Scottish Information Commissioner
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Decision Notice 253/2026

Guidance used by Rural Payments and Inspections Division (RPID) to make screening opinions under 2017 EIA regulations

Authority: Scottish Ministers
Case Ref: 202502163

Summary

The Applicant asked the Authority for information it used to make screening opinions under the 2017 EIA regulations. The Authority disclosed most of the information which fell within scope of the request, other than one paragraph within a specified guidance document because it comprised and internal communication; specifically, legal advice. The Commissioner investigated and found that the Authority was entitled to withhold this information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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" and "the Commissioner") (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 31 July 2025, the Applicant made a request for information to the Authority. He asked for copies of all the guidance, template documents, checklists and any other documents used by RPID to make screening opinions under the 2017 EIA Regulations (request 1) as well as all information held in respect of the referencing system used to allocate reference numbers on RPID's public EIA register (request 2).

2. The Authority responded on 27 August 2025 by disclosing redacted copies of information captured by the request (request 1). The Authority did not cite any exemption or exception (under FOISA or EIRs) in withholding the redacted information. It also provided an explanation for the reference numbers used in its public EIA register (request 2).

3. On 8 September 2025, the Applicant wrote to the Authority requesting a review of its decision in respect of request 1. The Applicant stated that he was dissatisfied with the redaction of information from the document entitled "001 SGRPID Internal Guidance on Environmental Impact Assessment…". He considered that the redactions amounted to a partial refusal of his request and, as such, the Authority had an obligation to specify the reasons for its refusal to provide all of the information captured by his request.

4. The Authority notified the Applicant of the outcome of its review on 1 October 2025, informing him that the review had concluded that the initial response was handled incorrectly. The Authority applied section 39(2) of FOISA and handled the request under the EIRs. It disclosed some additional information within the specified document (hyperlinks) but withheld one paragraph on page 16 of the document under regulation 10(4)(e) of the EIRs because the Authority considered this to be internal legal advice.

5. On 28 November 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 of request 1 because he disagreed with the redaction of information on page 16 of the specified document.

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 4 February 2026, 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 its reasons for withholding the information.

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. Having considered the subject matter and the terms of the request, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.

11. The Commissioner is satisfied that the information covered by the request is environmental information, as defined in regulation 2(1) of the EIRs. He would also note that he can see no detriment to the Applicant by considering his request under the EIRs rather than FOISA, nor has the Applicant disputed the Authority's decision to handle his request under the EIRs.

Section 39(2) of FOISA – Environmental information

12. 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.

13. In this case, the Commissioner accepts that the Authority would have been entitled to apply this exemption to the information requested, given his conclusion that it is properly classified as environmental information.

14. 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 requests under the EIRs) outweighs any public interest in disclosing the information under FOISA.

15. The Commissioner therefore concludes that the Authority was entitled to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs. He will therefore consider this case, in what follows, solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make environmental information available

16. 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 the authority when it receives a request.

17. 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) of the EIRs requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

18. 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.

Regulation 10(4)(e) of the EIRs – Internal communications

19. The information withheld by the Authority under regulation 10(4)(e) comprised one paragraph in section 2.6 (page 16) of the Authority's internal guidance entitled "SGRPID Internal Guidance on Environmental Impact Assessment (EIA) for Projects for the Restructuring, Drainage and Irrigation of Rural Land Holdings and Use of Uncultivated Land and Semi-Natural Areas for Intensive Agricultural Purposes".

20. Regulation 10(4)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available 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.

21. 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.

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)).

The Applicant's comments

23. The Applicant disagreed that the exception was relevant. It was his view that the redacted paragraph was not an internal communication. He cited page 85 of The Aarhus Convention: An Implementation Guide (2nd edition)[1] which states that "once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an 'internal communication', and commented that the Authority had shared a version of the specified document with Environmental Standards Scotland (ESS) as part of an investigation that ESS had carried out.

The Authority's comments

24. The Authority stated that the specified guidance was written to assist and guide RPID officers through the procedures required when a relevant application was submitted to the Authority or enforcement action was required.

