

Environmental Standards Scotland
Ìrean Àrainneachdail na h-Alba

ENVIRONMENTAL
Standards Scotland
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Mark Roberts
Chief Executive Officer
[redacted]

[redacted]
[redacted]

17 January 2024

Our ref: ESS.FOI.020

Dear [redacted],

I refer to your request dated 15 December 2023 for a review of the response you received on 12 December 2023 to your information request to Environmental Standards Scotland (ESS) dated 7 December 2023 for:

A copy of the advice ESS has received vis-à-vis case C-56/90 or otherwise summarise the main points to help us understand how that conclusion was reached on numeric thresholds.

To enable your review request to be considered afresh and impartially by someone who has not responded to your original request, I have undertaken the internal review on behalf of ESS.

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Your review request states that you are dissatisfied with our initial response to your request because you consider that:

- the response did not correctly apply the public interest test
- the reasons given in our response in favour of disclosure are generic and fail to identify specific reasons in favour of disclosure arising from the background to your Freedom of Information (FOI) request

You note that the specific reasons in favour of disclosure in this case include that ESS has a statutory role in monitoring and securing that public authorities comply with environmental laws.

You state that:

- ESS has been informed that a public authority's policy vis-à-vis the designation of bathing waters appears to be unlawful. Legal authority has been provided to ESS to support the proposition that the use of a 150 bathers threshold is unlawful (*Commission v UK C-56/90*)
- ESS has decided that the 150 bathers threshold is lawful. In reaching that conclusion, ESS has adopted a legal position which appears contrary to caselaw and is at odds with ESS' statutory purpose and that ESS has provided no explanation to support its position
- in light of the apparent conflict between ESS' position and *Commission v UK*, there is a clear public interest in favour of the disclosure of the advice in full or the disclosure of a summary of that advice, in order to ensure that ESS is properly discharging its statutory role
- there is a strong public interest in ESS providing reasons for its decisions, particularly on matters of wide public importance such as the criteria applicable to the designation of bathing waters. The public interest in favour of ESS providing reasons for its

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decisions are heightened in circumstances where ESS has adopted a position which appears inconsistent with caselaw

I have reviewed the scope and nature of the information you requested and our initial response to that request in terms of our duties under the Freedom of Information (Scotland) Act 2002 (FOISA). I have also considered whether the information you requested is environmental information in terms of Regulation 2(1) of the Environmental Information (Scotland) Regulations 2004 (EIRs).

I have decided that the information that you requested is environmental information in terms of the EIRs. On that basis, ESS has an obligation to deal with your request under the EIRs, and an option to also deal with it under FOISA or claim the exemption in section 39(2) of FOISA and deal with it under only the EIRs.

In the interests of transparency, I have decided at review stage to:

- deal with your request under both the EIRs and FOISA rather than only under the EIRs
- not rely on the exemption in section 39(2) of FOISA

My decision at review stage is set out below.

Response under FOISA

Section 36(1) FOISA – legal privilege

Having considered the nature of the information you have requested, it is clear that it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. It is legal advice given by our in-house solicitor to ESS staff members authorised to seek and obtain legal advice and it is confidential. The information is

therefore covered by legal advice privilege, which covers communications between legal advisers and their clients in the course of which legal advice is sought or given.

On that basis, I have decided that the exemption in section 36(1) of FOISA is engaged in relation to the information you have requested.

As this exemption is subject to the public interest test under FOISA, I have considered the public interest in favour of disclosure balanced against the public interest in favour of maintaining this exemption.

As stated in our initial response, ESS recognises that there is a public interest in relation to the transparency of decision-making. FOISA is a mechanism by which individuals can request information to understand the work of a public authority and enable accountability in relation to the basis upon which certain positions are reached and certain decisions made. In specific terms, ESS recognises that this public interest extends to its work and its decisions on matters of public importance, including the criteria applicable to designation of bathing waters.

However, we also consider that there is a strong public interest in a public authority being able to request and receive confidential legal advice; something the courts and the Scottish Information Commissioner have long recognised.

There is a wider public interest in public authorities being able to receive confidential legal advice. This is significant for all public authorities, including ESS. This confidentiality underpins the ability of ESS and all public authorities to receive free and frank legal advice, and to discuss all issues and options, to support robust decision-making, which itself is clearly in the public interest.

