The Campaign for Freedom of Information in Scotland

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Access to Environmental Information

Response to a Consultation by the Scottish Executive Environment Group

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Introduction

These comments relate to the Scottish Executive Environment Group's consultation paper on the proposed Environmental Information (Scotland) Regulations 2004 and the associated guidance.[1] We are not commenting separately on the draft code of practice, which in broad terms follows the draft code of practice under the Freedom of Information (Scotland) Act on which we have previously commented. We have no objection to this response being made public.

Our main concern is that, in two significant aspects, the proposed regulations are weaker than the corresponding provisions under the Freedom of Information (Scotland) Act. This could mean that in some respects the public may find it harder to obtain environmental information than other information. The Executive has previously indicated that this was not its intention and we urge it to address these weaknesses.

We are also concerned to find that the guidance appears to misstate the requirements of the regulations in relation to the public interest test and a number of other significant matters.

PART 1: THE DRAFT REGULATIONS

No 'substantial prejudice' test

We are extremely concerned to find the exceptions to the right of access to environmental information do not adopt the "prejudice substantially" test found in the Freedom of Information (Scotland) Act. Instead, a weaker test is used which allows information to be withheld where disclosure would merely "adversely affect" any of the interests specified in regulation 10(4). This will mean that public authorities will find it easier to withhold environmental information than other information.

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[1] Scottish Executive Environment Group. Access to Environmental Information. A Consultation. April 2004, Paper 2004/5.

Many requests will cover both environmental and non-environmental information and often both will appear in a single document, such as a contract, or even in a single paragraph or sentence. Aligning the exemptions, wherever possible, would not just strengthen the public's rights but considerably simplify the system for both requesters and authorities.

The failure to align the exemptions is all the more remarkable as the Scottish Executive had indicated that the Environmental Information Regulations (EIRs) *would* adopt the "prejudice substantially" test. Its 2002 consultation stated:

> "The Executive considers it important that the new environmental information regime is aligned as closely as possible with the general freedom of information regime. This will support public authorities' administration of the two regimes and also, more importantly, make things more straightforward for the general public. In particular, incorporation of two cornerstones of the Scottish Freedom of Information Bill, the independent Scottish Information Commissioner and *the harm test of substantial prejudice will ensure that the new environmental information regime goes further than Aarhus and is as open and accessible as the Scottish freedom of information regime*." (paragraph 2) (emphasis added)
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> "The decision to adopt the "substantial prejudice" harm test within the FoI regime was widely welcomed as a very open and progressive step. The inclusion of a "substantial prejudice" test in the new EIRs would go beyond what is required under the Convention and establish a more open regime, but would not affect UK ratification of the Convention.
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> Furthermore, closer alignment of the new EIRs and the FoI regime in this respect would not only support efficient administration of the regimes by public authorities, but also ensure greater consistency in the provisions allowing information to be withheld under the two regimes – in other words, it would help deliver a level playing field in the treatment of environmental information and other, more general, categories of information." [2] (paragraphs 17-18)

It is clear that the Executive had attached considerable importance to the adoption of the "substantial prejudice" test" Yet the retreat from this commitment is neither acknowledged nor explained in the consultation

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[2] Scottish Executive Environment Group. Proposals for a new regime on Public Access to Environmental Information A Consultation May 2002 Paper 2002/16

document. The breaking of this commitment would be an extremely serious matter and we urge the Executive to reinstate it.

Charges for information

The regulations appear to allow authorities to charge substantially higher fees for providing environmental information than for non-environmental information.

Here too the draft regulations represent a significant retreat from the Executive's 2002 consultation, which stated:

> "There also seems no logical argument for providing that information accessed under the new EIRs would cost an applicant more or less than information accessed under the FoI regime."[3]

The draft EIR(S) regulations would allow authorities to charge "a reasonable amount" which in most cases means "*a fee which does not exceed the cost to the authority of producing the information requested"*.[4] There is no requirement to waive the first £100 of charges, as the Executive has proposed under the FOI(S) Act, nor to limit charges to 10% of the marginal costs of finding the information.[5]

The draft code of practice states merely that for authorities which are also subject to the FOI(S) Act *"it may be appropriate"* to adopt the Act's fee structure.[6] Unfortunately, authorities will be free to ignore this recommendation. The most that the Scottish Information Commissioner will be able to do if the code is not followed is issue a non-binding "practice recommendation".[7]

Nothing in the regulations indicates that authorities would be unable to charge the full marginal costs of locating and collating requested information. This suggests that environmental information could be as much as 30 times more expensive than non-environmental information.

