

# Decision Notice



Decision 027/2012 David Cardwell and Dundee City Council

Information relating to a pavement on a specified road

Reference No: 201101257

Decision Date: 7 February 2012

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

**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
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## Summary

Digby Brown, Solicitors, on behalf of their client, David Cardwell, requested from Dundee City Council (the Council) information relating to the repair, maintenance and inspection of a pavement outside a specified address in Dundee. The Council refused to disclose the information on the basis that it was exempt from disclosure under sections 33(1)(b) (Commercial interests and the economy) and 36(1) (Confidentiality) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, in which the Council withdrew its reliance on the exemption in section 33(1)(b), Mr Cardwell remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information identified was environmental information, and asked for the Council's comments. The Council did not agree that the information was environmental, but it indicated that, should the Commissioner consider the case under the Environmental Information (Scotland) Regulations 2004 (the EIRs), it wished to rely on the exception under regulation 10(5)(b) of the EIRs in withholding the information.

The Commissioner considered this case under both FOISA and the EIRs. He found that the Council had failed to deal with the request in line with the EIRs, and that it had also failed to comply with Part 1 of FOISA. He required the Council to disclose the withheld information to Mr Cardwell.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) 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 the Appendix to this decision. The Appendix forms part of this decision.



## Background

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1. On 10 May 2011, Digby Brown, Solicitors, acting on behalf of Mr Cardwell, wrote to the Council in the following terms in relation to a pavement at a specified location:
  - (a) Is this pavement adopted by the Council in terms of the Roads (Scotland) Act 1984?
  - (b) What inspection intervals has the Council identified as being appropriate for this pavement? Please advise what factors were used in assessing the inspection interval.
  - (c) Please provide a copy of all inspection records for this pavement from 1 January 2007 to date.
  - (d) Please confirm specifically the date of the last inspection of this pavement prior to 8 September 2010 and confirm what was noted on the inspection and how the inspection was carried out.
  - (e) Please confirm the date of the first inspection following 8 September 2010, what was noted on the inspection and how the inspection was carried out.
  - (f) Please confirm whether any defects have been noted on that section of pavement, what repairs have been carried out to that section of pavement, what category any defects identified on that section of pavement have been assessed as, copies of any work orders raised relative to that section of pavement and any work lines or repair notes pertaining to that section of pavement.
  - (g) Please confirm whether any complaints have been made to the Council regarding defects on this section of pavement between 1 January 2007 and the date of this correspondence. Please confirm whether any complaints have been made on behalf of the Council to any other body, such as Scottish Water or British Telecom between 1 January 2007 and the date of this correspondence.

In this decision, all references to correspondence with Mr Cardwell are to correspondence with his solicitors.

2. The Council responded on 23 May 2011. It withheld all of the requested information on the grounds that it was exempt from disclosure under sections 33(1)(b) (which applies where disclosure would, or would be likely to, prejudice substantially the commercial interests of the Council) and 36(1) of FOISA (which applies to information prepared in contemplation of litigation and would not be recoverable in legal proceedings).
3. On 6 June 2011, Mr Cardwell wrote to the Council requesting a review of its decision. Mr Cardwell pointed out that he had not requested information that related to legal proceedings and he could not see how the disclosure of inspection records for roads and footpaths could prejudice the commercial interests of the Council.



4. The Council notified Mr Cardwell of the outcome of its review on 4 July 2011. Following its review, the Council withdrew its application of the exemption in section 33(1)(b) of FOISA, but upheld its decision to withhold all of the requested information on the grounds that it was exempt from disclosure under section 36(1) of FOISA.
5. On 12 July 2011, Mr Cardwell wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Cardwell 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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7. On 15 July 2011, the Council was notified in writing that an application had been received from Mr Cardwell and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. On 26 August 2011, the Council provided submissions on its application of the exemption in section 36(1) of FOISA to the withheld information.
10. During the investigation, the investigating officer referred the Council to the fact that its own website contained information which confirmed that the pavement in question had been adopted by it in terms of the Roads (Scotland) Act 1984<sup>1</sup>. The Council confirmed that this information was indeed available on its website and subsequently contacted Mr Cardwell to advise him that the pavement in question had been adopted by it in terms of the Roads (Scotland) Act 1984 (in answer to request a) above). Although the Council has now disclosed this information, the Commissioner will nonetheless consider whether it was correct to withhold this information in its initial response to Mr Cardwell and in its response to his requirement for review.

