

# Decision Notice



Decision 105/2010 Prestoungrange Arts Festival (2006) Limited and the  
Scottish Ministers

Application under Land Reform (Scotland) Act 2003

Reference No: 200900868  
Decision Date: 21 June 2010

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Dr Prestoungrange, on behalf of Prestoungrange Arts Festival Limited (PAF), requested from the Scottish Government (the Ministers) information relating to the valuation and consideration of an application under the Land Reform (Scotland) Act 2003 (LRSA). The Ministers responded by providing some information but withholding some in terms of section 25 of FOISA in that it was otherwise available to PAF. Following a review, during which the Ministers indicated that information supplied by a third party in confidence was withheld under section 36 of FOISA, PAF remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation the Ministers released further information and accepted that PAF's information request should have been dealt with under the EIRs. The Ministers therefore relied upon section 39(2) of FOISA and sought to rely on the exceptions in regulations 6(1) and 10(4)(e), (4)(d), (5)(d), (5)(e) and (5)(f) of the EIRs for withholding some information.

Following an investigation, the Commissioner found that the Ministers had dealt with PAF's request for information in accordance with Part 1 of FOISA by relying upon section 39(2) of FOISA. He also found that the Ministers complied with the EIRs by correctly applying the exception in regulations 10(4)(e) and (5)(d) of the EIRs in withholding information from PAF.

## Relevant statutory provisions and other sources

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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 of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request) and 10(1), (2), (4)(e) and (5)(d) (Exceptions from duty to make environmental information available)

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



## Background

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1. PAF had made an application under the Land Reform (Scotland) Act 2003 (LRSA) to register an interest in land at Prestonpans, East Lothian. This was refused under section 39(5) of the LRSA, on the grounds that the land was the subject of an agreement to sell.

### *First request*

2. On 10 November 2008, PAF wrote to the Ministers in relation to the matter and included in this correspondence was a request for the following information:
  - a. *... all information relating to your evaluation and consideration of our Application including details of the putative Option to Sell that Lidl GmbH entered into; together with such Framework Agreement as your Division might operate under when acting in the name of Scottish Ministers.*
  - b. *Please confirm to which Scottish Minister in particular your Division reports who will answer Questions in Parliament.*
3. The Ministers responded on 25 November 2008 and provided some of the information it held to PAF. The Ministers informed PAF that some of the information held was exempt in terms of section 25 of FOISA, in that PAF had already received this information and most of it was available on the Register of Community Interest in Land (to which it provided a link). In relation to further information, the Ministers stated they were relying upon various other sections of FOISA in withholding it.
4. The Ministers also informed PAF that they were unclear what was meant by "Framework Agreement", but advised that individuals might be authorised to act on behalf of Ministers in taking decisions (Ministers remaining accountable for those decisions). The Ministers also advised that the Scottish Minister whose portfolio included Community Right to Buy was Michael Russell MSP.
5. PAF did not receive the response of 25 November 2009 and, on 25 February 2010, wrote to the Ministers requesting a review.
6. On 26 February 2009 the Ministers responded to the request for review, providing a copy of the response and attachments previously sent on 28 November 2008. At this time, the Ministers also confirmed that the Minister responsible had changed to Roseanna Cunningham.

### *Second request*

7. On 12 March 2009, PAF wrote to the Ministers again, requesting the following:
  - a. *Will you please now provide us with the full details of the Option itself and the Terms and Conditions of that Option that led you to reject our Application and your reasoning for which your Minister is responsible.*



