

# Decision Notice

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## Decision 069/2016: Mr Chisholm and Scottish Borders Council

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### **Councillors' site visit**

Reference No: 201501162

Decision Date: 21 March 2016



Scottish Information  
Commissioner

## Summary

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On 24 April 2015, Mr Chisholm asked Scottish Borders Council (the Council) for information about a site visit which Councillors had made to the Avonmouth plant of New Earth Solutions Ltd.

The Council disclosed some information, but withheld information which it considered to be commercially sensitive. Following a review, the Council applied the exception in regulation 10(5)(e) of the EIRs to the withheld information. Mr Chisholm remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that Council had partially failed to respond to Mr Chisholm's request for information in accordance with the EIRs. This was because it had wrongly withheld some information under regulation 10(5)(e) of the EIRs (the exception had been correctly applied to the remainder of the information).

The Commissioner required the Council to disclose the information which was wrongly withheld.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information 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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. In February 2015, the Council announced that it was not proceeding with a 24-year contract for an integrated waste management facility near Galashiels. The contract had been agreed with New Earth Solutions Ltd. (NES). (The Commissioner is aware of a number of trading vehicles set up by New Earth Solutions, but in this decision, NES should be taken to refer only to New Earth Solutions (Scottish Borders) Ltd.)
2. On 24 April 2015, Mr Chisholm made a request for information to Scottish Borders Council, in relation to a site visit which Councillors had made to a plant operated by NES in Avonmouth, near Bristol. He asked for the following information:
  1. The names of those who were members of the delegation, and why they were included in the group.
  2. The total costs associated with the visit plus the separate amounts spent on travel, accommodation, and entertainment.
  3. A description of what took place during the site visit to Avonmouth, including questions asked of NES and issues discussed relative to the performance of the facility to ensure the aim of "due diligence" was achieved.

4. Information contained in reports, emails, minutes and documents generated as a result of the visit, before and after the event.
3. The Council responded on 21 May 2015. In its response, the Council provided information that met the terms of parts 1. and 2. of Mr Chisholm's request, but it withheld information covered by parts 3. and 4. on the basis that it was commercially confidential.
4. On the same day, Mr Chisholm wrote to the Council requesting a review of its decision. He was dissatisfied with the amount of information that had been redacted from the documents disclosed to him.
5. The Council notified Mr Chisholm of the outcome of its review on 16 June 2015. It upheld the decision to withhold information in order to protect the confidentiality of commercial information. The Council indicated that the information had been deemed to be confidential by virtue of its contract with NES which contained a confidentiality clause which it described as "particularly onerous" and remained in place until 2021. The Council stated that the information was withheld under regulation 10(5)(e) of the EIRs.
6. On 18 June 2015, Mr Chisholm applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Chisholm did not accept that the exception in regulation 10(5)(e) applied because the contract with NES had been terminated.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Chisholm made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 7 July 2015, the Council was notified in writing that Mr Chisholm had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Chisholm. The Council provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.
10. During the investigation, the Council indicated that it was withholding some information under regulation 11(2) of the EIRs as it was the personal data of living individuals. When questioned, Mr Chisholm confirmed that he did not require the personal data of any individual and that the information withheld under regulation 11(2) of the EIRs could be excluded from the scope of the investigation and decision; accordingly, this information is not considered further in this decision.
11. The Council disclosed additional information to Mr Chisholm during the investigation.

## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Chisholm and the Council. She is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

13. In its review outcome, the Council concluded that the requested information was environmental as it related to activities affecting the environment and to a factor affecting or likely to affect the elements of the environment, such as waste. Accordingly, the Council considered that the requested information fell under the definition of environmental information provided in paragraphs (b) and (c) in regulation 2(1) of the EIRs. Mr Chisholm has not disputed this. The Commissioner accepts that the information is environmental information; accordingly, she will consider the information in what follows solely in terms of the EIRs.

### Withheld information

14. The Council is withholding the following information from Mr Chisholm:
- (i) Document 4 (an email)
  - (ii) Document 5 (a PowerPoint presentation)
  - (iii) Document 10 (a PowerPoint presentation)
15. During the investigation, the investigating officer asked the Council to comment on why so few documents had been identified as falling within the scope of Mr Chisholm's request, for example why none of it post-dated the visit. The Council was also asked to explain how it had identified information falling within the scope of Mr Chisholm's request.
16. The Council explained that the Avonmouth trip was an information gathering and familiarisation event for Councillors, to increase their base knowledge of the project and the proposed solution: a decision about the project was to be made at the beginning of 2015. The Council submitted that there were no minutes taken on the day or further meetings organised by officers to discuss the visit. The Council maintained that it was for the individual members to use the insight provided by the trip as a firm grounding when considering the information and recommendations in the February 2015 report to the Council.
17. In relation to the searches carried out for information covered by Mr Chisholm's request, the Council explained that it used an electronic file management storage system to record information about the NES project, which contains every piece of information (including emails, reports and documents, and any document providing analysis) regarding the project. The Council had searched the file management system and the only information it had retrieved (meeting the terms of Mr Chisholm's request) was the information provided to the Commissioner.
18. While it might have expected for there to have been more information, the Commissioner's role is to satisfy herself that adequate searches have been carried out. In this case she is satisfied that the Council has conducted adequate searches and accepts that the only withheld information falling within the scope of Mr Chisholm's request is contained in documents 4, 5 and 10.