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[3] Paragraph 29
[4] Draft regulations 8(3) and 8(4)(b)
[5] These proposals are set out in the Draft Freedom of Information (Fees and Appropriate Limit) (Scotland) Regulations 2004, published for consultation by the Scottish Executive in March 2004.
[6] Draft Code of Practice on the Discharge of the Functions of Scottish Public authorities under the Environmental Information (Scotland) Regulations 2004, paragraph 29
[7] Under section 44 of the Freedom of Information (Scotland) Act. Draft regulation 16(5) provides that this provision which will apply to the EI(S)Rs.

Environmental information requiring 6 hours of work to locate could involve a charge of £90.[8] The equivalent non-environmental information would be free under the Freedom of Information (Scotland) Act.[9] If 10 hours work were involved, the charge for environmental information could be £150 compared to only £5 for non-environmental information.[10] If 20 hours work was involved the environmental information could cost £300 while the charge for non-environmental information would be only £20.

Our concern about high fees is reinforced by the draft guidance which states that for complex requests authorities can decide *"whether to seek to recover the costs involved"*.[11]

Such fees could not meet the Directive's requirement that any charges be "reasonable". But they would apparently be permitted under the draft regulations.

Definition of "reasonable amount"

Regulation 8(3) states that any charge for information "*shall not exceed a reasonable amount*". This is also the term used in the Directive. But Regulation 8(4) undermines this provision by producing a comprehensive definition of the term "a reasonable amount" which omits any reference to the term "reasonable".[12]

A charge would be held to be reasonable if it was either (a) a market-based fee in the case of information which the authority normally supplies commercially, where the continued enterprise would be undermined by charging a subsidised fee; and in all other cases, (b) a fee "*which does not exceed the costs to the authority of producing the information requested"*.

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[8] This assumes an hourly rate for staff time of £15/hour, the maximum permitted under the draft Freedom of Information (Fees and Appropriate Limit) (Scotland) Regulations 2004

[9] Under the draft fees regulations, the first £100 of any fee (other than for photocopying) would be waived.

[10] For environmental information, the charge would involve 10 hours @ £15 per hour. The same calculation would be made under the FOI(S) Act, but the first £100 of the £150 would be waived and the applicant would be charged only 10% of the remaining £50. Photocopying costs have not been taken into account for either calculation.

[11] Draft guidance paragraph 62

[12] Draft regulation 8(4) states:

'(4) For the purposes of paragraph (3), a reasonable amount means–

(a) where a Scottish public authority makes environmental information of the kind requested available on a commercial basis and the continued collection and publication of such information would be prejudiced if the authority did not charge a market-based fee, such a fee; and

(b) in all other cases, a fee which does not exceed the costs to the authority of producing the information requested.'

An excessively high fee, which members of the public could not afford, would be regarded as reasonable under the draft regulations if either of these tests are met.[13]

We believe this approach would be unlawful. The decision of the European Court of Justice in case C-217/97 makes it clear that a charge which is high enough to deter applicants from using their rights cannot be "reasonable". The court stated:

> "the purpose of the Directive is to confer a right on individuals which assures them freedom of access to information on the environment and to make information effectively available to any natural or legal person at his request, without his or her having to prove an interest. Consequently, any interpretation of what constitutes 'a reasonable cost' for the purposes of Article 5 of the Directive which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected."[14]

We suggest that, to comply with the Directive, regulation 8 should make clear that in all cases the fee must be reasonable and that, *without prejudice to the generality of that statement,* a fee which deters applicants from exercising their rights or which exceeds the direct costs of supplying the information to the applicant cannot be regarded as reasonable.

Cost of 'producing' information

We also think it inappropriate that regulation 8(4)(b) should permit the fee charged to reflect the costs of *"producing"* the information. This implies that authorities may be able to recover their original costs in generating information (such as the costs of setting up or operating a monitoring programme from which the information has been derived). This would be unacceptable and a breach of the Directive. The regulations should use the language of Article 5(2) of the Directive which states that a reasonable charge may be made for *"supplying"* information.