- b. *Will you please also notify us to whom, if anyone, we should now properly make any appeal concerning your redactions prior to taking the matter to the Scottish Commissioner for Information.*
8. The Ministers responded on 8 April 2009, informing PAF that the correspondence comprising the option agreement was withheld under section 36 of FOISA, having been supplied in confidence by a third party. In relation to point ii) at paragraph 7 above, the Ministers apologised that PAF had not been informed of the right to request a review in previous correspondence and explained the relevant process.
9. While PAF did not request a review at this time, the Ministers further wrote to PAF on 6 May 2009, indicating that a review had been carried out in relation to the response to its request of 12 March 2009. The Ministers informed PAF that the original decision was being upheld in that the information had been supplied in confidence by a third party.
10. On 10 September 2009, following correspondence with the Commissioner's Office, PAF wrote to the Ministers requesting a review in respect of the original requests dated 10 November 2008 and 12 March 2009. In particular, PAF stated that its dissatisfaction lay in the Ministers' failure to respond favourably to the requests.
11. The Ministers notified PAF of the outcome of their review on 8 October 2009. The Ministers confirmed their earlier decisions in respect of the withholding of information, while apologising again for their failure to provide information on PAF's right to seek a review.
12. On 16 October 2009 PAF wrote to the Commissioner's Office, 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.
13. The application was validated by establishing that PAF 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.

## Investigation

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14. On 12 November 2009, the Ministers were notified in writing that an application had been received from PAF and were asked to provide the Commissioner with any information withheld from PAF. The Ministers responded with the information requested, which consisted of 20 documents (some duplicated) and the case was then allocated to an investigating officer.



15. 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 to consider whether any of the information requested should have been dealt with as environmental information under the Environmental Information (Scotland) Regulations 2004 (the EIRs) and to justify their reliance on any provisions of FOISA and/or the EIRs they considered applicable to the information.
16. The Ministers accepted that the information requested by PAF was environmental information falling more appropriately under the EIRs and therefore indicated that they were relying upon section 39(2) of FOISA. The Ministers also considered that the majority of the requested information was subject to regulation 6(1) of the EIRs in that it was accessible to PAF either on-line or because PAF had been party to the correspondence containing it. PAF confirmed in the course of the investigation that it was not interested in this information, and consequently the Commissioner will not consider it further.
17. During the investigation the Ministers provided PAF with further information, which included information previously withheld under regulation 6(1), but which was temporarily unavailable on the relevant website.
18. Analysis of the information showed, taking account of the fact that the information in certain documents simply duplicated that in others, that the Ministers continued to withhold the information contained in documents 15, 17, 17a and 18, together with information redacted from document 18a, under one or more of the exemptions in regulations 10(4)(d), 10(4)(e), 10(5)(d), 10(5)(e) and 10(5)(f) of the EIRs. This will form the basis of the investigation.
19. The relevant submissions obtained from the Ministers and PAF will be considered fully in the Commissioner's analysis and findings below.

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

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20. 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 PAF and the Ministers and is satisfied that no matter of relevance has been overlooked.



### Section 39(2) of FOISA – environmental information

21. The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. In this case, the Ministers have claimed that the information withheld is exempt in terms of section 39(2) of FOISA. 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.
22. Given the subject matter (an application to register an interest for the purposes of the exercise of the community right to buy under the LRSA) of the information requested by PAF, the Commissioner agrees that any information withheld in this context is information on a measure affecting, or be likely to affect, the state of the elements of the environment or factors affecting, or likely to affect, those elements. As such, the Commissioner is satisfied that it falls within the definition of environmental information set out in regulation 2(1), and in particular part (c) of that definition.
23. 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). In this case, the Commissioner accepts that the Ministers were correct to apply the exemption to the withheld information, given his conclusion that this is environmental information.
24. The exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and in 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 has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
25. The Ministers claimed that the information was variously excepted from disclosure under the terms of regulations 10(4)(d), (4)(e), (5)(d), (5)(e), and (5)(f) of the EIRs.
26. Document 17a is a draft of document 18a, and is in substantially the same terms as the final version. A redacted version of document 18a was released to PAF. Only the information from document 17a which was not released in document 18a therefore requires to be considered in this decision.
27. The Commissioner will first of all consider regulation 10(5)(d) in relation to the information documents 15, 17 and 17a, and the redactions to 18a, and only where this exception does not apply will he go on to consider the other exceptions cited by the Ministers in relation to that information. He will in any event require to consider the exception in regulation 10(4)(e) in relation to the information in document 18.





