the judicial review process.
58. In the Commissioner's view, the public interest in the disclosure of information will change over time, depending on the circumstances prevailing at any given time. In this case, she considers the conclusion of the judicial review represented a significant change in circumstances.
59. The Commissioner notes the Council's position that the judicial review was not the sole reason why harm would ensue should the information be disclosed, and (in the Council's view) its conclusion did not cause the public interest to favour making the information available. In the Commissioner's view, it should have been apparent to the Council that the existence of the judicial review was a very substantial reason for her reaching the conclusion she did in that earlier decision. The Council was given the opportunity to provide reasons why disclosure would not be in the public interest in the present (changed) circumstances but it elected to rely on its earlier arguments.



60. In the current circumstances of this case, the Commissioner considers the arguments put forward by the Council are weak, unsubstantiated and hypothetical. They are not focused in any detail on circumstances following conclusion of the judicial review. The Council has submitted that disclosure of the information may cause significant harm to the developer's interests and may inhibit its own ability to determine future planning applications. In the Council's view, such harm and inhibition would not be in the public interest. The Commissioner is not convinced (on the basis of the submissions provided) of the likelihood of such harm either happening or being substantial.
61. Set against the conjectural nature of the Council's arguments, the Commissioner considers there is a strong public interest in allowing public scrutiny of the information withheld in this case. In her view, this would add to the public's understanding of the process and reasoning which led to the conclusion of the section 75 agreement, particularly in light of the public rights identified by FoLE. There is a public interest in understanding how these public rights were taken into consideration during the process.
62. The Commissioner has taken into account the terms of regulation 10(2)(b) of the EIRs (applying a presumption in favour of disclosure) and considered carefully the submissions made by both parties and the timing of the request. Having done so, she is satisfied that the public interest in making this information available is not outweighed by that in maintaining the exception in regulation 10(4)(e). Consequently, the Council was not entitled to withhold the information to which it applied regulation 10(4)(e) of the EIRs.

### **Consideration of the cumulative public interest test and the Commissioner's conclusion**

63. In some instances, the Council has applied the exceptions in regulation 10(4)(e) and 10(5)(e) of the EIRs to the same information. Where authorities apply more than one exception to the same information, the Commissioner must have regard to the judgment of the European Court of Justice (ECJ) in the case of *OFCOM v the Information Commissioner* [2011] EUECJ C-71/10<sup>6</sup>.
64. In that judgment, the ECJ considered how the public interest test should be addressed where more than one exception has been applied to the same information. The ECJ concluded that, in such cases, a two stage public interest test should be carried out:
  - (i) The first step 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.
65. In terms of the cumulative public interest test, the Council submitted that the arguments it had provided in relation to each of the exceptions, on their own, were sufficient to allow the Commissioner to find in its favour. Consequently, in the Council's view, the cumulative effect of its consideration of the public interest test was an even stronger argument that the public interest favoured maintaining the exceptions.

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<sup>6</sup> <http://www.bailii.org/eu/cases/EUECJ/2011/C7110.html>

66. The Commissioner is not persuaded by the Council's reasoning. The cumulative public interest is not simply an aggregation of the outcomes of the tests applied in relation to a number of exceptions, but a considered evaluation and balancing of the cumulative grounds for and against disclosure. In any case, the Commissioner has not accepted that the exception in regulation 10(5)(e) was engaged here, or that the public interest in relation to regulation 10(4)(e) favoured maintaining that exception, reducing any weight the Council's arguments may have had.
67. On balance, the Commissioner considers the overall public interest favours disclosure of the information. In the circumstances, the Commissioner is satisfied that the Council was not entitled to withhold the information requested by FoLE under either regulation 10(4)(e) or regulation 10(5)(e) of the EIRs. Consequently, she now requires the Council to disclose all of the withheld information to FoLE.

## Decision

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

The Commissioner finds that the Council was not entitled to withhold the information under regulations 10(4)(e) and 10(5)(e) of the EIRs.

The Commissioner therefore requires the Council to disclose all of the withheld information by **5 September 2016**.

## 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.

## Enforcement

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If Argyll and Bute Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**20 July 2016**

### 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.

...

- (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-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

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