

EIRs Guidance

Regulation 10(5)(a): International relations, defence, national security and public safety

Exception briefing



Scottish Information
Commissioner

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Glossary and abbreviations

Term used	Explanation
The Commissioner	The Scottish Information Commissioner
EIRS	Environmental Information (Scotland) Regulations 2004
FOISA	Freedom of Information (Scotland) Act 2002
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
The Directive	Directive 2003/4/EC on public access to environmental information
Implementation Guide	UNECE Aarhus Convention: An Implementation Guide (2 nd edition)

Cross-referenced VC documents (for internal use)

VC No	VC name
VC54300	C2 FOISA Guidance Section 32: International Relations v02 CURRENT ISSUE
VC61103	C2 FOISA Exemption Guidance Section 39: Health, safety and the environment v02 CURRENT ISSUE
VC73713	C2 EIRs Guidance: The Public Interest Test in the EIRs v01 CURRENT ISSUE

The exception

The exception: main points

1. Regulation 10(5)(a) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) allows a Scottish public authority to refuse to disclose environmental information, where its disclosure would, or would be likely to, cause substantial prejudice to one or more of the following:
 - (i) international relations
 - (ii) defence
 - (iii) national security
 - (iv) public safety.
2. In common with other exceptions in the EIRs:
 - (i) the exception is subject to the public interest test in regulation 10(1) of the EIRs. This means that, even if the exception applies, the information should still be disclosed if the public interest in making the information available is outweighed by the public interest in maintaining the exception.
 - (ii) the exception can be relied on regardless of the age of the information.
3. A public authority can refuse not to reveal whether it holds information if:
 - (i) doing so would involve making available information which would, or would be likely to, prejudice substantially any of the interests referred to in regulation 10(5)(a) and
 - (ii) it would not be in the public interest to reveal whether it holds the information.

Steps in applying the exception

4. These are the steps an authority must take once it has located and retrieved the requested information:
 - (i) Decide, does the exception apply? The exception must be interpreted in a restrictive way and the authority must apply a presumption in favour of disclosure (regulation 10(2) of the EIRs).
 - (ii) If the exception does NOT apply, the information cannot be withheld under the exception.
 - (iii) If the exception DOES apply, the public interest test must be applied.
 - (iv) If the public interest in making the information available outweighs the public interest in maintaining the exception, the exception does not apply and the information cannot be withheld under the exception.
 - (v) If the public interest in maintaining the exception outweighs the public interest in making the information available, the information can be withheld.

General points about interpreting the exception

5. The EIRs implement Directive 2003/4/EC on public access to environmental information. Neither the EIRs nor the Directive define any of the other terms used in the exception. However, the Aarhus Convention Implementation Guide, named after the Convention on which the Directive was based, contains some useful guidance on interpreting the EIRs. References to the Implementation Guide are included in this guidance. (See Appendix 1: Resources for a link to the Directive and to Implementation Guide.)
6. The exception can only be applied where disclosure would, or would be *likely to*, cause *substantial prejudice*. Both of these phrases are considered in more detail below.

