



Scottish Information
Commissioner
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Decision Notice 031/2026

Legal advice: Deposit Return Scheme

Authority: Scottish Ministers

Case Ref: 202500822

Summary

The Applicant asked the Authority for legal advice related to the introduction of a Deposit Return Scheme. The Authority withheld the information on the basis that it comprised internal legally privileged communications to Scottish Ministers and the public interest favoured withholding it.

The Commissioner investigated and found that the Authority had not complied with the EIRs in relation to some information which it had previously failed to identify. The Authority was, however, entitled to withhold all of the information which fell within scope of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” and paragraphs (a) and (c) of “environmental information” (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions).

Background

1. On 30 January 2025, the Applicant made a request for information to the Authority. He asked for:
 - (i) any verbal minuted legal advice Scottish Ministers received on the implementation of a Deposit Return Scheme (DRS) in Scotland between May 2021 and September 2023
 - (ii) any written legal advice Scottish Ministers received on the implementation of a DRS in Scotland between May 2021 and September 2023

The Applicant stated that he was interested, in particular, in any “legal advice on the potential clash of a Scottish DRS with the Internal Market Act, and the risk of UK government intervention”.

2. The Authority responded on 27 February 2025, having considered the request under the EIRs. The Authority withheld the information requested under regulation 10(4)(e) of the EIRs on the basis that it was internal communications (legal advice) to Scottish Ministers, and the disclosure of any such information would breach legal professional privilege.
3. On 15 April 2025, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because, in his view, the public interest in disclosure of the information outweighed legal professional privilege.
4. The Authority notified the Applicant of the outcome of its review on 13 May 2025. The Authority upheld its original response.
5. On 22 May 2025, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Authority’s review because it had failed to correctly apply the public interest test.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 24 June 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the searches that had been carried out and its reasons for withholding the information under regulation 10(4)(e) of the EIRs, including its consideration of the public interest test.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

10. The Authority considered the Applicant's request in accordance with the EIRs, on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs.
11. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
12. Having considered the withheld information (internal communications relating to the introduction of a scheme to recycle specified waste material and reduce the impact of these material on the environment) the Commissioner is satisfied that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (in particular, paragraphs (a), (b) and (c) of that definition).
13. The Applicant has not disputed the Authority's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Section 39(2) of FOISA – Environmental information

14. In the initial response, upheld at review, the Authority relied upon section 39(2) of FOISA. 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, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
15. The Authority explained to the Applicant that there was no public interest in dealing with the same request under two different regimes. It considered the public interest in maintaining the exemption in section 39(2) of FOISA outweighed that in considering the request under FOISA.
16. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
17. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.

Regulation 5(1) – Duty to make available environmental information on request

18. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any Applicant. This obligation relates to information that is held by an authority when it receives a request.
19. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
20. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies, but only if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

Withheld information

21. The Authority initially argued that the information it was withholding related solely to request (ii). It commented that it had not identified any information falling within the scope of request (i).

Request (i)

22. As part of the investigation, the Authority was asked questions about the content of the withheld information and, specifically, about content which appeared to indicate that legal advice had been given to Ministers, verbally, during meetings.
23. The Authority acknowledged that its original searches had not been sufficient to identify any records of legal advice given verbally at Cabinet meetings. It explained that this was because minutes of Cabinet meetings were classified and marked as Official-Sensitive documents, which meant that access was restricted and managed by the Cabinet Secretariat. Given this oversight, during the investigation, the Authority asked the Cabinet Secretariat to carry out searches with a view to identifying any relevant minutes and to provide extracts that record any legal advice given to Ministers at Cabinet within scope of request (i).
24. As a result of these additional searches, the Authority identified two documents that fell within scope of request (i) and it withheld these documents under regulation 10(4)(e) of the EIRs.
25. As the Authority failed to identify all the information falling in scope of request (i) by the review stage (at the latest), the Commissioner must find that the Authority failed to comply with regulation 5(1) of the EIRs.