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<sup>1</sup> <http://www.dundee.gov.uk/forms/LOPR.php>



11. Also during the investigation, having considered the nature of the information requested in this case, the investigating officer concluded that at least some of the information falling within the scope of the request would be environmental information and therefore subject to the EIRs. The investigating officer asked the Council to comment on this point and to provide submissions as to whether it considered that the requested information fell within the scope of any of the exceptions contained in the EIRs. The Council was also asked whether it wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
12. In response, the Council stated that it did not accept that the information under consideration comprised environmental information. However, the Council also stated that, should the Commissioner conclude that the information did comprise environmental information, it considered the information to be excepted from disclosure in terms of regulation 10(5)(b) of the EIRs on the basis that its disclosure would, or would be likely to, prejudice substantially the course of justice. The Council indicated that it considered this exception to be applicable for the same reasons that it had provided previously in relation to the exemption in section 36(1) of FOISA. The Council did not indicate whether it wished to apply the exemption in section 39(2) of FOISA.
13. The investigating officer also contacted Mr Cardwell during the investigation, seeking his submissions on the matters to be considered in the case. Mr Cardwell's submissions, along with those of the Council, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

## Commissioner's analysis and findings

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14. 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 Mr Cardwell and the Council and is satisfied that no matter of relevance has been overlooked.

### FOISA or EIRs

15. Environmental information is defined in regulation 2(1) of the EIRs (parts (a) and (c) of the definition are reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
16. The Commissioner 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*<sup>2</sup> and need not repeat it in full here. However, he will reiterate some of the key points which are relevant in this case:

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



- (a) The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
  - (b) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
  - (c) Any request for environmental information therefore **must** be dealt with under the EIRs.
  - (d) In responding to a request for environmental information under FOISA, an authority **may** claim the exemption in section 39(2).
17. The implication of *Decision 218/2007* for the Commissioner's consideration of Mr Cardwell's request is that he must first determine whether the information withheld is environmental information. If it is, he must go on to consider the Council's handling of the request in terms of both the EIRs and FOISA.
  18. In this case, the Council handled Mr Cardwell's request for information and requirement for review in terms of FOISA.
  19. As indicated above, the Council did not accept that the withheld information comprised environmental information. However, the Council did not provide any reasons to substantiate its position. The Council did not apply the exemption in section 39(2) of FOISA, but stated that, should the Commissioner conclude that the information under consideration was environmental information, it considered that the exception in regulation 10(5)(b) of the EIRs applied.
  20. Having considered the nature of the withheld information, the Commissioner is satisfied that it comprises environmental information as defined within regulation 2(1) of the EIRs. As the requested information concerns the condition of a pavement (including responsibility for its repair and maintenance), it relates to measures (the Council's policy of conducting inspections of pavements and recording the outcome of these inspections and its responsibilities) and activities (the Council's responsibilities in terms of the Roads (Scotland) Act 1984) affecting or likely to affect the elements referred to in part (a) of the definition of environmental information, in particular land and landscape. As such, the Commissioner is satisfied that the information withheld by the Council is environmental information as defined in part (c) of the definition.
  21. Having drawn this conclusion, the Commissioner must conclude that by failing to consider and respond to Mr Cardwell's request in terms of the EIRs, the Council failed to comply with regulation 5(1) and (2)(b) of the EIRs.
  22. The Commissioner also concludes that the exemption in section 39(2) of FOISA *could* have been applied to this information. If this exemption had been applied by the Council, this conclusion would have prompted the Commissioner to consider whether the information had otherwise been properly withheld only in terms of the EIRs.



23. However, as noted in *Decision 218/2007*, there is no obligation on an authority to rely upon any exemption in FOISA. In the circumstances, the Commissioner has found it appropriate to consider the Council's handling of Mr Cardwell's request and to set out his conclusions in terms of both FOISA and the EIRs.

### Consideration of the information withheld under FOISA

24. As noted above, the Council withheld all of the information requested by Mr Cardwell on the basis that it was exempt from disclosure under section 36(1) of FOISA.

### Section 36(1) - Confidentiality

25. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
26. As noted above, the Council argued that all of the information sought by Mr Cardwell was prepared by the Council in contemplation of litigation.
27. Communications *post litem motam* 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 generally being whether litigation was actually in contemplation at a particular time.
28. 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. This is a question of fact in each 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.
29. 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.



