

# Decision Notice



Decision 090/2012 Dr Paul Thornton and Heriot Watt University

Communications with Department of Transport on High Speed Rail

Reference No: 201102304  
Decision Date: 18 May 2012

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**Rosemary Agnew**  
Scottish Information Commissioner

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

Dr Thornton requested from Heriot Watt University (the University) information from communications exchanged with the Department of Transport, including its subsidiary company HS2, with regard to High Speed Rail. The University provided some information, but decided that the remainder was exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Dr Thornton remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, having concluded that the withheld information was environmental information and therefore should have been dealt with under the EIRs, the Commissioner found that the University had been entitled to withhold the information as commercially confidential information under regulation 10(5)(e) of the EIRs. She did not require the University to take any action.

## 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); 39(2) (Health, safety and the environment)

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

## Background

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1. On 5 July 2011, Dr Thornton wrote to the University to ask for information from communications exchanged between Professor Woodward and his team and the Department of Transport (including its subsidiary company, HS2 Ltd) on the subject of High Speed Rail.



2. The University responded on 22 August 2011. It provided copies of emails, some of which had been partially redacted. The University explained why the information withheld was considered to be exempt from disclosure under sections 38(1)(b), 30(c) and 33(1)(b) of FOISA (and also, where relevant, why it considered the public interest favoured maintaining the exemptions).
3. On 18 September 2011, Dr Thornton wrote to the University requesting a review of its decision. In particular, Dr Thornton asked for a review of the decision to withhold certain information under sections 30(c) and 33(1)(b) of FOISA, and the University's conclusion that the public interest in withholding the information was greater than the public interest in its disclosure.
4. Dr Thornton did not challenge the decision to withhold information under section 38(1)(b) of FOISA (personal data).
5. The University notified Dr Thornton of the outcome of its review on 13 October 2011. In relation to the withheld information, the University upheld its decision and provided further explanation of its reasons for withholding the information under sections 30(c) and 33(1)(b) of FOISA.
6. On 4 December 2011, Dr Thornton wrote to the Commissioner, stating that he was dissatisfied with the outcome of the University's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Dr Thornton 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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8. On 21 December 2011, the University was notified in writing that an application had been received from Dr Thornton and was asked to provide the Commissioner with any information withheld from him. The University responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the University 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.
10. The University was advised that the Commissioner was likely to consider that the information covered by the request was environmental information, as defined in regulation 2 of the EIRs, and was invited to consider whether any of the exceptions in the EIRs might apply.



11. The withheld information included the outline of a research proposal intended for submission to the Engineering and Physical Sciences Research Council (EPSRC) for grant funding. The University was asked whether the draft research proposal had been submitted to the EPSRC. It was also asked to explain in more detail why disclosure of the withheld information, and in particular the EPSRC proposal, would be likely to damage the commercial interests of any party. Finally, the University was asked to explain why certain information was considered sensitive, when apparently similar information was already in the public domain.
12. The University responded, advising that if the information was considered to be environmental information (which it questioned), it wished to apply the exemption in section 39(2) of FOISA and the exceptions in regulations 10(5)(c) and (e) of the EIRs. The University provided detailed arguments in support of this exemptions and exceptions, and to the effect that the public interest in its disclosure was outweighed by the public interest in withholding it under the exemptions or exceptions cited.
13. The University decided to disclose a small amount of information after accepting that Professor Woodward's general area of research was information already in the public domain. This information has not been considered further in this decision notice.
14. The relevant submissions received from both the University and Dr Thornton will be considered fully in the Commissioner's analysis and findings below.

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

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15. 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 Dr Thornton and the University and is satisfied that no matter of relevance has been overlooked.

### **EIRs or FOISA?**

16. In his application, Dr Thornton asked the Commissioner to consider whether the information he had requested should properly be considered environmental information, as defined in regulation 2 of the EIRs. As noted previously, the University initially dealt with Dr Thornton's request under FOISA. While remaining of the view that this had been the appropriate approach when the matter was raised by the investigating officer, the University recognised the possibility that the information could be categorised as environmental information.
17. The information withheld by the University relates to a programme of research to develop technology related to the impact of high speed rail developments. It is not possible for the Commissioner to explain in detail why she considers that this information is environmental information, as to give her reasons would necessarily disclose information currently withheld by the University, but she is satisfied that the information falls within paragraphs (b) and (c) in the definition set out in regulation 2 of the EIRs. (These paragraphs are set out in full in the Appendix to this decision.)



18. 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, with a view to any such information being considered primarily in terms of the EIRs. In this case, the University advised that if the Commissioner decided the case should be dealt with under the EIRs, it would apply the exemption in section 39(2) of FOISA. Given her conclusion that the withheld information is environmental information as defined by regulation 2(1), the Commissioner accepts that the University was entitled to apply the exemption in section 39(2) of FOISA to the information requested by Dr Thornton.
19. This 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.

