

**SPICe**

The Information Centre

Scottish Parliament Information Centre  
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## **Freedom of information**

Thank you for your enquiry regarding freedom of information. As I understand it, you wanted to know whether a PFI partner or private contractor can be subject to freedom of information requests in the same way as public authorities. I note that SPICe cannot provide legal advice in individual cases but I can provide a general outline of the law in this area.

### **Summary**

Broadly speaking, freedom of information requirements apply only to public rather than private bodies. There are important exceptions to this. It is possible that companies such as Stirling Water and Veolia Water could be required to release environmental information under the Environmental Information (Scotland) Regulations 2004. However, there are exemptions to the information which must be supplied – including a wide-ranging exemption for internal communications. Courts have separate powers to require that documents relevant to a court case are made available, and these apply equally to private and public bodies.

### **Background**

The Freedom of Information (Scotland) Act 2002 sets up a framework for making freedom of information requests to Scottish public authorities. This regime is overseen by the [Scottish Information Commissioner](#). The Freedom of Information Act 2000 sets up a similar regime for UK-wide and English public authorities. It is overseen by the [Information Commissioner](#). In addition, it is possible to gain access to environmental information under the Environmental Information (Scotland) Regulations 2004

### **Freedom of Information (Scotland) Act 2002**

Under the 2002 Act, it is possible to request access to any information held by a Scottish public authority. A Scottish public authority can refuse the request on the basis of a number of statutory exemptions – such as that the information is personal information; that it substantially prejudices commercial interests or that it has national security implications. Some of the exemptions are absolute – ie. they, of themselves, provide a basis for a Scottish public authority to refuse to release the information. However, in most cases, a Scottish public authority has to satisfy itself that the public interest in disclosing the information is outweighed by the need to maintain the exemption.

Where a Scottish public authority refuses to release information, an applicant is able to ask the Scottish Information Commissioner to decide whether the Scottish public authority has complied with the law. A decision of the Scottish Information Commissioner can be appealed to the Court of Session on a point of law.

A “Scottish public authority” is defined in section 3 of the 2002 Act as:

- (a) any body which, any other person who, or the holder of any office which—
  - (i) is listed in schedule 1; or
  - (ii) is designated by order under section 5(1); or
- (b) a publicly-owned company, as defined by section 6.

The kinds of bodies which are listed in schedule 1 include Scottish Ministers, local authorities, NHS organisations, certain educational institutions and a number of miscellaneous bodies. Scottish Water is listed as a Scottish public authority. However, neither Stirling Water nor Veolia Water are – and, being private companies, they would not come under the definition of a publicly-owned company in section 6.

### Practical implications

The freedom of information regime under the 2002 Act applies, practically speaking, only to public bodies. This means that it is not possible to require private companies to provide information in the same manner.

It is possible to make a request to a public body – such as Scottish Water – to supply information it holds in relation to a private company – for example Veolia Water. However, the public body may be able to argue that they do not have to release the information under one of the statutory exemptions, for example because it might seriously prejudice commercial interests (see section 33) or because it is held in confidence (see section 36). The Scottish Information Commissioner provides detailed guidance about factors to take into consideration when looking at [commercial interest](#) or [confidentiality](#).

It is also possible for bodies which are not Scottish public authorities to be designated as having to comply with the 2002 Act by Scottish Ministers. The procedures for doing this are contained in section 5 of the 2002 Act. Scottish Ministers can designate bodies which either:

- appear to the Scottish Ministers to exercise functions of a public nature
- are providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority.

It would appear to be arguable that Stirling Water or Veolia Water could be designated under either provision. This would mean that they would have to comply with freedom of information requests on the same basis as a Scottish public authority. However, to date, no designations of any sort have been made by Scottish Ministers.

### **Environmental Information (Scotland) Regulations 2004**

The 2004 Regulations were implemented to meet Scotland’s obligations under the [Aarhus Convention](#) (Convention on Access to Information, Public Participation in Decision-making

and Access to Justice in Environmental Matters). Under the regulations, it is possible to require a Scottish public authority to provide environmental information.

Under regulation 2, environmental information includes information about:

- the elements of the environment, such as air and atmosphere
- factors, such as emissions, which may affect those elements
- measures, such as policies and plans, likely to affect those elements and factors

It would therefore appear that the sort of information which the Seafield petitioners wish to get from Veolia Water is covered by the regulations.