Request (ii)

26. During the investigation, the Authority was asked about the date range of the withheld information. In response, the Authority acknowledged that its original interpretation of the request was too narrow and that its original searches may not have identified all of the information captured by the request, particularly any advice pre-dating 2022. The Authority explained that this was because information submitted into its records management system (eRDM) prior to 2022 may not have been clearly marked as legal advice.
27. The Authority carried out additional searches to ensure it had identified all relevant information falling within the scope of this request.

It explained that, in addition to keyword searches of eRDM, it also manually reviewed nine separate and specific policy folders within its Circular Economy: Deposit Return Scheme records and the Authority provided evidence of these searches. As a result of the additional searches, the Authority identified a further two documents that were not previously identified.

28. Given that the Authority failed to identify all the information falling within the scope of request (ii) by the review stage (at the latest), the Commissioner must find that the Authority failed to comply with regulation 5(1) of the EIRs.
29. The Commissioner will now consider whether the Authority was entitled to withhold all of the information from the Applicant.

Regulation 10(4)(e) – Internal communications

30. Regulation 10(4)(e) allows authorities to refuse to disclose internal communications. This is a class-based exception, meaning that there is no need to consider whether disclosure of the communication would cause harm before applying the exception.
31. For information to fall within the scope of the exception in regulation 10(4)(e) of the EIRs, it need only be established that the information is an internal communication.
32. As with all exceptions in regulation 10 of the EIRs, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure.
33. The Authority withheld all of the information captured by both parts of the request (that originally identified and that identified during the investigation) under the exception in regulation 10(4)(e) of the EIRs.
34. The Authority explained that the information it was withholding had only been circulated internally within the Authority and had not been shared externally at any point. The Authority argued, therefore, that the information was internal communications and as such fell under the exception at regulation 10(4)(e). It was the Authority's view that disclosure of the information requested would breach legal professional privilege and it considered that all of the necessary conditions for legal advice privilege to apply were satisfied.
35. Having reviewed the withheld information, the Commissioner is satisfied that it comprises internal communications and the cited exception is relevant.
36. The Commissioner will now go on to consider the public interest.

Public interest test – regulation 10(4)(e)

37. Regulation 10(4)(e) is subject to the public interest test contained in regulation 10(1)(b) of the EIRs, so the request might legitimately be refused only if, in all the circumstances, the public interest in making the information available was outweighed by that in maintaining the exception.

The Applicant's comments on the public interest

38. Applicant submitted that the Authority had failed to correctly apply the public interest test because it had not identified any specific reasons in favour of disclosure. He considered that the public interest in disclosure of the information was stronger than the public interest in maintaining legal professional privilege.