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[13] This definition is apparently based on a Recital 18 of the Directive, the relevant part of which states *"Public authorities should be able to make a charge for supplying environmental information but such a charge should be reasonable. This implies that, as a general rule, charges may not exceed actual costs of producing the material in question."* This does not mean that any charge which does not exceed the costs of producing the information must automatically be treated as reasonable.

[14] European Court of Justice. Commission of the European Communities v Federal Republic of Germany, Case C-217/97, available from: http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en

Format of information

Regulation 5 should follow the FOI(S) Act in explicitly stating that the applicant is entitled to obtain information *"by one or more…means"*.[15] That would make clear that, for example, a person may apply to inspect and, where appropriate, be supplied with copies of records.

Regulation 5(1)(a) allows an authority to refuse to supply information in the applicant's preferred format if it is *"reasonable"* for it to provide it in some other format. We think the onus should be reversed, so that the authority is required to comply with the applicant's wishes unless these are *unreasonable*. Alternatively, as the FOI(S) Act puts it, the applicant's wishes should be complied with so long as it is *"reasonably practicable"* to do so.[16]

Form of refusal

We do not understand why an authority which refuses to make information available in the applicant's preferred form, need not give a written explanation for this decision unless the applicant explicitly asks for one.[17] Where the applicant's request has been made in writing the authority's response, including the reasons for its decisions, should automatically be in writing too.

Extension of time limit

The regulations allow the normal 20 working day period for responding to requests to be extended to 40 working days where the normal limit is impracticable because of *"the volume or complexity"* of the requested information.[18] This misstates the requirements of the Directive, which allow extensions only where the *"volume and complexity"* prevent compliance.[19]

Where an authority considers that a request is too general, the regulations would require it to ask the applicant for more details within 20 working days[20] and this period would not begin until the extra details had been received.[21] We think the 20 day deadline should begin on the day on which the request is received but that the clock should stop when the authority asks for further details and restart when they are supplied.

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[15] FOI(S) Act section 11(1)
[16] See section 11(1) of the FOI(S) Act.
[17] Draft regulation 5(2)(b)
[18] Draft regulation 7(1)
[19] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003. Article 3(2)(b)
[20] Draft regulation 9(2)(a)
[21] Draft regulation 7(3)(a)

Emissions data

Regulation 10(5) disapplies various exemptions in relation to emissions data contained in "environmental information *to be made available*". This should refer to "environmental information *which has been requested"*.

Emissions and personal data

Article 4(2) of the Directive requires that the data protection directive be complied with and this is reflected in draft regulation 10(2). However, it also states that emissions data cannot be withheld under the exception for personal data - but this provision has been omitted from the draft regulations.[22] The failure to transpose this part of the Directive is neither acknowledged nor explained in the consultation document. Scottish public authorities are given no guidance on how to handle these circumstances.

The two provisions should be capable of coexisting: there is no reason to include one and ignore the other. The Data Protection Act does not impose an absolute prohibition on the disclosure of personal data. A legal duty to disclose emissions data, even where these involve personal data, can be complied with without contravening the data protection principles.

It seems unlikely that information about those affected by environmental pollution will normally be so closely associated with emissions data that the release of that data will disclose identifiable personal details. Where such a possibility exists, it would be reasonable to err on the side of the protection of the individual's privacy.

But the position is different where the personal data relates to the polluter. In these circumstances, it would be wrong to withhold details of the emissions in order to protect the 'privacy' of the polluter.

This problem is likely to arise where pollution is caused by the activities of a sole trader, such as a person burning cable to recover metal, a highly polluting process. Information which identified the emissions as coming from the trader's private address might fall within the definition of personal data. The regulations might allow such information to be withheld to protect the polluter's privacy, even though it involved emissions data, contrary to the Directive.

The regulations should be amended either to ensure that in these circumstances emissions data cannot be withheld under the privacy exception or, at least, to ensure

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[22] Article 4(2)

that this provision is fully taken into account when applying the data protection principles.

National security

The regulations permit ministers to issue a conclusive certificate establishing that the disclosure of environmental information would adversely affect national security.[23] Such a certificate could presumably be challenged only on the limited grounds available at judicial review.