International relations

7. International relations are not defined in the EIRs. The equivalent exemption in the Freedom of Information (Scotland) Act 2002 (FOISA) (section 32(1)(a)) applies to information which would harm relations between the UK and any other State, or relations between the UK and any international organisation or international court. (See **Appendix 1: Resources** for a link to the Commissioner's guidance on section 32 of FOISA.)
8. The term "international relations" is not defined in the EIRs or in the Directive. The Aarhus Implementation Guide states (at page 86) that the definition of "international relations", "national defence" or "public security" should be determined in accordance with their generally accepted meaning in international law. (See **Appendix 1: Resources** for a link to the Aarhus Implementation Guide.)
9. When considering harm to international relations, public authorities need to concentrate on the potential impact that disclosure may have on a particular relationship, rather than looking solely at the nature, content and/or sensitivity of the information. Disclosing potentially controversial information about one State may have little or no impact on international relations, while disclosing seemingly innocuous information about a different State may have a substantial impact. Existing political relations or diplomatic sensitivities are likely to be relevant (see **Appendix 1: Resources** for examples of decisions issued by the Commissioner).
10. Cultural, religious or legislative differences may also be relevant. The attitude of a particular State or organisation towards freedom of information may be relevant: relations with States or bodies which are less open may be at greater risk of prejudice if sensitive information is released.
11. Even if a negative reaction is anticipated from the disclosure of information, an assessment will have to be made as to whether this reaction would, or would be likely to, prejudice substantially international relations. There may be circumstances where the disclosure of information may cause diplomatic annoyance or irritation, but would not result in serious, long-term harm to the relations between countries.
12. Information which has not been made available in the UK has, in the past, been disclosed under the US Freedom of Information Act without substantial prejudice to relations between countries. In the 1980s, a House of Commons Select Committee investigating the collapse of the International Tin Council was unable to access information held by the UK Government, which claimed it was confidential. As a result, much of the information considered by the committee came from disclosures made under the US FOI Act.

Defence

13. “Defence” and “national security” aren’t defined in the EIRs. In practice, there is likely to be an overlap between information which would, or would be likely to, substantially prejudice the defence of the realm, and information which would, or would be likely to, substantially prejudice national security. The exception may apply to information about:
 - (i) the defence of the realm
 - (ii) the prosecution of war
 - (iii) the disposition of the armed forces
 - (iv) nuclear weapons
 - (v) the activities of the security and intelligence services.
14. The list isn’t exhaustive. There may be other kinds of information that fall within this definition.
15. Section 2(4) of the Official Secrets Act 1989 (OSA) provides some guidance about matters that may be relevant to “defence”. It defines “defence” as:
 - (i) the size, shape, organisation, logistics, order of battle, deployment, operations, state of readiness and training of the armed forces of the Crown
 - (ii) the weapons, stores, or other equipment of those forces and the invention, development, production and operation of such equipment and research relating to it
 - (iii) defence policy and strategy and military planning and intelligence
 - (iv) plans and measures for the maintenance of essential supplies and services that are or would be needed in time of war.
16. Section 2(2) of OSA states that disclosure of information relating to defence is damaging if it:
 - (i) damages the capability of the armed forces of the Crown to carry out their tasks
 - (ii) leads to loss of life or injury to members of those forces
 - (iii) leads to serious damage to the equipment or installations of those forces
 - (iv) endangers the interests of the United Kingdom abroad
 - (v) seriously obstructs the promotion or protection by the United Kingdom of those interests
 - (vi) endangers the safety of British citizens abroad.
17. Although the definitions in OSA are helpful, authorities need to demonstrate that disclosure would substantially prejudice defence (or any of the other matters covered by the exception) before relying on regulation 10(5)(a). The simple fact that the information *relates* to any of these matters is not enough for the exception to apply.

National security

18. Neither the EIRs nor the Directive define “national security”. In *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, national security is defined as “the security of

the United Kingdom and its people". (See **Appendix 1: Resources** for a link to this judgment.)

19. Even where information is already in the public domain, disclosing it under the EIRs might still cause substantial prejudice to national security, particularly if it entered the public domain through unofficial channels (e.g. through the leaking of information). Where information has been leaked, authorities might be concerned that formal disclosure will not only authenticate the information, but also confirm that the information is accurate.
20. The Scottish Government has prepared guidance for Scottish public authorities dealing with requests where Security and Intelligence Agency information and/or information related to national security issues are involved. (See **Appendix 1: Resources** for a link to the guidance.)
21. The guidance covers cases where a Scottish public authority receives a request for information:
 - (i) related to national security, which it holds in confidence having been supplied by any UK Minister or UK government department. In these cases, the information is not held by the public authority for the purposes of the EIRs (see regulation 2(2) of the EIRs); and
 - (ii) which it holds in its own right and which it considers should not be disclosed because disclosure would, or would be likely to, substantially prejudice national security. In these cases, the information is held by the public authority for the purposes of the EIRs, but may be excepted from disclosure under regulation 10(5)(a).
22. To date, the Commissioner has not issued any decisions on cases where information has been withheld under regulation 10(5)(a).