39. In correspondence with the Commissioner, the Applicant intimated that he wanted the Commissioner to take into account the detailed public interest arguments he made in his requirement for review as well as those made in his application.
40. In those arguments, the Applicant noted that the implementation of Scotland's DRS was delayed by intervention from the UK Government via the Internal Market Act (IMA) and he considered that Ministers, in receiving legal advice, should or would have been aware of the risks of that intervention occurring. He argued that there was a public interest in knowing whether advice had been received about those risks and what that advice was. He submitted that it was clearly in the public interest to enhance scrutiny of Ministers decision-making processes and thereby improve accountability and democratic participation and that those processes were inextricably linked with any legal advice that may have been received on the matter.
41. The Applicant also noted that the delay of Scotland's DRS has resulted in legal action by Biffa against the Scottish Government, seeking compensation of £166,200,000 for loss of investment, management costs and profits as the scheme's planned logistic partner. The Application submitted that it was in the public interest for the Authority to receive proper legal advice if there was a risk of litigation, particularly if that litigation involved compensation claims. He argued that it was in the public interest to ascertain whether the legal advice received was proper, accurate in terms of the implications of the IMA and the likelihood of UK Government intervention to ensure that any losses to the taxpayer were minimised. He stated that effective oversight of potential expenditure of public funds due to improper legal advice was clearly in the public interest.
42. The Applicant considered that the delay of Scotland's DRS was fundamentally a constitutional issue, given its interface with the IMA and the disclosure of the information requested would significantly enhance public debate as a result, as per paragraph 41 of [Decision 048/2022](#)¹. He notes that the DRS was a clear example of the IMA's conflict with prior devolution settlements, getting to the core of Scotland's constitutional settlement with Westminster and tapping into ongoing public debate on Scottish devolution and the nation's integration in the UK post-departure from the EU.
43. Taking into account climatic and ecological crises, the Applicant submitted that it was clearly in the environmental public interest for a DRS to be introduced. He argued that such a scheme would mitigate against the throwaway culture, encourage recycling, incentivise reuse and contribute to the Scottish Government's goal of achieving a circular economy and that any delay in implementation of the DRS would be a delay to necessary environmental action. It was his view that disclosure of the requested legal advice, which may have hinted at or prevented the delay in implementation, would have prevented additional environmental harm caused by such a delay.
44. Furthermore, the Applicant considered that disclosure of the legal advice would contribute to the discussion of how constitutional barriers limited the ability of the Scottish Parliament to take environmental action and that this was clearly in the public interest.
45. The Applicant noted that there was a clear divergence between the pathways taken by Scotland and Wales's DRSs in that Wales's recent decision to exit a UK-wide scheme, and launch one in parallel that includes glass, has yet to face an intervention from the UK Government via the IMA.

¹ <https://www.foi.scot/decision-0482022>

The Applicant was unsure whether the reason for this was political or technical, but he considered that the legal advice the Authority received in the noted time period in all likelihood influenced the Scottish Government's strategy of implementing their DRS. He argued that, given the current relative success of Wales's efforts, the integrity of advice received by the Authority may be in question and it was therefore in the public interest for this legal advice to be disclosed. He further argued that it was in the public interest to learn from past errors, hold government to account, and potentially allow for the eventual inclusion of glass in Scotland's DRS; the latter being an unalloyed environmental good.

46. The Applicant commented that he did not consider that disclosure of the legal advice in this case, would lead to future advice being more circumspect or not sought in the first place. He argued that, if anything, the details of this case may reveal that legal advice should be more circumspect, or that legal advice should be sought more frequently and vigorously to prevent downstream litigation.

The Authority's comments on the public interest

47. The Authority restated its view that the information which fell within scope of the request was, by definition, legal advice and, therefore, disclosure of that information would breach legal professional privilege.
48. The Authority acknowledged the strong presumption in favour of disclosure under the EIRs and recognised the public interest in disclosure of the information for reasons of openness, transparency and accountability.
49. The Authority accepted that there was a public interest in the DRS in particular, and in understanding why the scheme did not progress. The Authority acknowledged that disclosure of the legal advice may help the public's understanding of the matter.
50. However, the Authority submitted that there was a very strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and clients. It argued that it was important that lawyers could provide free and frank legal advice which considered and discussed all issues and options without fear that their advice may be disclosed and, as a result, potentially taken out of context.
51. The Authority considered that there was a public interest in ensuring that the Government's position on any issue was not undermined by the disclosure of legal advice, particularly where that advice was relevant to court proceedings (as referenced by the Applicant in his application). The Authority argued that its legal advisers needed to be able to present the full picture without that advice being disclosed publicly and in relation to topics such as the subject matter of the request, which were emotive and the subject of political debate. Its view was that any expectation that legal advice could be released would inevitably lead to the legal advice being much more circumspect and therefore less effective.
52. The Authority noted that all government decision-making and policy was underpinned by the rule of law and was often informed by complex and nuanced legal advice which evolved throughout the development of the policy and it rarely fell squarely into one of two categories; "significant risk" of "minimal risk". The Authority argued that the fact that a legal risk materialised, does not show that it ignored legal advice or that the legal advice was wrong.