This provision appears to breach the requirements of Articles 6(2) and (3) of the Directive which requires that wrongful refusals to provide information be subject to independent review by a court or a body such as the Scottish Information Commissioner capable of making "final" and "binding" decisions.

Drafting points

In paragraph (a)(ii) of the definition of "Scottish public authority" in regulation 2, the reference to "Section 5(i)" of the Act should refer to "Section 5(1)".

The reference in regulation 10(3)(d) to incomplete "date" should be to "data"

[23] Draft regulations 10(7) and (8)

PART 2: THE DRAFT GUIDANCE

Public interest test

The draft guidance incorrectly describes the scope of the public interest test. It suggests that the test only applies where disclosure would adversely affect one of the interests specified in regulation 10(4).[24] In fact the public interest test also applies when information is withheld under the grounds mentioned in regulation 10(3). The public interest in disclosure must be taken into account before rejecting a request on the grounds that it is manifestly unreasonable, too general, relates to unfinished documents or involves internal communications.[25]

Internal communications

The failure to acknowledge the public interest test is most significant in relation to the exception for internal communications. The guidance presents this as an almost blanket provision which allows all confidential internal communications to be withheld.[26] It fails to recognise that such information can only be withheld if the *"public interest in maintaining the exception outweighs the public interest in making the information available"* and that in balancing these considerations authorities are required to "*exercise a presumption in favour of disclosure"*.[27] These tests apply to all the exceptions in regulation 10(3).

We are also concerned at the suggestion that internal communications could be withheld if its release *"might lead to speculation, confusion or misinterpretation"*.[28] These grounds are subjective and all-embracing and should be omitted. In any event they are incompatible with a later passage of the guidance which states that in considering the public interest *"authorities should not take into account…the risk of the applicant misinterpreting the information"*.[29] This statement is also found in the draft code of practice under the FOI(S) Act.[30]

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[24] Draft guidance paragraph 63
[25] See draft regulation 10(1)
[26] Draft guidance paragraph 76
[27] Draft regulation 10(1)(b)
[28] Draft guidance paragraph 76
[29] Draft guidance paragraph 113
[30] Draft Scottish Ministers Code of Practice on the Discharge of Functions by Public Authorities Under the Freedom of Information (Scotland) Act 2002, June 2003.

The guidance states that *"opinions and interpretations"* could be withheld, particularly if they have not been validated.[31] However, where such material has been relied on in reaching a decision the public interest in its disclosure will be substantial. Where opinions or interpretations *which have not been validated* have been acted on, the public interest in their disclosure becomes even greater.

Paragraph 77 states that "*correspondence between a Scottish Minister and a local authority council member"* can be withheld. This and other statements in the paragraph are directly contradicted by paragraph 76 which states that the exception *"does not…extend to interagency correspondence"*.

Paragraph 78 further reinforces the misapprehension that the public interest test only applies to the exceptions in regulation 10(4).

Public interest not subjective

We do not agree that decisions on whether the public interest requires disclosure involve "*a subjective"* judgment on the part of Scottish public authorities.[32] This implies a decision which cannot be reviewed on its merits by the Scottish Information Commissioner or by the courts - which is not the case in relation to the public interest test.

This section of the guidance should also draw attention to the requirement that in considering the public interest test authorities "shall exercise a presumption in favour of disclosure".[33]

Applicant's reasons for making a request

We strongly disagree with the suggestion, in paragraph 44 of the draft guidance, that authorities should attempt to establish *"the applicant's interest or reasons for the request".* The regulations should be purpose blind and not encourage authorities to inquire into an applicant's motives. If they do so, it is inevitable that:

(a) some applicants will feel under pressure to disclose their purpose, and

(b) knowledge of the applicant's purpose, particularly if it is considered to be unhelpful to the authority, will adversely affect the way in which the request is treated.

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[31] Draft guidance paragraph 76
[32] Draft guidance paragraph 111
[33] Draft regulation 10(1)(b)

The suggestion that authorities ask about the applicant's reasons contradicts:

- Article 3(1) of the Directive, which states that an applicant is entitled to receive information "without his having to state an interest"; and

- Paragraph 17 of the draft code of practice, which states that in seeking more information from an applicant in order to help deal with a request the aim is to *"clarify the nature of the information sought* ***not*** *to determine the aims or motivation of the applicant"*.