National security certificates

23. Regulation 12(1) of the EIRs allows the Scottish Ministers to certify that disclosing environmental information would, or would be likely to, prejudice substantially national security. Such a certificate would prevent the Commissioner from challenging whether the harm would occur. No certificates have ever been issued under regulation 12(1).

Public safety

24. "Public safety" is not defined in the EIRs, but refers to the welfare and protection of the general public. "Safety" suggests freedom from danger as well as protection from the risk of harm or injury.
25. In relying on this exception, a public authority must be able to show there is a real risk or likelihood that actual harm will occur at some time in the near (certainly foreseeable) future, if information is disclosed. There must be a genuine and realistic threat to public safety. The exception will not apply if harm is a remote or hypothetical possibility. There must also be a directly causal link between disclosure of the information and the likelihood of harm.
26. Authorities seeking to show that disclosure would, or would be likely to threaten public safety may draw upon examples from similar situations, as well as evidence relating directly to the situation under consideration.

27. There is a similar exemption in section 39(1) of FOISA which allows public authorities to withhold information if disclosure would, or would be likely to, endanger the physical or mental health or safety of an individual. See **Appendix 1: Resources** for a link to the Commissioner's guidance on section 39(1).
28. See also **Appendix 1: Resources** for examples of decisions issued by the Commissioner.

“Likely to”

29. The exception can only be applied where disclosure would, or would be likely to, cause substantial prejudice. There must be at least a significant probability that substantial prejudice would occur in order for the exception to be appropriately applied. There must be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.

“Substantial prejudice”

30. There is no definition of substantial prejudice in the EIRs, but the damage caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal.
31. Authorities must avoid classifying types of documents as potentially falling within this exception. Its use must be justified on a case by case, and document by document, basis.
32. The disclosure of seemingly innocuous information might substantially prejudice defence or national security if, once disclosed, it could be used in combination with another piece of information already in the public domain. Again, this should be considered on a case by case basis.
33. Consideration should be given to what information is already in the public domain. Where information has been disclosed in another official source, it will be much more difficult to satisfy the Commissioner that disclosure under the EIRs would cause substantial prejudice.

The public interest test

34. If the exception applies, the authority must go on to consider the public interest in relation to the information. In terms of regulation 10(1)(b), this means assessing whether – in all the circumstances – the public interest in making the information available is better served by withholding the information or making it available. The authority must identify the competing arguments for these two outcomes and must carry out a balancing exercise to determine where the public interest lies in that particular case.
35. In carrying out the balancing exercise, the authority must take account of the explicit presumption in favour of disclosure in regulation 10(2)(b).
36. The EIRs do not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public”. It has also been said that the public interest means what is in the interests of the public, rather than what is of interest to the public (although the two are not always mutually exclusive).
37. The Commissioner has published guidance on the public interest test in the EIRs. (See **Appendix 1: Resources** for a link to the guidance.)

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision Number	Parties	Summary
<p>“International relations”</p> <p>Paragraph 8</p>	051/2009	Advocates for Animals and the Scottish Ministers	<p>The Ministers were asked for correspondence about the proposed introduction of Giant Pandas to Edinburgh Zoo. The Ministers argued that disclosure of some information would harm relations between the UK and China.</p> <p>The Commissioner accepted this, taking into account the Ministers’ submissions on the nature of relations with China and how this matter related to wider political questions. At the time, agreement had still to be reached on the introduction of the Giant Pandas. The information included views from both UK Government and Chinese officials, expressed with candour and of some sensitivity.</p>
<p>“International relations”</p> <p>Paragraph 8</p>	174/2014	Mr L and Glasgow City Council	<p>The Council was asked for a geotechnical report on Celtic Football Club’s Westthorn training ground. It withheld the report because the sale of the training ground to Celtic FC was the subject of an investigation by the European Commission. The Council believed there was a real risk that the ongoing investigation would be undermined if information relating to the subject matter of the complaint was made public. It argued that relations between the UK and the EU would be substantially prejudiced by disclosure.</p> <p>The Commissioner accepted that the exception applied.</p>
<p>“Public safety”</p> <p>Paragraph 27</p>	108/2008	Simon Brogan and Highlands and Islands Fire Board	<p>Mr Brogan asked for the Site Specific Fire/Incident Plan for the Kirkwall fuel depot. The Fire Board believed that information about on-site capacity, fuel storage and firefighting capability could be used by someone intent on wrongdoing or terrorism to decimate fuel storage arrangements throughout the UK, with a detrimental effect not only on emergency services but on the armed services, placing national security in serious jeopardy. The Board also argued that there would be a risk to the physical health or safety of staff or residents nearby.</p> <p>The Commissioner queried whether disclosure would have such an impact as to threaten national security, but accepted that it would present a real risk to staff at the oil depot, the emergency service, and local residents.</p>

