

Environmental Standards Scotland
Ìrean Àrainneachdail na h-Alba

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ENVIRONMENTAL
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07 July 2026

Our ref: ESS.IR.038 Part 3
Your reference: EIR review request of ESS.IR.032 Part 3

Dear ██████████,

We note that you have formally requested an internal review of ESS's responses to your information request ESS.IR.032, received on 26 May 2026, in respect of Parts 1, 2, 3, and 4.

Because we responded separately to each part of your request, we will also respond separately to each part of your review request.

The information you requested in Part 3 is as follows:

“1. All records of any meetings, discussions, or decisions at management or senior level within ESS that touch on the investigation described in Part 1 above, including any records of escalation, de-escalation, or specific direction given to caseworkers or investigators.

2. Any Ministerial correspondence, Parliamentary correspondence, or correspondence with the Scottish Government concerning the investigation described in Part 1 or concerning ERCS, during the relevant period.

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3. Any complaints received by ESS (whether from the public, ERCS, or any other party) concerning ESS's handling of environmental planning breach investigations, during the period March 2024 to the date of this request, including ESS's responses to any such complaints."

You accept that the information you have requested is 'environmental information' for the purposes of the Environmental Information (Scotland) Regulations 2004 (EIRs) and you have raised no objection to us responding to your request under that regime.

We have provided you with some information and we have applied a number of exceptions to allow us to redact or withhold some information from disclosure. During the review the search for information was widened and one additional document has been considered. The associated schedule of information and documentation is included with the Part 1 review response.

Regulation 10(4)(e) allows public authorities to refuse to disclose internal communications and we have applied this exception to the information requested at point 1. The exception in Regulation 10(4)(e) is subject to the public interest test. We recognise that regulation 10(2)(b) of the EIRs builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed. We also recognise the public interest in transparency and accountability in the decision-making processes of public authorities, and in understanding how particular decisions are reached. We acknowledge that disclosure of the information would assist such accountability and understanding. However, the release of records of meetings and discussions into the public domain could result in officers being less willing to be full and frank with their internal communications. Officers rely on meetings and internal communications to evaluate, communicate and make informed decisions, and releasing these to the general public would have a detrimental effect on the decision-making process. Internal discussions do not represent the final view of a

public authority and should not be released into the public domain.

On balance, we consider that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.

The exception set out in Regulation 10(5)(d) of the EIRs allows information to be withheld where disclosure would harm the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law. It may apply to information about the proceedings of a public authority where the proceedings are considered to be confidential. The proceedings may be those of the public authority receiving the request, in this case ESS, or those of any other public authority.

Section 40 of the UK Withdrawal from the European Union (Continuity)(Scotland) Act 2021 (the “2021 Act”) imposes obligations of confidentiality upon ESS. While it is recognised that there is an inherent need to protect the confidentiality of communications between public authorities in order to encourage cooperation between them, it is also recognised that there is public interest in transparency in relation to investigations by public authorities. We consider that breaching the obligations set out in the 2021 Act would be likely to harm the confidentiality of proceedings of both ESS and any public authority which is cooperating with them.

The Commissioner has also previously held, in Decision 156/2020, that seeking and obtaining legal advice can constitute proceedings, in which a claim of confidentiality can be maintained, for the purposes of the exception in regulation 10(5)(d) of the EIRs. In its publication, The Aarhus Convention: an implementation guide, the Economic Commission for Europe (the United Nations agency responsible for the Convention the EIRs are designed to implement) notes, at page 87, that the Convention does not comprehensively define “proceedings of public authorities”. It suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The common law of

Scotland provides protection for communications between a legal adviser and client for the purpose of seeking and providing legal advice. Because of the need here to maintain confidentiality of proceedings between legal adviser and client to allow us to obtain free and frank advice in relation to our statutory duties, we consider that making this information available would substantially prejudice the confidentiality of our proceedings. So, to the extent that the requested information contains legal advice, we consider that the advice is exempt from disclosure in terms of regulation 10(5)(d).

The exception in Regulation 10(5)(d) is subject to the public interest test. We recognise that regulation 10(2)(b) of the EIRs builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed. We also recognise the public interest in transparency and accountability in the decision-making processes of public authorities, and in understanding how particular decisions are reached. We acknowledge that disclosure of the information would assist such accountability and understanding. However, we consider that there is a greater public interest in maintaining confidential cooperation between public authorities in terms of the 2021 Act. It should be noted that the confidentiality imposed by the 2021 Act ceases to have effect after an investigation has closed. We will publish the outcome of our investigation upon conclusion, and at that stage the information may be made publicly available.

We also consider that there is a greater need for public authorities to be able to obtain and consider legal advice on confidence to allow for fair and effective decision making.

We therefore consider that, on balance, at that stage the benefit in maintaining the exception outweighs that in disclosing the information and we consider that the information should be withheld.

Regulation 10(4)(a) of the EIRs allows public authorities to refuse to make

environmental information available if they do not hold the information when the request is received. In this case, we can confirm that we hold no *“Ministerial correspondence, Parliamentary correspondence, or correspondence with the Scottish Government concerning the investigation described in Part 1 or concerning ERCS, during the relevant period”* and therefore the exception in regulation 10(4)(a) applies.

The exception is subject to the public interest test. As we do not hold the information, we cannot see any public interest in making the information available. On balance, we therefore consider that the public interest in maintaining the exception outweighs the interest in disclosing the information.

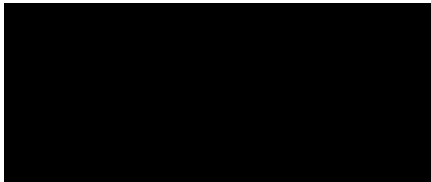
The information we hold in relation to the documents requested by you contains some personal data of third parties, i.e. data that identifies them and relates to them, which we consider would be unfair to disclose to you and put into the public domain, as it would be beyond their reasonable expectations and would not be reasonable or possible for us to notify them or seek their consent to disclosure. By being unfair, such a disclosure would therefore also be unlawful in terms of the first data protection principle in Article 5(1)(a) of the UK GDPR. For that reason (of unfairness), we consider that it is not necessary to assess whether or not there is a legal condition for disclosure to you in Article 6(1) of the UK GDPR. We have therefore applied the exception in regulation 11(2) to withhold this information from disclosure to you, as it would contravene the first data protection principle in Article 5(1)(a) UK GDPR. This exception is not subject to the public interest test.

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
Chief Executive