25. The Authority submitted that this guidance was a confidential internal document which had not been published externally and it had not been shared with anyone externally other than ESS. It noted that the only passage that remained withheld referred to legal advice given to the Scottish Ministers and, as such, this specific passage was covered by legal professional privilege. The Authority considered that all of the necessary conditions for legal professional privilege to applied had been satisfied.

26. In regard to the sharing of the guidance with ESS, the Authority stated that the document was shared with ESS in May 2024 as part of case IESS.23.022[2] which ESS had investigated. It explained that it was necessary to share the document with ESS as part of the informal resolution process and to demonstrate compliance with the findings of the investigation.

27. The Authority submitted that, as discussed in the Commissioner's previous Decision 284/2024[3], the sharing of information with ESS under a statutory obligation to do so did not mean that the shared document was no longer considered an internal document. The Authority argued that the same considerations discussed in Decision 284/2024 were relevant to the consideration of the withheld information in this case.

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[1] https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

[2] https://environmentalstandards.scot/wp-content/uploads/2023/09/ESS-Investigation-EIA-Regulations-Informal-Resolution-Report-IESS.23.022.pdf

[3] https://www.foi.scot/decision-2842024

28. The Authority noted that in response to a similar request made to ESS for the same guidance document, ESS had disclosed all of the guidance document except the same paragraph that had been withheld in this particular case. The Authority, therefore, argued that the withheld information in this case had never been shared externally other than with ESS as part of their statutory investigation.

The Commissioner's view on regulation 10(4)(e)

29. The Commissioner has carefully considered the submissions of the Applicant and the Authority together with the withheld information.

30. The Commissioner recognises that the specified document has been shared with a third party, the ESS. In almost all cases, information that has been shared with a third party cannot be excepted from disclosure under regulation 10(4)(e) of the EIRs.

31. However, for the same reasons as discussed in Decision 284/2024, the Commissioner is satisfied that the specified guidance document and, in particular, the withheld paragraph, remains an internal communication for the purposes of regulation 10(4)(e) because it was only shared with ESS to the extent that that the Authority was required to do so, in order to satisfy its statutory obligation under section 23(1) of the Continuity Act.

32. In all the circumstances, the Commissioner is satisfied that the information withheld from the specified guidance document, remains an internal communication and is, therefore, subject to the exception in regulation 10(4)(e) of the EIRs.

33. The Commissioner must, therefore, go on to consider whether, in all of the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exception.

The public interest test – regulation 10(4)(e)

34. 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

35. The Applicant did not accept that the withheld information was legal advice.

36. He considered that the Authority had not given any detailed explanation why the internal guidance specified would contain legal advice. It was his understanding that the specified document was a practical tool for Rural Payments and Inspections Division (RPID) staff to assist them on how to navigate the implementation of The Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017 ('the 2017 Regulations') and that there were no indications or implications within the document that it was in any way a confidential document or that it may contain legal advice.

37. The Applicant commented that legal advice was advice from a legal professional to a client which, in most circumstances, took the form of a letter or an email addressed to the client. He argued that it would be very unusual for legal advice to be included within a public body's internal guidance document.

38. The Applicant did not consider that the information withheld from him would attract legal professional privilege.

He cited Alan Paterson and Bruce Ritchie in their book *Law, Practice and Conduct for Solicitors* (2nd edition, 2014, W Green) that, "Only professional communications between the solicitor and the client which are referable to the giving or receiving of advice within the solicitor and client relationship are covered by the privilege" and that in order to attract legal professional privilege "The communications must relate to confidential matters".

39. The Applicant argued that the redacted information was clearly not a professional communication between a solicitor and a client, but rather it was text from an internal guidance document which was not confidential. As such, it was his view that legal professional privilege did not apply.

40. The Applicant argued that the Authority had failed to correctly apply the public interest test. He commented that the Authority's arguments in relation to the public interest it had carried out were generic, lacking in detail and missed out several important considerations.