<p>“Public safety”</p> <p>Paragraph 27</p>	<p>193/2012</p>	<p>Global Alliance Against Industrial Aquaculture (GAAIA) and the Scottish Ministers (the Ministers)</p>	<p>GAIAA asked about seals killed under licence by salmon farmers in 2011 and 2013. The Ministers provided figures, but withheld details of the number of seals killed at individual sites, and the names of the salmon farming companies involved.</p> <p>The Ministers provided examples of direct action by animal rights protestors, but these bore little relation to the issues or situations under consideration. The Ministers were asked to provide evidence of a genuine and realistic threat to public safety, but did not produce any examples or proof of threatening behaviour in similar situations. The Commissioner found that they had failed to demonstrate a real risk to public safety or to show that the harm they anticipated was likely to occur at some time in the near (foreseeable) future, following disclosure.</p>
<p>“Public safety”</p> <p>Paragraph 27</p>	<p>102/2015 and 103/2015</p>	<p>Global Alliance Against Industrial Aquaculture (GAAIA) and the Scottish Ministers (the Ministers)</p>	<p>Decision 102/2015 concerns a request for the number of seals shot at salmon farms for the years 2013 and 2014. Decision 103/2015 concerns a request for the seal killing return forms from salmon farms for the same years.</p> <p>In both cases, the Ministers withheld the information, claiming that disclosure would cause substantial prejudice to public safety. The Commissioner accepted that there was a history of protest action at salmon fisheries, but was not given any evidence of protest action at salmon farms. She did not accept that the Ministers had provided enough evidence that disclosure would, or would be likely to, lead protestors to threaten public safety at salmon farms.</p>
<p>“Public safety”</p> <p>Paragraph 27</p>	<p>033/2015</p>	<p>Paul Hutcheon and Historic Scotland</p>	<p>Paul Hutcheon asked about the potential refurbishment or relocation of the First Minister’s official residence. Historic Scotland withheld information which it believed would pose a real threat to the security of the First Minister and Cabinet, and the First Minister’s staff (public safety).</p> <p>The Commissioner accepted that disclosure of the detailed plans would result in substantial danger by providing information about points of entry to the building and potential surveillance points within it, which could be exploited.</p>

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 032/2014).

If you do not have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

Other Resources

Paragraph	Resource	Link
1	Directive 2003/4/EC on public access to environmental information	http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF
1, 6	The Aarhus Convention: An Implementation Guide (second edition)	https://www.unece.org/env/pp/implementation_guide.html
5	Section 32 guidance: International relations	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section32/Section32.aspx
17	Secretary of State for the Home Department v Rehman [2001] UKHL 47	https://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011011/rehman-1.htm
19	Scottish Government's guidance for dealing with requests involving Security and Intelligence Agency information or information about national security	http://www.gov.scot/About/Information/FOI/18022/guidesecurity
26	Section 39 guidance: Health, Safety and the environment	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx
36	EIRs guidance: the public interest in the EIRs	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx

Appendix 2: The exception

Regulation 10

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - (a) international relations, defence, national security or public safety;
- ...

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