The guidance says it may be helpful to know the reasons for a request in case the information is needed quickly in connection with some time-limited procedure. If this is the concern we suggest that the guidance should advise authorities to (a) invite applicants to say when information is urgently needed and (b) make particular efforts to respond to such requests promptly.

"Unreasonable" requests

The guidance states that "*unreasonable*" requests can be refused.[34] This is an unhelpful way of referring to the exception, which applies only if requests are "*manifestly unreasonable*".[35]

The guidance gives a number of examples of requests which could be refused on these grounds, one of which is said to be "*when the amount of information sought is considerable"*.[36] The volume of information may be a relevant factor. However, it cannot in itself be enough to establish that a request is manifestly unreasonable, as it takes no account of ease/difficulty with which the if the information can be located and disclosed.

Nor do we think that *"significant searching in large databases"* is in itself likely to be manifestly unreasonable. A large database can be searched as easily as a small one.

The guidance fails to make clear that, before refusing information on these grounds, the public interest in making the information available must be considered.[37]

Finally, the guidance should make it clear that a request will not be manifestly unreasonable if the difficulty in complying with it is attributable to the authority's failure to adopt reasonable standards of records management.

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[34] Draft guidance paragraph 71
[35] Draft regulation 10(3)(b)
[36] Draft guidance paragraph 71
[37] Draft regulation 10(1)

Confidentiality of proceedings

The guidance on this exception fails to recognise that it only applies to the confidential proceedings of a public authority *"where such confidentiality is provided for by law"*.[38] The guidance wrongly states that this exception applies to proceedings of an authority *"if they are considered to be confidential"*.

The guidance should state which provisions of law provide for such confidentiality and make clear that the exception will not be available in other cases.

Commercial or industrial confidentiality

The guidance on the exception for commercial or industrial confidentiality does not properly address the requirement that such confidentiality must also be "protected by law".[39] It does refer to the fact that confidentiality may be based on the common law of confidence or on contract. It also refers to circumstances in which information has been withheld from a register in accordance with statutory provisions. But it does not explicitly address the meaning of "protected by law"; it does not clearly set out the types of legal provision which provide such protection; and it does not make clear that in the absence of such a legal basis the exception cannot apply.

Indeed, the discussion in paragraphs 92-100 appears to ignore this requirement altogether and gives the impression that all that need be demonstrated is some adverse commercial effect.

The reference in paragraph 90 to regulation 4(5) should refer to regulation 4(4).

The guidance could be more explicit in stating that the effect of this regulation is to set aside any statutory bar on disclosure. However, where such a bar exists the "provided for by law" element of regulation 10(4)(e) would presumably be met.

Finally, the difference between this exception and the corresponding FOI exemptions could be more clearly addressed. For example why (apart from the fact that it is the term used in the Directive) does the exception refer to the confidentiality of "commercial *or industrial"* information when the FOI(S) exemption applies solely to "commercial interests"? Does the reference to "industrial" confidentiality add anything and if so why is this term not also found in the FOI(S) Act?

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[38] Draft regulation 10(4)(d)
[39] Draft regulation 10(4)(e)

Joint guidance

It may be helpful to issue joint guidance covering both the Freedom of Information (Scotland) Act and the Environmental Information (Scotland) Regulations, rather than cover these separately. The danger of separate guidance is that it may be inconsistent or introduce unintended differences of substance or emphasis. Joint FOI/EIR guidance is being produced for the UK legislation and a similar approach in Scotland should be considered.

Proactive dissemination

The potential problems of not co-ordinating the guidance are illustrated by the references to proactive dissemination of information. This subject is discussed without acknowledging that the FOI(S) Act requires Scottish public authorities to produce publication schemes for precisely this purpose.[40] Should authorities introduce separate arrangements for the proactive release of environmental information? Should they incorporate environmental information into their existing schemes? If the latter, what special requirements, over and above those which apply to publication schemes generally, must be followed? None of these obvious questions is addressed.

Objectives of the Directive

When quoting or summarising the Directive the guidance does not always do so accurately. For example, it says that the objective of the Directive "as stated in Article 1" is "*to develop"* the right of access to environmental information.[41] In fact the object is *"to guarantee"* the right of access.