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

20. The University withheld a research proposal outline in its entirety, along with varying amounts of information from six emails, under regulation 10(5)(e) of the EIRs.
21. 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.
22. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
23. The Aarhus Convention: an Implementation Guide<sup>1</sup> (which offers guidance on the interpretation of the convention from which the EIRs are derived) notes (at page 60) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information: it 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.
24. 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:
  - a. Is the information commercial or industrial in nature?
  - b. Does a legally binding duty of confidence exist in relation to the information?

<sup>1</sup> <http://www.unece.org/env/pp/acig.pdf>



- c. Is the information publicly available?
- d. 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?*

- 25. The University submitted that a key deliverable of the research project was the development and commercial application of leading edge technology (which it described), and explained the market for such research in some detail. The University pointed to Professor Woodward's previous experience in developing technology in related fields and exploiting it for the commercial benefit of the University through licensing arrangements. It put forward arguments to support its view that disclosure of the research proposal, at this stage, would enable commercial competitors to exploit the University's ideas before these could be developed to a point where patent protection could be obtained.
- 26. The Commissioner accepts that the withheld information relates to a research proposal concerning the development of technology with significant potential commercial value. The fact that Professor Woodward has previously overseen the development of technology which was commercially exploited by the University lends weight to the arguments that his latest idea may also be capable of such exploitation, and that the University has commercial interests relating to the development of the technology in question. The Commissioner therefore accepts that the withheld information is commercial in nature, even though the research proposal has yet to be fully developed into a commercially viable product.

*Does a legally binding duty of confidence exist in relation to the information?*

- 27. The Commissioner considers that the confidentiality provided for by law to protect a legitimate economic interest (regulation 10(5)(e)) will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute. There is no need, under the exception in regulation 10(5)(e), for the information to have been obtained by the public authority from another person; in that respect, it differs from the "confidentiality" exemption in section 36(2) of FOISA. The exception in regulation 10(5)(e) can therefore cover information created by the public authority and provided to another party, or to information jointly created or agreed between the public authority and a third party.
- 28. The University has not argued that any contractual obligation or statute creates a duty of confidence in the circumstances of this case. Consequently, the Commissioner has considered whether confidentiality has been imposed under common law.
- 29. The University argued that, given the commercial sensitivity of the information in question, it had been careful to limit access to it. The University advised that, at the time of its review, the subject of the research proposal and the draft research proposal itself had been disclosed only to the EPSRC and an "inner circle" of key contacts at three named organisations, all of whom had treated the information as confidential. An "outer circle" consisting of a larger number of potential collaborators had received limited information about the research project, but had no knowledge of the specific technology proposed for development.



30. The University advised that there was an unwritten understanding between all parties that the information shared about the research project must be kept confidential. This understanding stemmed from a widely acknowledged professional and ethical expectation within academic circles that academic researchers will discuss proposals and the progress of confidential research in total confidence. The existence of such an expectation was confirmed by the University's legal advisers, who support academics in developing grant and contract bids and exploiting the intellectual property in their innovations. The University considered that expectations of confidentiality in such matters were also underpinned by the University's Intellectual Property policy.
31. The University advised that, while it had not been considered necessary for the parties involved to expressly agree to non-disclosure, those parties were in agreement that any activities associated with the EPSRC bid would be classed as confidential. It described academic custom and practice in this regard in some detail, concluding that culturally it was not necessary to enter into express non-disclosure agreements with partners in such an environment.
32. The University indicated that the proposed research partners each understood that unauthorised disclosure of information about this research proposal would substantially prejudice the confidentiality of the information and, in turn, their organisation's commercial interests, and could lead to legal action. However, given the academic environment and professional code of conduct described above, the University found it difficult to imagine that such a breach of confidence would occur.
33. In the circumstances outlined above, the Commissioner accepts that the parties with access to the withheld information understood that it was to be treated confidentially, even though no formal non-disclosure agreement bound them.

*Is the information publicly available?*

34. The University submitted that the information was not publicly available (as explained in the preceding paragraphs), stating that it had already disclosed any information already in the public domain or which an informed individual might have been able to deduce. The University had taken steps to limit disclosure of the details of the research proposal to an "inner circle", as described previously.
35. The Commissioner accepts that, at the time the University dealt with Dr Thornton's request and request for review, the withheld information was confidential in nature and was being treated confidentially.