## **Regulation 5(1) - duty to make environmental information available**

19. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12, requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply 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.

## **Regulation 10(5)(e) - prejudice to confidentiality of commercial or industrial information**

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 disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
23. The Aarhus Convention: an Implementation Guide<sup>1</sup> (second edition), which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
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:
  - (i) Is the information commercial or industrial in nature?
  - (ii) Does a legally binding duty of confidence exist in relation to the information?
  - (iii) Is the information publicly available?
  - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

### *Is the information commercial or industrial in nature?*

25. The withheld information relates to the commercial activities of NES, in that it references NES's research and development activities and its financial set up as well as outlining the steps and processes involved in its existing and proposed waste management plants.
26. The Commissioner is satisfied that this is commercial information.

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<sup>1</sup> [http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

*Does a legally binding duty of confidence exist?*

27. In terms of regulation 10(5)(e), confidentiality "provided by law" will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute.

28. The Council submitted that clause 50 of the contract between the Council and NES ("Confidentiality") applied to the information withheld from Mr Chisholm. Clause 50.1 defines confidential information as:

*any and all information of a confidential nature relating to the other Party (whether before or after the Commencement Date), either in writing, orally or in any other form, directly from or pursuant to discussions with the other Party...*

29. The Council told the Commissioner that the withheld information was provided to the Council by NES. It argued that the information was confidential as it contains information about NES's technology and financial arrangements as well as details of how the proposed waste management plant would or could be implemented.

30. Clause 50.2 of the contract states that, except in specified circumstances as set out in the clause (none of which are relevant here):

*Each Party shall hold in confidence any Confidential Information.*

31. Clause 50.3 goes on to list other situations where the obligation to maintain confidentiality shall not apply. One of these (clause 50.3.3) states that:

*... the obligation to maintain confidentiality does not apply to Confidential Information to the extent that any person is required to disclose such Confidential Information by Law (other than under [FOISA] or the [EIRs], disclosure pursuant to which is governed by Clause 50.3.7 and Clause 51.5) or any regulatory or government authority (but only to that extent).*

32. Clause 51.5 states that:

*The Council may disclose pursuant to a Request for Information or otherwise publish pursuant to [FOISA] or the [EIRs] any Information (whether Confidential Information, Commercially Sensitive Information or otherwise) which it considers, at its absolute discretion, that:*

*51.5.1 it is required in terms of [FOISA] or the [EIRs] to so disclose or publish; or*

*51.5.2 it would otherwise be in the public interest to so disclose or publish,*

*provided that in so doing the Council acts in accordance with the guidance set out in the [Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004], including by consulting with [NES] prior to any such disclosure or other publication, if and to the extent necessary to comply with that guidance.*

33. The Council takes the view that clause 50 of the contract requires it to keep confidential the information which it has withheld from Mr Chisholm. It acknowledged that clause 50.3.3 (as read with clause 51.5):

*recognises the existence of the Freedom of Information and Environmental Information Regulations*

but took the view that this reference related to:

*the entire scope of those legislative interventions. In other words, where an exemption applies, the Council should seek to preserve the integrity of the confidentiality agreement and act in accordance with that exemption.*

34. As with *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*<sup>2</sup>, the Commissioner does not accept that the existence of a confidentiality agreement will, in itself, mean that all information captured by such a clause should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to contract out of their obligations under the EIRs, regardless of whether the information in question is actually confidential. The Commissioner is required to look beyond the confidentiality clause and to focus on the nature of any withheld information to determine whether the duty of confidence should stand.
35. Even if the duty of confidence does stand, the Commissioner must go on to consider the other tests in regulation 10(5)(e) before determining whether information should be withheld or disclosed. It is not enough that the information is subject to a duty of confidence.
36. Clause 51.5 of the contract underlines this approach. It recognises that, regardless of the agreement entered into by the Council and NES, there will be times when information must be disclosed by the Council in order to allow it to comply with its statutory duties under the EIRs (or, as appropriate, FOISA).
37. The Commissioner will now go on to consider whether a duty of confidence is owed by the Council to NES.
38. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met. These are:
  - (i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
  - (ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
  - (iii) there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

#### Necessary quality of confidence

39. To have the necessary quality of confidence, the information should not be generally accessible. In this case, the Commissioner notes that the Council is withholding some limited information from Mr Chisholm that has already been disclosed under the EIRs. The Commissioner considers that these disclosures may well be as a result of inconsistent redactions, but once information is disclosed under the EIRs it is considered publicly available and no longer has the quality of confidence. The Council has also withheld some information which has been published on the NES website. The Commissioner cannot accept that information is confidential if it has previously been put into the public domain.