30. The Council submitted that Mr Cardwell's information request was a "fishing expedition" to find out whether any information existed that would enable a personal injury claim to be raised against the Council. The Council argued that the request had been made by the agent of a party who wished to pursue a legal action against the Council in circumstances where that party was certainly contemplating litigation.
31. The Council submitted that there was nothing in FOISA which modified the well established rules relating to the recovery of documentary and real evidence in court proceedings. The Council stated that these rules include the well known rule that, in no circumstances, will the Court at any stage grant a "fishing" diligence for the recovery of documents which a party hopes will disclose material for a case which he has not viewed on record.
32. The Council argued that the terms of section 36(1) are clearly established, especially because an application under section 1 of the Administration of Justice (Scotland) Act 1972<sup>3</sup> (this being an application to the Court to order the production or recovery of documents or property which are relevant to a Court case) falls within the definition of "legal proceedings".
33. The Council also argued that, as far as the term "contemplation of litigation" is concerned, this had to be construed from the point of view of a defender (in a legal action). The Council submitted that many of its documents were created with a view to avoiding litigation or maximising prospects of success and were therefore created "in contemplation of litigation" as regards the Council as defender. The Council noted that the position of a pursuer in a legal action is very different as a pursuer only contemplates litigation when they consider they might have a claim and that any view that "in contemplation of litigation" can only apply at or near the time of a response to an actual claim was too narrow an interpretation and an error in law.
34. In his submissions, Mr Cardwell argued that whether a particular document was created in contemplation of litigation was a question of fact and the key test was whether litigation was actually in contemplation at a particular time.
35. Mr Cardwell submitted that the documents being sought related to public footpath inspection and maintenance records from January 2007 and ought to have been prepared by the Council in compliance with its legal duties under the Roads (Scotland) Act 1984. He argued that the relevant documents were prepared by the Council several months, or years, prior to any potential litigation being contemplated and accordingly, could not be held to have been prepared in contemplation of litigation.
36. In any case, Mr Cardwell argued that whether or not any litigation was being contemplated by him was irrelevant, given when the documents were prepared, and the reasons for their preparation. He also submitted that the records were prepared by Council staff as part of their daily routines, in the course of their employment, and as such, could not be said to have been prepared in contemplation of litigation.

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<sup>3</sup> <http://www.legislation.gov.uk/ukpga/1972/59/introduction>





*The Commissioner's view*

37. The Commissioner notes the arguments advanced by the Council, but would stress that the rules governing the information which can be requested through the court recovery process are different to those governing requests under FOISA (although clearly there will be some overlap, particularly when determining whether information is subject to litigation privilege in terms of section 36(1)). It may well be the case that an application to the courts made under the 1972 Act will lead to less (or, indeed, more) information being disclosed than a request under FOISA, but that does not mean that a request made under FOISA should be interpreted only in the light of what a person would be entitled to by virtue of the 1972 Act.
38. The Commissioner considers that for information to be exempt under section 36(1) in this case, the information must not only have been prepared in contemplation of litigation, but must also be confidential.
39. The Commissioner notes that the information sought in request a) can be found on the Council's website and therefore cannot be considered to be confidential. As such, the Commissioner finds that the information sought in request a) is not exempt under section 36(1) of FOISA. Although this information was disclosed to Mr Cardwell during the investigation, this was only as a result of the investigating officer pointing out to the Council that the information was in fact available on its own website.
40. In considering the information sought in requests b) to g), the Commissioner has considered the purpose for which the communication was made; as noted above, whether the information in these documents was prepared in contemplation of litigation will depend on the circumstances of each case.
41. As Lord Justice-Clerk Thomson commented in *Young v National Coal Board* 1957 SC 99 (at page 105):
- "The court has inherent power to compel the parties to a cause to produce documents which may have a bearing on the issues between them. The court will not, however, in the ordinary run of things order production of documents which have been prepared in anticipation or in development of a party's case. Once the parties are at arms length, or are obviously going to be at arms length, the details of their preparation of weapons and ammunition are protected as confidential. Just when the parties come to be at arm's length may often be a difficult question, especially as some potential defenders prepare well in advance against the contingency of accidents, and indeed, under modern conditions, few accidents and particularly few industrial accidents can happen without it occurring to one or other party at any early stage that questions of disputed liability may arise."*
42. As Lord Justice-Clerk Thomson made clear, it can be difficult to identify when parties come to be at arms length (and, as a result, when the *post litem motam* rule will come into effect). However, a general apprehension of future litigation or possibility that someone might at some point in the future make a claim against the Council, is not, in the Commissioner's view, sufficient, given that, according to Lord Justice-Clerk Thomson, the parties must either be at arms length, or are "obviously going to be" at arms length.