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

36. As mentioned previously, the term “legitimate economic interest” is not defined in the EIRs. The interest in question will, however, be financial, commercial or otherwise “economic” in nature, and the prejudice to that interest must be substantial. In order to apply this exception an authority must, in the Commissioner’s view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
37. The University has explained that the research proposal concerns the development of technology capable of commercial exploitation. The technology would be applicable not only to the growing number of high speed rail networks throughout the world, but to conventional rail networks too. The University was not aware of any other body engaged in the development of similar technology, and had already spent considerable time researching the potential for the technology. The EPSRC grant would enable the University to develop the technology; if this development proved successful, then the University would licence the technology to third parties and make a commercial return from its academic research.
38. The University was extremely concerned that, if its idea entered the public domain at this early stage, other academic and commercial bodies would focus on the development of such technology.
39. The University therefore argued that disclosure of information about the grant application, while it was still being drafted and agreed among the partners, and before it had been submitted to the EPSRC, would substantially prejudice the outcome of the grant application and the ability of the University and its partner institutions to collaborate effectively on leading-edge research. The University anticipated that disclosure would mean that commercial bodies all around the world would be able to routinely request details of prospective grant applications from Scottish universities with significant adverse implications for Scottish academic research. It also highlighted specific potential harm to its collaboration in this particular project.
40. The Commissioner does not accept that disclosure in this case would mean that Universities would be required to routinely disclose details of grant applications. As pointed out in previous decisions of the Commissioner, decisions on whether disclosure of information is required by law are taken on a case-by-case basis, taking into account both the nature of the information and the circumstances in which it was created or obtained and is held.
41. In this case, the Commissioner cannot judge how likely it is that a competitor would be able to steal a march on the University and develop similar technology more quickly, but it is clear that the University has taken measures to prevent disclosure of its idea beyond a tightly-controlled group of people; the Commissioner accepts that to some extent this must support the University’s view that the information is vulnerable to exploitation by commercial rivals. On balance, the Commissioner accepts that disclosure of information revealing the nature and purpose of the technology in question would have prevented the University from protecting an idea which, if developed, might reasonably have been expected to make an appreciable commercial return for the University and which would, or would have been likely to, cause substantial harm to the University’s economic interests.





42. After considering the four tests described in paragraph 24 above, therefore, the Commissioner has accepted that the exception in regulation 10(5)(e) applies to the withheld information. She will go on to consider the public interest test required by regulation 10(1)(b).

### **The public interest test**

43. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from Dr Thornton and under consideration in this decision, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

#### *Public interest arguments from Dr Thornton*

44. In his application to the Commissioner, Dr Thornton stated that he did not seek disclosure of “the precise detail of genuinely new design concepts that are truly commercially sensitive”. However, he believed that it was essential for all other withheld information to be published in the public interest. Dr Thornton identified four main reasons why it would be in the public interest for the University to disclose information relating to the research proposal:
- to confirm the full terms by which HS2 Ltd had been expertly advised in respect of track vibrations at the very high speeds proposed, particularly clarifying the nature, scale and probability of those risks and the associated detriment.
  - to confirm exactly when that advice and information was provided to HS2 Ltd.
  - to confirm the full extent to which HS2 Ltd had denied or acknowledged that risk or detriment.
  - to clarify the extent to which there was concordance between the public claims made with regard to the High Speed rail vibrations and those shared in communications with the University.
45. Dr Thornton went on to consider other factors which the Commissioner has previously identified as relevant to the public interest test. He argued that:
- disclosure would help ensure that the public debate on the issue was properly and fully informed
  - disclosure would promote accountability and transparency by the public bodies involved in the progression of the HS2 project in relation to decisions taken by them and the spending of public money.
  - disclosure of information relating to public safety and the risk of high speed train derailment was in the public interest.
  - disclosure without delay would be in the public interest, before costly decisions are made and public spending contracts entered into.



*Public interest arguments from the University*

46. The University considered whether disclosure would contribute to ensuring the effective oversight of public funds; whether disclosure would ensure that the public obtained value for money in connection with HS2; whether disclosure would contribute to the debate on a matter of public interest; and whether disclosure would enhance scrutiny of decisions taken on HS2. The University concluded that disclosure would not serve any of these purposes.
47. The University put forward a number of points to support its view that disclosure of the redacted information would not be in the public interest. These have been summarised as follows:
- There is a clear public interest in enabling the University to generate commercial revenue in addition to the public funding it receives, in the context of public sector budget cuts. This revenue will enhance the educational services it provides and enable the University to establish itself as a centre of excellence in a growth area, both of which are in the public interest.
  - There is a clear public interest in universities being able to work up and complete grant applications without having to disclose them before the application is submitted or having to discuss the funding they are seeking. Specifically, there is a clear public interest in allowing Professor Woodward to develop his research for the wider public benefit, and in allowing the University to establish itself as a centre of excellence in a growth area.
  - There is a clear public interest in allowing the University to develop new technologies and push the boundaries of science. There is a real public interest in bringing the technology in question to the market, to the benefit of ultra-speed and conventional rail.
  - The University acknowledged a public interest in certain information in this field entering the public domain, but found that at this particular point there was a public interest in ensuring that the information available to the public had been properly researched and fully validated. The University took the view that disclosure at this point of the information it held would not inform the public adequately of any danger to public health and safety or to the environment.
  - The University argued that it would not be in the public interest to inhibit the submission and confidential scrutiny of the funding application. If the research was funded, the project would enable the development of technology which would provide for objective measurement of the impact of ultra-speed, high-speed and conventional trains on the environment, and would thus support informed contribution to a matter of public interest or debate relating to public health and safety or the environment.