There is also a real likelihood that the disclosure of legal advice requested and received by a public authority in the absence of an overwhelming public interest in favour of disclosure,

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which we have not identified in this case, would create a 'chilling effect' in terms of future legal advice for ESS being requested and received, which could also extend to other public authorities seeking and receiving legal advice.

Based on my consideration of the competing public interest arguments, I have decided that the public interest in favour of disclosure of the information you have requested is outweighed by the public interest in favour of maintaining the exemption in section 36(1) of FOISA. On that basis, I uphold the decision made in respect of our initial response to your information request.

Response under the EIRs

I have also considered your request for a copy of the advice ESS has received vis-à-vis case C-56/90 under the EIRs, in terms of your right in Regulation 5 of the EIRs to request environmental information that we hold, as defined in Regulation 2(1)(c) of the EIRs: namely, information on measures (including administrative measures), policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraph (a) and (b) of Regulation 2(1).

Our duty to make environmental information available to you under Regulation 5 is subject to exceptions set out in the EIRs. Although I have considered those exceptions in a restrictive way and applied a presumption in favour of disclosure, I have decided to apply the exception in Regulation 10(4)(e) to the advice that you have requested. This exception enables ESS as a Scottish public authority to refuse to make environmental information available to the extent that a request involves making available internal communications. The advice you have requested is legal advice and was in the form of an internal communication between our in-house solicitor and other ESS staff.

This exemption is subject to a public interest test under the EIRs, which requires an assessment as to whether, in all the circumstances, the public interest in making the

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environmental information available is outweighed by the public interest in maintaining the exemption.

As stated above in terms of our response to you under FOISA, ESS recognises that there is a public interest in relation to the transparency of decision-making, and that the EIRs provide a mechanism for individuals to seek information to understand the work of a public authority, including the exercise of public functions in relation to the environment. We also understand the public interest in seeking to obtain accountability for decisions, including criteria applicable to designation of bathing waters.

However, there is strong public interest, as explained in our FOISA response, for ESS as a public authority to have a right to request and receive confidential legal advice in order that it performs its functions effectively including in relation to the environment. The right of any client to receive confidential and privileged legal advice is one which the courts and the Scottish Information Commissioner have long recognised as being in the interests of justice and the wider public interest.

There is a wider public interest in public authorities being able to receive confidential internal advice, including legal advice. The existence of a private space for internal communications on sensitive matters, including in this case legal advice, underpins the ability of ESS and all public authorities to receive free and frank advice in the form of internal communications, to discuss all issues and options and to support sound decision-making, which itself is clearly in the public interest.

As noted in our FOISA response, in a case where the internal communications include legal advice, and in the absence of an overwhelming public interest in favour of disclosure, we consider there to be a likelihood of a 'chilling effect' in terms of future legal advice communicated internally if the internal communication in the form of in-house legal advice is disclosed in this instance.

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On balance, I have decided that the public interest in favour of disclosure of the information you have requested is outweighed by the public interest in favour of maintaining the exception in Regulation 10(4)I of the EIRs. ESS is therefore withholding the information that you have requested from disclosure to you and into the public domain under Regulation 10(4)(e) of the EIRs.

I consider that your review request has been dealt with in accordance with our duties under FOISA and the EIRs and with our right to apply exemptions and exceptions in relation to the duty to disclose information.

Your information request also appears to include a request that we summarise the main points of our legal advice to help “us” (by which we understand you mean [redacted]) understand how a conclusion was reached on numeric thresholds. We note that FOISA and the EIRs do not require ESS to create new information in order to engage in dialogue, dispute or legal debate with parties or to respond to statements of your position that do not include a request for information.

While we have considered all relevant points as part of this review, including those made in your review request, we note that neither FOISA nor the EIRs require us to respond in a level of detail that would actually disclose information protected by applicable exemptions or exceptions.

If you are dissatisfied with this response to your review request, you have a right of appeal to the Scottish Information Commissioner within six months of this review response. The Scottish Information Commissioner’s guidance on making an appeal describes the process, including the application form.

Further information, including relevant contact details is available on the website.

www.itspublicknowledge.info/Appeal

If you are dissatisfied with the decision of the Scottish Information Commissioner, following an appeal to the Scottish Information Commissioner, you have a right of appeal to the Court of Session on a point of law.

Yours sincerely,

Mark Roberts
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