

Dr Ruth Tingay

By email: [REDACTED]

Date: 19 December 2024

Our ref: SIR177476/A4655166

Dear Dr Tingay

Information Request – Change of Approach to Licensing Guidance and Conditions - Grouse Moor Management

Thank you for your information request, which we received on 11 October 2024. We have considered your request under the Environmental Information (Scotland) Regulations 2004 ('the EIRs').

We apologise for the delay in sending our response and for any inconvenience this has caused you.

Your Request

"This is a request for information under the FoI/EIR legislation in relation to the change of approach for licensing guidance and conditions for grouse moor management, as published on the NatureScot website on 10 October 2024:

[https://www.nature.scot/professional-advice/protected-areas-and-species/licensing/species-licensing-z-guide/red-grouse-and-licensing#:~:text=The%20Wildlife%20Management%20and%20Muirburn%20\(Scotland\)%20Act%202024%20\(the,the%20management%20of%20grouse%20moors.](https://www.nature.scot/professional-advice/protected-areas-and-species/licensing/species-licensing-z-guide/red-grouse-and-licensing#:~:text=The%20Wildlife%20Management%20and%20Muirburn%20(Scotland)%20Act%202024%20(the,the%20management%20of%20grouse%20moors.)

Please can you provide the following:

1. Copies of all correspondence with external stakeholders in relation to this change of approach.
2. Copies of all correspondence with Ministers in relation to this change of approach.
3. Copies of all internal correspondence within NatureScot in relation to this change of approach.
4. A copy of the legal advice received by NatureScot in relation to this change of approach."

Our Response

We have carried out a detailed search of the information we hold, and we have identified a number of documents relevant to your request. We have responded to each part of your request in turn.

1. Copies of all correspondence with external stakeholders in relation to this change of approach.

Copies of the relevant documents are attached along with this letter. We have redacted some personal data from the documents, because releasing that personal data into the public domain in response to an access to information request would breach the Data Protection Act 2018. We are therefore withholding the information under EIRs Regulation 11(2) (Personal data)s.

We have withheld some legal information Scottish Land and Estates (SLE) shared with us. The information was shared with us in confidence and is not publicly available. We have established that an obligation of confidentiality with regard to the information remains and we are therefore withholding the information under EIRs Regulation 10(5)(d) (Confidentiality provided in law).

We recognise that there is public interest in making available information which would promote a greater awareness of environmental matters, more effective participation by the public in environmental decision making and a better environment. However, when discharging our statutory duties and exercising discretionary powers NatureScot must also ensure that it acts lawfully and in a way which does not undermine its ability to function for the greater public good. This includes maintaining the confidentiality of information shared with us in confidence.

On balance, we consider that the public interest in making the requested information available is outweighed by that in maintaining the exception in Regulation 10(5)(d) of the EIRs.

2. Copies of all correspondence with Ministers in relation to this change of approach.

We do not hold any correspondence with Ministers in relation to the change of approach. I therefore need to explain that this means that EIRs Regulation 10(4)(a) (Information not held) applies to this part of your request.

3. Copies of all internal correspondence within NatureScot in relation to this change of approach.

The internal correspondence is included in the attached information released. We have again redacted personal data, for the reasons noted above.

4. A copy of the legal advice received by NatureScot in relation to this change of approach.

The exception in Regulation 10(5)(d) of the EIRs provides that a public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.

Legal advice in relation to the approach to licensing guidance and grouse moor management relates to NatureScot's functions under the Wildlife Management and Muirburn (Scotland) Act

2024. We consider that this process should be accepted as “relevant proceedings” for the purposes of Regulation 10(5)(d). Our reasons for withholding this advice are as follows:

Reasons for withholding legal advice

For information to be confidential under the common law, two main requirements must be met. These are:

- (i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already; and
- (ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties.

We consider, given the nature of the relationship between client and solicitor, that communications requested here attract an implied obligation of confidence. The communications meet all of the requirements for legal advice privilege, itself an aspect of the common law of confidence. They are communications in the course of which legal advice is sought and given, by professional legal advisers acting in that capacity and in the context of a professional relationship with their client. SLE shared some legal advice with NatureScot and our solicitor on the basis that this would be treated as confidential and subject to legal privilege.

We considered whether the confidentiality identified above would have been, or would have been likely to have been, prejudiced substantially by making the withheld information available. We believe that it would be. The nature of the legal advice would be disclosed at a time when the issues discussed remained current and subject to potential litigation. There are, and will continue to be, occasions when we require to obtain impartial and expert legal advice to ensure the legitimacy of our actions. Making the information available would substantially inhibit officers from seeking and giving legal advice in this manner, thus affecting NatureScot’s decision making.

We recognise that there is public interest in making available information which would promote a greater awareness of environmental matters, more effective participation by the public in environmental decision making and a better environment. However, we do not believe that making the legal advice available would further such aims. In discharging our statutory duties and exercising discretionary powers, NatureScot must ensure that it acts lawfully and in a way which does not undermine its ability to function for the greater public good. We need to obtain impartial and expert legal advice to ensure the legitimacy of our actions, which might be subject to legal challenge by groups holding conflicting views. We consider it essential to be able to obtain and consider comprehensive and frank legal advice in private on such occasions, to ensure we are not to be disadvantaged. We are unable to identify a wider general public interest in making the information available. On balance, we consider that the public interest in making the requested information available is outweighed by that in maintaining the exception in Regulation 10(5)(d) of the EIRs.

How We Handled Your Request

We believe you have asked for environmental information as defined in the Environmental Information (Scotland) Regulations 2004 ('the EIRs'), so we are dealing with your request under those regulations. To be able to use the EIRs, we must apply an exemption under section 39(2) of the Freedom of Information (Scotland) Act 2002 ('FOISA'). The Scottish Information Commissioner's guidance recommends that public authorities apply this exemption to environmental information and handle request under the EIRs.

If you would like to find out more about the access to information legislation, there is a guidance booklet available on the Scottish Information Commissioner's website:

https://www.foi.scot/sites/default/files/2022-03/Your_Right_to_Know_2018-compressed.pdf

Review and Appeal

I hope this information meets your requirements, but if you are dissatisfied with how we have responded to your information request, please write to us within 40 working days explaining your concerns. You can contact us at Battleby, Redgorton, Perth, PH1 3EW or email us at foi@nature.scot. We will carry out a review of our response and contact you with our findings within 20 working days.

If you are not satisfied following this, you can make an appeal to the Scottish Information Commissioner within 6 months. The Scottish Information Commissioner can be contacted at:

Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS

Online appeal service: <https://www.foi.scot/appeal>

Website: <https://www.foi.scot/>

Telephone: 01334 464610

Yours sincerely

Rhoda Davidson

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