It argued that the fact that the DRS was challenged did not weigh against its right to confidential legal advice and it strongly rejected the Applicant's view that the existence of legal proceedings against a party did not diminish that party's right to legal professional privilege. The Authority commented that it would be very dangerous to create a precedent along those lines.

53. The Authority recognised that disclosure would contribute to the public debate on a significant constitutional issue and it recognised that disclosure of the legal advice might help the public's understanding of why the DRS had not progressed along the original timeline. However, it did not accept that this argument was of sufficient weight to override the inherent public interest in upholding legal professional privilege. The Authority considered that there were other forums for public discourse on the matter and the public interest in understanding the IMA intervention could be satisfied in other ways, without disclosure of the privileged communications.
54. The Authority acknowledged the Applicant's view that there was a public interest in achieving the Scottish Government's environmental objectives in a time of climatic and environmental crisis and that he considered that disclosure of the legal advice would contribute to those objectives. The Authority agreed that there was a strong public interest in ensuring that the Scottish Government could effectively tackle environmental issues. However, it did not agree that there was a sufficiently close causal link between disclosure of the legal advice and achieving these environmental objectives. The Authority considered this factor was too remote and did not weigh heavily enough in the public interest to override the inherent public interest in upholding legal professional privilege.
55. The Authority submitted that the information in question retained its privilege. It stated that the information was confidential because it was legal advice and that it would always remain confidential. It considered that the passage of time had no impact on confidentiality of the communications in question. Moreover, the Authority commented that [at the time of the request] there were court proceedings in respect of the DRS that were live (those referenced by the Applicant).
56. In all of the circumstances described in its submissions, the Authority considered that the public interest in disclosure was outweighed by the public interest in upholding the exception.

The Commissioner's view on the public interest

57. 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.
58. The starting position is, therefore, that there is a public interest in disclosure of environmental information (as expressed in the EIRs and associated EU Directive) and that only if there is a stronger competing public interest in withholding the information should exceptions be applied.
59. The Commissioner has carefully considered the submissions of the Applicant and the Authority together with the withheld information (which he has accepted comprises internal communications for the purposes of the exception in regulation 10(4)(e) of the EIRs).
60. The Commissioner notes, as he has done in previous decisions involving both FOISA and the EIRs, that 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.

61. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48² and in the Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164(QB)³. The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
62. Having considered the withheld information, the Commissioner accepts that it is subject to legal professional privilege given the expectation of confidentiality of communications between legal adviser and client.
63. The Commissioner acknowledges the Applicant's clearly explained concerns about being able to scrutinise the legal advice given to Scottish Ministers, in particular, in light of the legal proceedings that took place and in relation to the constitutional matters arising from the IMA. He accepts that there is, indeed, a public interest in these matters. However, the Commissioner finds the Authority's rebuttal of the Applicant's arguments persuasive.
64. The Commissioner must take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice without concern that this will be placed in the public domain.
65. He accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such comprehensive advice being available to the Authority, its ability to come to fully informed decisions and draft robust legislation would be restricted, which would not be in the public interest.
66. Having considered the substance of the withheld information, together with submission made by the Applicant, the Commissioner is not satisfied that the public interest in disclosure of the withheld information is significant enough to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
67. On balance, after careful consideration, the Commissioner is satisfied that greater weight should be afforded to the public interest in maintaining the exemption in this case. Consequently, the Commissioner is satisfied that the Authority correctly withheld all of the information falling within scope of the Applicant's request under the exception in regulation 10(4)(e) of the EIRs.

² <https://www.bailii.org/uk/cases/UKHL/2004/48.html>

³ <https://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

Decision

The Commissioner finds that the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority complied with the EIRs by correctly withholding information under the exception in regulation 10(4)(e) of the EIRs.

However, the Authority failed to comply with regulation 5(1) the EIRs, by failing to identify all information in scope of the request until during the investigation

Given that the Commissioner is satisfied the Authority has now identified all information in scope of the request, he does not require it to take any action in response to this failure in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority 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.

David Hamilton

Scottish Information Commissioner

27 February 2026