The remaining summary of Article 1 also omits a number of significant elements of its contents. It would be more helpful to quote such provisions in full.

Definition of public authority

The draft guidance says that the definition of a Scottish public authority includes a body which is *"under the responsibility"* of another public authority.[42] The reference should be to a body which is *"under the control of"* another authority. Unless this term is used, the following discussion of the term "control" cannot be understood.

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[40] Draft guidance paragraphs 37-39
[41] Draft guidance paragraph 4
[42] Draft guidance paragraph 10(c)

Paragraph 11 of the draft guidance purports to define the term *"management"* but is actually defining what is meant by *"control"*.

Form in which information is provided

Paragraph 48 states that information must be made available in the form requested unless *"it is unreasonable"* to make it available in another form. This should say unless *"it is reasonable"*.

Transfer of requests

Where a request is transferred to another authority, the applicant should be given a contact name and not just the phone number of the authority.[43]

Refusals

The draft guidance says the new EIRs "continue and extend the *presumption* that environmental information will be made available on request".[44] This should refer to a *legal right* not a presumption.

Time limits

The guidance incorrectly states that under the FOI(S) Act the 20 day limit for responding to FOI requests can be extended when considering the public interest test.[45] This describes the position under the UK FOI Act - not the Scotland Act.

The draft code of practice makes a similar error in stating that where the public interest has to be considered the time limits under the EI(S)Rs are "stricter" than those under the FOI(S)A. If anything, the reverse is the case.[46]

Charges

The draft guidance incorrectly states that under the FOI(S) Act public authorities have "*discretion to respond to requests where costs are low or above an upper threshold"*.[47] There is no discretion to respond to requests where the costs are low - compliance is mandatory.

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[43] Draft guidance paragraph 52
[44] Draft guidance paragraph 63
[45] Draft guidance paragraph 65
[46] Draft code of practice, paragraph 24. In fact, the FOI(S) Act allows 20 working days for all decisions, including those where the public interest test has to be considered. The EI(S)Rs also provides a 20 day limit, but - unlike the FOI(S) Act - extends it to 40 working days where the volume and complexity of the information requires it.
[47] Draft guidance paragraph 62

The draft guidance states that where no information has been provided no charge can be made to the applicant *"and this includes any legal fees incurred by the public authority even if legal advice were sought on whether or not information should be provided"*.[48] It would be helpful to redraft this to exclude the implication that where information is disclosed, the cost of legal advice *can* be recovered from the applicant.

Judicial bodies

The guidance states that the regulations do not apply to a Scottish authority "that" is acting in a judicial or legislative capacity.[49] It would be more correct to say "insofar" as it is acting in such a capacity.

Course of justice

The guidance states that this exception applies to any public authority *"local, regional, national or international"*.[50] It is not clear how a Scottish public authority could also be an international body. If the intention is to refer to the possibility of prejudicing legal proceedings before an international body, this could be stated more clearly.

This section also refers to the possibility of prejudicing proceedings "of a coroner's court".[51] Coroners' courts do not exist in Scotland.

The interests of the individual providing information

Paragraph 105 states that information will not be protected by this exception if an authority *"could have required the information for the purposes of a legal obligation"*. A more accurate description of regulation 10(4)(f) would be to say that volunteered information will not be protected if the authority *"has the power to require the person to supply it"*.

Personal information

Paragraph 110 refers to the possible "correlation" between environmental and personal information and urges officials to *"understand the public interest and human rights implications of environmental information, so that they can identify and seek advice in appropriate circumstances"*.

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[48] Draft guidance paragraph 68
[49] Draft guidance paragraph 82
[50] Draft guidance paragraph 84
[51] Draft guidance paragraph 84

Rather than presenting Scottish authorities with this complex legal challenge it would help if the guidance suggested some of the circumstances in which a disclosure of personal information, which did not breach the data protection principles, might be capable of infringing someone's human rights.

A Scottish authority which seeks legal advice is likely to be told that the regulations fail to reflect the requirements of Article 4(2) of the Directive, which state that emissions data cannot be withheld under the exception for personal information. The failure of the guidance to explain why this provision has been omitted, or to advise authorities how to handle such circumstances without contravening the Directive, will no doubt be reflected in the size of the legal bills presented to Scottish authorities.