*The Commissioner's views on the public interest test*

48. The Commissioner has carefully considered all the public interest arguments put forward by both Dr Thornton and the University. In doing so, she has focused on the arguments as they would relate to the disclosure of the specific information withheld by the University. She has not considered the public interest arguments in relation to research proposals as a "class" of information as this is not required in the current case.



49. The Commissioner accepts that, if disclosure would bring about the outcomes suggested by Dr Thornton, then there would be strong arguments for disclosure in the public interest. In other words, if disclosure of the withheld information would provide real clarification of the advice provided to HS2 Ltd about vibrations, this would be strongly in the public interest, given the importance of the project in terms of public spending, environmental impact and human health and safety. Similarly, if disclosure would enhance public debate on the issue, or improve accountability and transparency in relation to decision-making or public spending, the Commissioner would accept that these as strong arguments for disclosure in the public interest.
50. However, having examined the information withheld by the University, the Commissioner is not persuaded that its disclosure would serve the public interest in the ways suggested by Dr Thornton. The subject matter of the withheld information is narrow in scope, relating to the idea for potential technological development and the associated research proposal. The withheld information does not relate directly to the expert advice provided to HS2 Ltd and does not include any technical data which would enable a comparison to be made between the public claims made with regard to the High Speed rail vibrations and those shared in communications with the University. Overall, the Commissioner considers that disclosure would be of limited benefit in terms of public scrutiny of the high speed rail project.
51. The Commissioner accepts that disclosure of the information would increase public awareness of a technical issue which could impact upon the high-speed rail project. However, she takes the view that the University has already disclosed information which would achieve this outcome without requiring the additional disclosure of information relating specifically to the research proposal.
52. In relation to the arguments put forward by the University, the Commissioner accepts that there would be a strong public interest in enabling research into technology which could have significant benefits in terms of public health and safety, and in better understanding the impact of high-speed rail on the surrounding environment. However, the University's main arguments against disclosure focus on the fear that a commercial rival might develop a competing product and damage the commercial interests of the University. In terms of the public interest, the Commissioner must question whether it matters whether it is the University or a commercial rival which develops the technology: the outcome, in terms of public benefit, would seem to be the same.
53. Nonetheless, the Commissioner considers that there is an inherent public interest in enabling the University to protect an idea which is at such an early stage of development that it cannot yet be protected by patent, but which may nevertheless be capable of commercial exploitation. In a situation where the University's commercial rivals are not equally obliged to respond to freedom of information requests, there is a public interest in ensuring that where there is a real danger that commercial rivals may benefit from the disclosure of the information, the University is allowed private space to work up research proposals and submit a bid for research funding, so that it is not disadvantaged by its status as a Scottish public authority or deprived of the opportunity to benefit financially from ideas generated by expert staff such as Professor Woodward.



54. Given the importance of the proposed technology in terms of its potential benefits in the field of high-speed rail, especially in relation to health and safety, the Commissioner also accepts that there is a public interest in ensuring that the research project remains in the hands of Professor Woodward, an acknowledged expert in the field who has already overseen the development of leading-edge technology.
55. As in previous decisions, the Commissioner also recognises that there is an inherent public interest in confidences being maintained.
56. On balance, therefore, the Commissioner finds that the public interest in disclosure is outweighed by the public interest in maintaining the exception and withholding the information. The Commissioner therefore finds that the University was entitled to withhold the information in question under regulation 10(5)(e) of the EIRs, and consequently was not required to disclose it in response to Dr Thornton's request.
57. Having concluded that the information in question is excepted from disclosure under regulation 10(5)(e), the Commissioner is not required to go on to consider the exception in regulation 10(5)(c).

## DECISION

The Commissioner finds that the University complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Dr Thornton.

## Appeal

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Should either Dr Thornton or Heriot Watt University 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**  
**18 May 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.

...

##### 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

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...

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

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

...

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

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

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

### 10 Exceptions from duty to make environmental information available–

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

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



- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
- (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.
- ...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
- ...
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
- ...