

Regulation 10(4)(e) – internal communications

An exception under regulation 10(4) (e) of the EIRs (internal communications) applies to some of the information you have requested because it is internal communication in the form of Ministerial briefings, notes and emails between Scottish Government Ministers and officials about the development and processing of the Aquaculture and Fisheries (Scotland) Act 2013 and the Regulatory Reform (Scotland) Act 2014.

This exception is subject to the ‘public interest test’. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exception. We have found that, on balance, the public interest lies in favour of upholding the exception. We recognise that there is some public interest in release as part of open, transparent and accountable government, and to inform public debate.

However, there is a greater public interest in high quality policy and decision-making, and in the properly considered implementation and development of policies and decisions. This means that Ministers and officials need to be able to consider all available options and to debate those rigorously, to fully understand their possible implications. Disclosing such discussions may undermine or constrain the Government’s view on policies while they are still under discussion and development.

An exception under regulation 10(4)(e) of the EIRs (internal communications) also applies to some of the information you have requested because it is internal legal advice and disclosure would breach legal professional privilege.

This exception is subject to the ‘public interest test’. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exception. We have found that, on balance, the public interest lies in favour of upholding the exception. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, this is outweighed by the strong public interest in maintaining the right to confidentiality of communications between legal advisers and clients, to ensure that Ministers and officials are able to receive legal advice in confidence, like any other public or private organisation.

Regulation 10(5)(d) Confidentiality of proceedings

An exception under regulation 10(5)(d) of the EIRs (confidentiality of proceedings) applies to some of the information you have requested. This exception applies because disclosure of this information would harm the confidentiality of the proceedings of a public authority where such confidentiality is provided for by law. In this context, “proceedings” includes the administrative processes whereby the Scottish Ministers seek Crown consent in order to satisfy the requirements of Rule 9.11 of the Standing Orders of the Scottish Parliament. Within those proceedings,

we consider that an obligation of confidence at common law exists in respect of correspondence between the Scottish Government and Her Majesty, including Her representatives, in relation to Crown consent.

This exception is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exception. We have found that, on balance, the public interest lies in favour of upholding the exception. We recognise that there is some public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. Disclosure would also facilitate further understanding of the mechanism by which Crown consent is obtained in relation to Scottish Parliament Bills. However, we consider that this is outweighed by the public interest in maintaining good relations between the Scottish Government and the Royal Household, in protecting the free exchange of information, and in protecting a channel of communication between the Scottish Government and the Royal Household. It is important that there is the ability to have full and frank discussions on behalf of the Head of State and the Scottish Government about the issues that relate to Crown consent including how the legislation applies to the Crown to enable this constitutional process to work in an effective way.

Disclosing the content of such communications is likely to mean that future communications will be less open and less frequent, with less exchange of information, which would negatively affect the process of obtaining Crown consent in future. There can be no public interest in the disclosure of information which will damage that relationship and disrupt future communications. Additionally, there is a strong public interest in maintaining the longstanding constitutional Convention that correspondence between the Sovereign and her Government is confidential in nature. This Convention is an adjunct of the right of the Sovereign to be consulted by her Government, and to advise, encourage and to warn as the circumstances require. If the content of these consultations became known, it might serve to undermine the appearance of the political neutrality of the Sovereign, and so the rights of the Sovereign could not be exercised effectively without this expectation of confidentiality.

The public interest is also served by the information that is provided to the Parliament about the matters in the Bill that require Crown consent and publicly available information about how legislation applies to the Crown which can be debated and scrutinised by Parliament.

Regulation 11(2) – Personal data of a third party

An exception under regulation 11(2) of the EIRs (personal information) applies to some of the information requested because it is personal data of a third party, and disclosing it would contravene the data protection principles in Article 5(1) of the General Data Protection Regulation and in section 34(1) of the Data Protection Act 2018. This exception is not subject to the 'public interest test', so we are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exception.