41. He considered that there were significant public concerns that RPID was failing to lawfully discharge its functions under the 2017 Regulations and that disclosure of the withheld information would contribute to ensuring that RPID was, indeed, adequately discharging those functions. To support this, the Applicant referred to the (aforementioned) ESS investigation that was carried out regarding this and noted that the specified guidance document was produced as a result of that ESS investigation.

42. The Applicant referred to an additional, separate, investigation[4] that had been carried out by ESS and stated that this, alongside the earlier investigation referred to in paragraph 26, was demonstrative of the significant public concern that RPID was not lawfully discharging its functions under the 2017 Regulations.

43. The Applicant also referred to a complaint made to RPID by the Environmental Rights Centre for Scotland (ERCS) in November 2025 regarding RPID's EIA guidance and screening opinion proforma, in which ERCS alleged that these documents contained several defects which contradicted various provisions in the 2017 Regulations. He noted that RPID's response to ERCS stated:

"I have had an initial look over the points you have raised and generally agree with you that most of these areas of the guidance could be improved, and I will ask my team to do that. There will be issues e.g. the appeals process where we will need to take advice, and with current work pressures and resource constraints we aim to complete these enhancements by March 2026 and will send you the updated versions of the documents."

44. He argued that disclosure of the redacted information was vital to ensure that RPID's EIA guidance could be fully scrutinised because he considered it was entirely possible that the redacted sections of the guidance contained further legal errors. The Applicant considered that the disclosure was necessary in order that the public could review and challenge any additional unlawful sections of the guidance.

45. The Applicant commented that there was ongoing public debate as to whether RPID was acting lawfully in terms of its implementation of the 2017 Regulations, as evidenced by the ESS investigations and the response to the ERCS complaint. It was his view that disclosure of the redacted information would contribute to a debate on a matter of public interest.

[4] https://environmentalstandards.scot/our-work/our-investigation-reports/rural-payments-division-rpid-eia-register-informal-resolution-report/

The Authority's comments

46. The Authority noted 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. It acknowledged the public interest in the EIAs and how the 2017 Regulations operate and that disclosure of the legal advice in the paragraph withheld might help the public's understanding of this.

47. 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. The Authority argued that it was important in all cases that lawyers could provide free and frank legal advice which considered and discussed all issues and options, without fear that that advice may be disclosed and, as a result, potentially taken out of context.

48. Furthermore, the Authority submitted that there was a public interest in ensuring that its position on any issue was not undermined by the disclosure of legal advice. The Authority submitted that legal advisers needed to be able to present the full picture to their clients without that advice being disclosed publicly, and an expectation that legal advice could be released would inevitably lead to legal advice being much more circumspect and, therefore, less effective.

49. The Authority concluded that there was a stronger public interest in protecting the confidentiality of the withheld information in order to ensure that it and its officers were able to discuss and take decisions in full possession of thorough and candid legal advice and could take decisions in a fully informed legal context, having received legal advice in confidence as any other client would.

The Commissioner's view on the public interest

50. 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.

51. 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.

52. 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).

53. 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.

54. 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 48[5] and in the Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164(QB)[6]. 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.

55. However, the Commissioner also acknowledges the Applicant's clearly explained concerns about being able to scrutinise the way in which RPID carries out its regulatory functions, specifically in this case in relation to the 2017 Regulations and, in particular, in light of the ESS investigations and the ERCS complaint response. The Commissioner accepts that there is, indeed, a public interest in these matters.

56. 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. He notes the Applicant's comments that it would be very unusual for legal advice to be contained within a public body's internal guidance document but, having considered the information, he must conclude that the information is legal advice, and that it satisfies all relevant tests.

57. 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.

58. 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 and its officers, its ability to come to fully informed decisions and to carry out its regulatory functions would be restricted, which would not be in the public interest.

59. 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.

60. On balance, after careful consideration, the Commissioner is satisfied that greater weight should be afforded to the public interest in maintaining the exception 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.

Decision

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

[5] https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm

[6] https://www.bailii.org/ew/cases/EWHC/QB/2009/164.html

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.

Euan McCulloch
Head of Enforcement

5 October 2026