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<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>



Where the Commissioner has determined that information has been made publicly available she will find that such information does not have the necessary quality of confidence and she will require its disclosure.

40. While the Commissioner has found that some of the information being withheld does not have the necessary quality of confidence, she is satisfied that the remainder of the information is confidential. The remaining information will only have been viewed by a limited number of individuals and was clearly received under circumstances from which it should reasonably have been inferred that it was confidential.
41. The Commissioner is satisfied that when NES provided the withheld information to the Council, it did so in the expectation that the information would not be disclosed into the public domain during the lifecycle of the contract. The Commissioner also notes that when both parties re-signed the confidentiality agreement in March 2015 (once the contract was terminated), the confidentiality agreement restricted disclosure of confidential information for a period of six years from 31 March 2015.
42. The Commissioner considers that this indicates that the remaining information had, and has retained, the necessary quality of confidence.

#### Obligation to maintain confidentiality

43. The Council must also have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
44. The Commissioner accepts that the information in question in this case (that which she has determined has the necessary quality of confidence) was received under an explicit obligation to maintain confidentiality. Such an expectation would have been normal in relation to information of this kind.

#### Unauthorised disclosure would cause detriment

45. The third requirement is that that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it.
46. In its submissions, the Council provided the Commissioner with a number of examples of harm which it considers would result from disclosure of the information. These are considered in more detail below. The detriment under consideration in this instance need only be potential for the test to be met, and the Commissioner is satisfied that the disclosure of the information in this case is potentially capable of causing detriment to NES.
47. The Commissioner is therefore satisfied that a legally binding duty of confidence exists in relation to the information which has the necessary quality of confidence.

#### *Is the information publicly available?*

48. The third factor to consider in relation to the exception in regulation 10(5)(e) is whether the information is publicly available. The Council has submitted that the withheld information is not publicly accessible and the Commissioner accepts this position in relation to the information which has the necessary quality of confidence.

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

49. The term "legitimate economic interest" is not defined within the EIRs. In the Commissioner's view the interest in question will be financial, commercial or otherwise "economic" in nature.



The prejudice to that interest must be substantial, and therefore of real and demonstrable significance.

50. The Council has argued that disclosure of the withheld information would be likely to cause substantial harm to the legitimate economic interests of NES. The information contains details about the technology which NES is developing as well as its financial arrangements and that this information is commercially sensitive. The Council argued that disclosure of the information would reveal confidential information about NES and its technology, and competitors would be able to use this information to the commercial disadvantage of NES. The Council indicated that if the information were to be disclosed it would cause substantial and serious harm to NES.
51. The Commissioner has considered all of these arguments carefully. While she is satisfied that most of the withheld information is highly sensitive and is critical to the commercial success of NES, she has concluded that some of it is not.
52. The Commissioner considers that disclosing information about the financial arrangements or technology developments of NES would, or would be likely to, cause substantial harm to its legitimate economic interest. The Commissioner accepts that disclosure of this information would be to the commercial disadvantage of NES and would harm both its commercial and financial interests. In the circumstances, the Commissioner accepts that the Council was entitled to apply the exception in regulation 10(5)(e) to this information.
53. However, some of the withheld information does not contain sensitive details of NES's finance or technology but instead it contains general details of NES's work and activities, lacking in specificity and detail. The Commissioner does not consider that disclosure of this type of general information would cause the harm that the Council has claimed, nor does she see from the Councils' submissions how any competitor of NES could use this information to gain any real commercial advantage.
54. Having considered all of the relevant tests, the Commissioner does not accept that the Council was entitled to apply the exception in regulation 10(5)(e) to this more general information. She requires disclosure of this information.
55. Where the Commissioner has upheld the application of regulation 10(5)(e) of the EIRs, she will go on to consider the application of the public interest test contained in regulation 10(1)(b) of the EIRs.

#### *Consideration of the public interest*

56. Regulation 10(1)(b) of the EIRs states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
57. The Council acknowledged that there is a public interest in accessing information in order to ensure that the public can scrutinise the performance and integrity of public bodies, including of their staff and members, to ensure that public bodies act in a way which achieves best value and to ensure they use public money appropriately.
58. The Council accepted that the NES project had high value and ultimately required a write-off of £2,000,000, for accounting processes. However, it argued that the public interest in the Council being able to enter into complex commercial contracts in a confidential manner

outweighs the public interest in disclosing the particular information requested by Mr Chisholm.