### Regulation 10(5)(d) of the EIRs – Confidentiality provided for by law

28. Regulation 10(1) of the EIRs provides that a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10(4) and (5) applies to that information and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. It should be noted that under regulation 10(2), authorities are required to interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.
29. The exception in regulation 10(5)(d) 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 the proceedings of any public authority where such confidentiality is provided for by law. The Ministers have submitted that the information contained in documents 15, 17 and 17a, and the information redacted from document 18a, is covered by this exception.
30. In its publication *The Aarhus Convention: an implementation guide*, the Economic Commission for Europe (the United Nations agency responsible for the convention which the EIRs are designed to implement) notes at page 59 that the convention does not comprehensively define "proceedings of public authorities", but suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
31. It is the Ministers' position that the information withheld in documents 15, 17, 17a and 18a relates to their proceedings in relation to the LRSA application. They have provided explanations in support of this claim.
32. The Commissioner accepts that the communications which comprise the withheld information in these documents fall within the suggested definition of "proceedings of public authorities" set out in paragraph 30 above. For the exception in regulation 10(5)(d) to apply, however, the Commissioner must be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings. Firstly, he must be satisfied that the proceedings are confidential, such confidentiality being provided for by law.
33. In many cases where this exception will apply, there will be a specific statutory provision prohibiting the release of the information. However, the Commissioner considers that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings. An aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege.
34. The Ministers intimated that the information within document 15 was provided in confidence by Lidl UK to assist the Scottish Government in assessing PAF's community right to buy application. The Ministers also contended that such was the expectation of confidence in the provision of the information to it that consent had to be sought by Lidl UK prior to the information being forwarded to the Ministers.



35. Taking cognisance of the way in which the information contained in document 15 was provided to the Ministers, the Commissioner is satisfied that this information was provided in confidence to assist the Ministers to carry out an administrative process and was supplied to the Ministers on the understanding that it had the quality of confidence and solely for that specific purpose.
36. The Ministers further considered that the information withheld in documents 17 and 17a and redacted from document 18a comprised information to be protected by legal professional privilege and that a claim to confidentiality of communications could be maintained in legal proceedings as the communication was between a professional legal advisor (in this case a Scottish Government solicitor) and their client within the context of a professional relationship.
37. In the circumstances of this case, the Commissioner is satisfied that the withheld information in documents 17, 17a and 18a all records legal advice provided by a legal adviser to a client within the context of a professional relationship in circumstances in which legal professional privilege could apply.
38. The Commissioner must now go on to consider whether disclosure of the information in documents 15, 17, 17a and 18a would, or would be likely to, prejudice substantially the confidentiality of those proceedings.
39. The Ministers contended that the release of such information would substantially prejudice the ability of the Ministers to engage in similar proceedings in future, given the importance of maintaining confidentiality especially while proceedings are underway. They also contended that disclosing legal advice would prejudice the ability to fully consider all relevant issues prior to any decision being made. Revealing documentation supplied in confidence or disclosing a legal position could prejudice a future challenge to the decision or act as a restraint if faced with a similar situation in future. The Ministers believed this would damage their decision-making process.
40. The Ministers also contended that disclosing information received in confidence could prejudice their ability to acquire necessary information in the future (there being no legal authority to require its production in such circumstances). In this case, it was necessary to see the option agreement as proof that one existed, otherwise they would not have been able to consider PAF's application. Should Ministers not be satisfied of the validity of an option agreement, they suggested, there was a chance that a community body might take Ministers to court on the grounds that they had insufficient evidence to decline to consider their application.
41. The Commissioner is satisfied that the information withheld in documents 15, 17, 17a and 18a is subject to confidentiality provided for by law and, having considered the Ministers' arguments, that disclosure would, or would be likely to, prejudice substantially the confidentiality of their proceedings in this connection. Consequently, he is satisfied that the exception in regulation 10(5)(d) of the EIRs applies to this information. As mentioned above, however, the application of the exemption is subject to the public interest test in regulation 10(1)(b).





