

Environmental Standards Scotland
Ìrean Àrainneachdail na h-Alba

Alasdair Dewar
Freedom of Information Officer
foi@environmentalstandards.scot
0808 1964000

ENVIRONMENTAL
Standards Scotland
Ìrean Àrainneachdail na h-Alba

[redacted]
[redacted]

12 December 2023

Our ref: ESS.FOI.020

Dear [redacted] ,

Thank you for your email of 30 November 2023, and subsequent email of 7 December 2023, requesting information under the Freedom of Information (Scotland) Act 2002. The information which you request is as follows:

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.

Response:

1. Your request for information has now been considered and a decision has been made not to grant your request. The information requested by you is considered to be exempt in terms of the Freedom of Information (Scotland) Act 2002 (FOISA).
2. Section 16 of FOISA requires ESS to provide you with a notice which: (a) states that it holds the information; (b) states that it is claiming an exemption; (c) specifies the exemption in question; and (d) states that, if it is not otherwise apparent, why the exemption applies. Where information is considered to be exempt, this letter serves as a Refusal Notice that information is held and an explanation of the appropriate exemption is provided.
3. In relation to the legal advice that ESS holds the following exemption is applicable:

Environmental Standards Scotland
enquiries@environmentalstandards.scot
Thistle House, 91 Haymarket Terrace, Edinburgh, EH12 5HD
0808 1964000

Section 36(1) – Confidentiality

Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between legal advisers and their clients in the course of which legal advice is sought or given.

As you may be aware, for the exemption to apply to this particular type of communication, certain conditions must be fulfilled, namely:

- (i) The information must relate to communications with a professional legal adviser. The privilege applies to advice given by in-house solicitors;
- (ii) The legal adviser must be acting in their professional capacity;
- (iii) The communications must occur in the context of the legal adviser's professional relationship with their client; and
- (iv) The information must be confidential.

I would advise that the withheld information comprised confidential communications between ESS' in-house solicitor and ESS staff members, authorised to seek and obtain legal advice, as their client, in which legal advice was sought and provided.

Consequently, I consider the withheld information is subject to legal advice privilege and is therefore information to which a claim to confidentiality of communications could be maintained in legal proceedings.

The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA i.e. the public interest in favour of disclosure balanced against the public interest in maintaining the exemption.

ESS recognises that there is a public interest in relation to transparency of decision-making. There is a public interest in individuals being able to exercise their rights under FOISA in order to enhance their understanding of the work of a public authority and ensure openness and accountability in relation to the basis upon which certain positions are reached and decisions made.

However, as the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. There is a strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and their clients. It has been stated, and reiterated, in a number of Decisions that while the Commissioner will

consider each case individually, he is likely only to order the release of such communications in highly compelling cases.

In my deliberations I would argue that it is important that our in-house legal adviser can provide free and frank legal advice, which considers and discusses all issues and options without the potential for aspects of that advice to be disclosed and, as a result, potentially taken out of context. Further, if there was an expectation that such legal advice would be disclosed in the future, this would inevitably lead to similar advice being much more circumspect and therefore less effective.

As such, considering all competing arguments, it is the position of ESS that the public interest in disclosure of this information is outweighed by the public interest in maintaining the exemption.

If you are unhappy with this response to your request under the Freedom of Information (Scotland) Act 2002, you may ask us to carry out an internal review of the response by writing to:

Mark Roberts
Chief Executive Officer
Environmental Standards Scotland
Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HD
Email foi@environmentalstandards.scot

Your review request should explain why you are dissatisfied with this response, and should be made within 40 working days from the due date when you received this letter. We will complete the review and tell you the result within 20 working days from the date when we receive your review request.

If you are not satisfied with the result of the review, you then have the right to appeal to the Scottish Information Commissioner. More detailed information on your appeal rights is available on the Commissioner's website at:

[Appeal to the Commissioner | Scottish Information Commissioner \(itspublicknowledge.info\)](https://www.scot.nhs.uk/itspublicknowledge/info)

Yours sincerely,



Alasdair Dewar
Freedom of Information Officer
Environmental Standards Scotland