59. The Council claimed that there is a significant public interest in ensuring that local authorities are able to enter into agreements of a commercially sensitive nature to ensure the efficient and effective delivery of services. The Council submitted that, when entering into contracts of such a significant nature, it is important that the local authority is able to access full, frank and detailed information from suppliers and prospective suppliers. The Council argued that such suppliers would, even if prepared to enter into such contracts with a local authority, be reluctant to provide information with the same rigour if they feared that the information would find its way into the public domain.
60. On balance, the Council considered that the public interest lay in maintaining the exception and withholding the information covered by Mr Chisholm's request.
61. Mr Chisholm argued that because the termination of the NES contract resulted in the loss of millions of pounds of public money, disclosure of the information was of great public interest.
62. Mr Chisholm noted that, throughout the project, the Council claimed that it had carried out "due diligence" at all times to protect its taxpayers. He disputed this claim. He considered that the trip to NES facilities at Avonmouth in October 2014 represented one of the main events as far as "due diligence" is concerned, and submitted that it is now clear that at the time of the visit, the Avonmouth Energy Recovery Facility (ERF) had major technical issues and was under-performing. Mr Chisholm argued that these malfunctions were costing its owners and funders vast sums of money, yet it was this ERF plant that was to be "copied" at Easter Langlee in the Scottish Borders, involving expenditure of up to £10 million.
63. Mr Chisholm argued that the public has a right to know how rigorous this "due diligence" exercise by the Council's representatives was, and what was gleaned from the trip. He believed it was obvious that the councillors and senior officers who went on the trip to Avonmouth did not achieve "due diligence" as the contract for the development of the ERF at Easter Langlee had to be cancelled just four months later because of "technological" issues. He disputed the Council's claim of "commercial sensitivity", given that its contract with NES had been terminated, and argued that it was in the public interest for all available information to be disclosed.

#### *Commissioner's conclusions*

64. The Commissioner accepts that there is a general public interest in transparency and accountability, particularly where this involves large sums of public money. The Commissioner notes that the Council had to "write off" £2,000,000 worth of public money when the contract with NES was terminated. This alone ensures that there is significant public interest in information which would promote public understanding of the background to this decision.
65. Having considered the specific information withheld from Mr Chisholm under regulation 10(5)(e), the Commissioner notes that it focuses primarily on the activities and financial arrangements of NES itself, and does not offer any insight into the Councillors' views or conclusions about their visit. There is no record of any questions that might have been asked or answered during the site visit, or any other information showing what conclusions the Councillors drew from their visit. In short, the withheld information is information about NES, which originated from NES, and it does not illuminate any of the decision-making processes of the Council. While the Commissioner recognises that this information may be of interest

to the general public, she does not accept that there is a strong public interest in its disclosure, as it would not add anything of substance to what is already known regarding the “due diligence” undertaken by the Council or its decision-making processes in this matter.

66. The Commissioner has considered the public interest arguments put forward by the Council. She does not consider it likely that businesses would refrain from entering into contracts with the Council if information in this case were disclosed, but she accepts that businesses may be less willing to share sensitive information with the Council if this happened. The information contains sensitive details about NES’s financial arrangements and technological developments, and the Commissioner accepts that its disclosure could result in contractors being more reticent about sharing information with the Council in future.
67. It is in the public interest for any business that enters into contract with the Council to feel able to share detailed information with it, so that the Council can make decisions based on a full understanding of the contractor’s position. If businesses withheld critical information from the Council for fear that it might be disclosed into the public domain, the Council would be disadvantaged in any contract as it would be forced into making decisions without being in possession of all of the facts. This would not be in the public interest.
68. The Commissioner has already acknowledged that disclosure of information about the financial arrangements and technology developments of NES would cause, or would be likely to cause substantial harm to the legitimate economic interests of NES. She accepts that this would not be in the public interest.
69. On balance, having considered the withheld information in the context of all relevant submissions she has received, the Commissioner finds that the public interest in making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.
70. The Commissioner will provide the Council with a marked up version of the information which has been withheld from Mr Chisholm showing what additional information should be disclosed.

## Decision

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The Commissioner finds that Scottish Borders Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Chisholm.

The Commissioner finds that by correctly applying the exception contained in regulation 10(5)(e) of the EIRs to some of the information it was withholding from Mr Chisholm, the Council complied with the EIRs.

However, by wrongly applying the exception contained in regulation 10(5)(e) to other information it was withholding from Mr Chisholm, the Council failed to comply with part 5 of the EIRs.

The Commissioner therefore requires the Council to disclose information that was wrongly withheld under regulation 10(5)(e) of the EIRs by **5 May 2016**.

## **Appeal**

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Should either Mr Chisholm or Scottish Borders Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## **Enforcement**

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

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

**21 March 2016**

### 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;

...

## 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;



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