*Public interest test – regulation 10(5)(d)*

42. In considering the public interest test, the Ministers acknowledged that PAF had a clear interest in information relating to the evaluation of their application to register a community interest in the site. They also acknowledged the wider local interest in the development of the site in question.
43. The Ministers concluded, however, that these interests were outweighed by the far broader public interest in ensuring that correct procedures were followed, in respecting the fact that information had been supplied voluntarily and in confidence, and in allowing the Ministers (including legal advisors) the private space to exchange candid opinions with the confidence that these would not be made public.
44. The Ministers also contended that the disclosure of the information would fundamentally impact on the Ministers' function to ensure that correct procedures were followed when assessing applications to register a community interest, particularly in ensuring that third parties could be confident in future that co-operation with the Ministers will not result in release of information into the public domain.
45. The Ministers concluded that, given that the key information relating to the decision on PAF's application had already been released, the disclosure of the withheld information would not provide anything of useful instructional value. Indeed, they argued, disclosure of the withheld information would significantly impact on third parties liaising with the Ministers and consequently the effectiveness with which they could ensure the following of correct procedures are being followed, as well as breaching reasonable expectations of confidentiality. The Ministers stressed that none of these impacts would be in the broader public interest.
46. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. Clearly, there is a strong public interest, recognised by the courts, in maintaining confidences generally.
47. In this case, the Commissioner considers that PAF and indeed the public have an interest in ensuring that the Ministers effectively and efficiently carry out the processes required under the LRSA. Against this, however, the Commissioner has identified a considerably stronger public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds and the need for public authorities to undertake its proceedings in confidence where applicable. He must also consider the provision of information in confidence to a Scottish public authority and the possible effects that may result from release. On balance, therefore, the Commissioner has determined, in all the circumstances of this case, that the public interest in making the information available is outweighed by the public interest in maintaining the exception under regulation 10(5)(d).



48. The Commissioner is therefore satisfied that the Ministers correctly applied regulation 10(5)(d) to the information withheld and contained in documents 15, 17, 17a and 18a. Given that this information was correctly withheld under this exception, the Commissioner will not consider it further under any other exception.

#### **Regulation 10(4)(e) of the EIRs**

49. The Ministers contended that regulation 10(4)(e) applied to document 18, classing it as an internal communications. For information to fall within the scope of this exception, it need only be established that it is an internal communication.
50. Having examined the information contained in document 18, the Commissioner is content that it is an internal communication for the purposes of regulation 10(4)(e) of the EIRs. As mentioned above, however, the application of this exception is subject to the public interest test in regulation 10(1)(b).

#### *Public interest test – regulation 10(4)(e)*

51. In considering the public interest in favour of disclosure of the information, the Ministers acknowledged similar arguments to those outlined above in relation to regulation 10(5)(d).
52. The Ministers argued, however, that it was in the broader public interest that correct procedures were followed and that officials were allowed private space to exchange candid opinions with the confidence that these would not be made public. They did not consider that the public interest lay in disclosing internal exchanges as the Ministers developed their response to PAF's application. The Ministers drew attention to the fact that the substance of any exchange was in effect public in the notice issued to PAF.
53. There is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. The Commissioner acknowledges a more specific public interest in allowing scrutiny of the matters considered by the Ministers in relation to this specific topic, namely the consideration of an application under a statutory procedure designed for the benefit of the public.
54. Having examined the actual content of the information under consideration, the Commissioner has found little that would significantly inform PAF on any aspect of the Ministers' involvement in the application under the LRSA. In all the circumstances, the Commissioner is not convinced that the publication of the internal communication withheld here would add substantially to what is already in the public domain on this issue. Against that, the Commissioner finds at least some force in the countervailing arguments put forward by the Ministers.
55. The Commissioner therefore concludes that the public interest in making the information in document 18 available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he considers the Ministers to have been justified in withholding the information under that exception.



56. Given that the Commissioner has concluded that all of the information was properly withheld from PAF under regulations 10(4)(e) and 10(5)(d) of the EIRs, he is not required (and does not intend) to consider the exceptions in the other regulations cited by the Ministers.

## DECISION

The Commissioner finds that the Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Prestoungrange Arts Festival (2006) Limited.

## Appeal

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Should either PAF 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**  
**21 June 2010**



## Appendix

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### Relevant statutory provisions

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

##### 1 General entitlement

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

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

##### 39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...



## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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)-

...



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