Importantly, the regulations contain a much wider definition of a “Scottish public authority” than the Freedom of Information (Scotland) Act 2002. Under regulation 2, a Scottish public authority includes any body covered by the 2002 Act, any other public body exercising mixed or no reserved functions under the Scotland Act 1998, and any person or body, under the control of a Scottish public authority, which either:

- has public responsibilities relating to the environment
- exercises functions of a public nature relating to the environment; or
- provides public services relating to the environment

It would appear to be arguable that Stirling Water and Veolia Water are under the control of Scottish Water (a Scottish public authority) and provide public services relating to the environment. [Guidance](#) provided by the Scottish Information Commissioner on the 2004 regulations, suggests (page 22):

“This could include private contractors involved in PPP/PFI or similar contracts and other bodies with environmental functions, eg. functions relating to waste disposal, energy production, drainage, transport or environmental consultancy.”

Any body that is covered by the regulations has a duty to make environmental information available on request (regulation 5) – within 20 or 40 days, depending on the nature of the request. The body may make a reasonable charge for supplying the information.

The body can refuse to make information available on the basis of a number of exceptions listed in regulation 10. These are similar to, but not the same as, the exemptions under the Freedom of Information (Scotland) Act 2002. In all cases, the body should consider whether the interest in maintaining the exemption is outweighed by the public interest in releasing the information.

There are exemptions in relation to general confidentiality and commercial confidentiality – although these do not apply requests for environmental information in relation to emissions (which may be relevant to any request from the Seafield petitioners). There is also an exemption where “the request involves making available internal communications”.

The exception in relation to internal communications may be important in relation to the information sought by the Seafield petitioners. The Scottish Information Commissioner has

issued a decision dealing with what constitutes an internal communication<sup>1</sup>. It can cover emails and documents sent between individuals in the same organisation. It can also cover draft letters and file notes for internal purposes. It may also, in certain circumstances, include documents sent between different bodies designated as Scottish public authorities. It is therefore a wide exclusion that could cover a number of documents of interest to the Seafield petitioners.

As with requests under the Freedom of Information (Scotland) Act 2002, the Scottish Information Commissioner can be asked to review whether a Scottish public authority has complied with the law in the way it has dealt with a request for information. A decision of the Scottish Information Commissioner can be appealed to the Court of Session on a point of law.

### Practical implications

It would appear that a case could be made that Stirling Water and Veolia Water are covered by the definition of a “Scottish public authority” and can therefore be required to release environmental information under the Environmental Information (Scotland) Regulations 2004. The Scottish Information Commissioner has not issued any decision dealing directly with this issue. It is therefore recommended that a solicitor is consulted for further advice. However, a request from the Seafield petitioners may be refused on the basis that it involves making available internal communications.

### **Powers of the courts to require documents to be released**

It appears that there was some confusion on behalf of witnesses to the Public Petitions Committee on the issue of the Seafield petition regarding whether private companies could be required to supply information. As requested, I have outlined above the general powers available under freedom of information and related legislation. However, courts have quite separate powers to require documents related to a court case to be provided. These make no differentiation between whether the documents are held by a private company or a public body.

Courts have the power to require “disclosure” of documents relevant to a court case – ie. the holder of a document (regardless of whether they are an individual or a private or public entity) can be required to make it available to parties to a court case. Generally speaking, requests for disclosure in Scotland take place after an initial case has been made to the court (ie. after a court action has been raised). However, it is possible, under the Administration of Justice (Scotland) Act 1972 to request disclosure before any court action has been initiated. Legal advice would have to be sought in relation to the specific position of the petitioners.

The situation the petitioners are complaining about is that they cannot afford to take court action without having a better understanding of their chances of success through access to further information to support their case. The counterargument to this position is that it can be difficult and costly, especially for large organisations, to comply with requests for disclosure of unspecified documents and that this cannot be justified in situations where it is not clear whether there is a case to answer.

Both the petition and the witnesses made reference to a “pre-action protocol” in place in England which enabled information to be released to those affected by pollution in a case analogous to that of the Seafield petitioners. A number of formal pre-action protocols exist

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<sup>1</sup> Decision 141/2007 Integra Compliance Ltd and the Scottish Environmental Protection Agency

in England. They form part of the court procedural rules dealing with particular forms of court action. In Scotland, the only formal pre-action protocol relates to actions between commercial organisations and therefore would not apply in the petitioners' situation.

Pre-action protocols lay out what action parties should take before coming to court. They are designed to ensure that the court is only involved where this is really necessary. Disclosure of information can be an important part of any pre-action protocol and can help to resolve cases before they reach court. These advantages have to be weighed against the disadvantages relating to disproportionate cost to the parties outlined above.

The Scottish Civil Courts Review (the Gill Review) recommended that pre-action protocols be developed in Scotland. This process is likely to involve careful consultations between relevant interest groups in particular forms of court action (eg. family law practitioners in family cases; trade unions, insurers and claims companies in personal injury cases) to decide what steps would be most helpful in resolving disputes before they reach court. This is likely to result in a number of different pre-action protocols relevant to particular types of court action.

Justice and Social Affairs Research Unit