43. Having considered the nature of the information sought in requests b) to g), the Commissioner cannot agree that the information was prepared in contemplation of litigation. The information in question was created prior to the receipt of Mr Cardwell's information request which the Council had concluded to be an indication that litigation was being contemplated. However, there is nothing to suggest that the information was prepared in anticipation or in development of the Council's case should any litigation proceed. As a consequence, the Commissioner does not consider the information in these documents to be exempt from disclosure under section 36(1) of FOISA.
44. As the Commissioner has concluded that none of the information sought by Mr Cardwell is exempt by virtue of section 36(1) of FOISA, he is not required to consider the application of the public interest test in section 2(1) of FOISA.
45. The Commissioner therefore finds that the Council acted in breach of Part 1, and particularly section 1(1) of FOISA by withholding the information sought by Mr Cardwell.

### **Consideration of the information withheld under the EIRs**

#### **Regulation 10(5)(b) of the EIRs**

46. 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 a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
47. Although there is no definition within the EIRs of what would constitute substantial prejudice, it is the Commissioner's view that the standard to be met in applying this test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of some real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.
48. As noted above, the Council indicated that it considered this exception to be applicable on the basis that disclosure would be likely to prejudice substantially the course of justice, for the same reasons as those set out previously in relation to section 36(1) of FOISA (see paragraphs 30 to 33 above). As noted there, the Council's position is that the withheld information is subject to litigation privilege and so is exempt from disclosure.
49. When considering the Council's handling of Mr Cardwell's request in terms of EIRs, the Commissioner has considered those same arguments, and considered whether they demonstrate that the harm test in regulation 10(5)(b) would be met if the withheld information was disclosed.
50. The Commissioner notes that, unlike section 36(1) of FOISA, the wording of regulation 10(5)(b) does not explicitly exempt 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, especially litigation privilege.



51. The Commissioner recognises that the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. As noted above, the principle, derived from the adversary 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).
52. 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 according to the circumstances of the particular case under consideration, and the likelihood that disclosure would or would be likely to prejudice substantially the course of justice may fade over time.

### *The Commissioner's view*

53. As noted above, in the consideration of section 36(1) of FOISA, the Commissioner does not agree that the information under consideration in this case was created in contemplation of litigation. Accordingly, he does not consider the information to be subject to litigation privilege.
54. The Commissioner is unable to accept the Council's contention that the information was created with a view to avoiding litigation or maximising prospects of success and were therefore created "in contemplation of litigation" as regards the Council as defender. In the Commissioner's view, the information was created as part of the Council's usual business with a view to ensuring the maintenance and repair of its pavements in fulfilment of its statutory duties.
55. In the circumstances, the Commissioner is unable to accept that the disclosure of such routine information would or would be likely to cause substantial prejudice to the course of justice.
56. Accordingly, the Commissioner does not accept that the information is excepted from disclosure in terms of regulation 10(5)(b) of the EIRs.
57. Having found that the exception in regulation 10(5)(b) did not apply in the circumstances of this case, the Commissioner is not required to go on to consider the public interest test in regulation 10(1)(b) in relation to the withheld information.
58. The Commissioner finds that the Council acted in breach of the EIRs, and particularly regulation 5(1) by withholding the information requested by Mr Cardwell

### **Conclusion**

59. As the Commissioner has found that both the exception in regulation 10(5)(b) of the EIRs and the exemption in section 36(1) of FOISA have been incorrectly applied by the Council, he now requires the Council to disclose the information sought by Mr Cardwell in requests b) to g) (the information sought in request a) having been disclosed by the Council during the investigation).



The Commissioner finds that Dundee City Council (the Council) failed to comply with both Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Cardwell.

The Commissioner finds that by failing to identify and respond to Mr Cardwell's information as one seeking environmental information as defined by regulation 2(1) of the EIRs, the Council breached regulations 5(1) and (2)(b) of the EIRs.

The Commissioner finds that the Council was not entitled to withhold the information requested by Mr Cardwell on the basis of the exception in regulation 10(5)(b) of the EIRs or the exemption in section 36(1) of FOISA. By failing to provide Mr Cardwell with the requested information, the Council failed to comply with regulation 5(1) of the EIRs and section 1(1) of FOISA.

The Commissioner therefore requires the Council to provide Mr Cardwell with the information sought in requests b) to g) by 23 March 2012.

## Appeal

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Should either Mr Cardwell or Dundee City Council 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**  
**7 February 2012**

## 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.

## **36 Confidentiality**

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

## **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;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

## **5 Duty to make available environmental information on request**

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

## **10 Exceptions from duty to make environmental information available-**

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.



...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (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;

...