

EIRs Guidance

Regulation 10(5)(b): The course of justice, ability to receive a fair trial, etc.

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
VC58974	C2 FOISA Exemption Guidance Section 36: Confidentiality v02 CURRENT ISSUE

VC No	VC name
VC73713	C2 EIRs Guidance: The Public Interest Test in the EIRs v01 CURRENT ISSUE

The exception

The exception: main points

1. Regulation 10(5)(b) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) provides an exception which allows a Scottish public authority to withhold environmental information if its disclosure would, or would be likely to, cause substantial prejudice to one or more of the following:
 - (i) the course of justice
 - (ii) the ability of a person to receive a fair trial
 - (iii) the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
2. In common with other exceptions in the EIRs:
 - (i) the exception is subject to the public interest test in regulation 10(1). 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 making it available.
 - (ii) the exception can be relied on regardless of the age of the information.

Steps in applying the exception

3. 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 in regulation 10(5)(b) applies, the public interest test must be applied.
 - (iv) If the public interest in making the information available outweighs by 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

4. The EIRs implement Directive 2003/4/EC on public access to environmental information. The EIRs don't 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 useful guidance on interpreting the EIRs and references to the Implementation Guide are contained throughout this guidance. (See **Appendix 1: Resources** for a link to the Directive and Implementation Guide.)

5. 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.

Course of justice

6. The Implementation Guide says (at page 87) that “the course of justice” refers to active proceedings within the courts. The Guide goes on to say that the term “the course of” implies that there must be an active judicial procedure which is capable of being prejudiced – in preparation if not actually started. The exception does not apply simply because the information falling within the scope of the request was part of a court case at one time. Every effort should be made to make the information available once the proceedings have been completed, unless harm to further ongoing proceedings can be demonstrated.

Fair trial

7. Page 87 of the Aarhus Implementation Guide also refers to the second limb of the exception, where the harm would be to the ability of a person to receive a fair trial. This should be interpreted in the light of the law relating to the rights of the accused – safeguards designed to avoid “trial by media” and protect the presumption of innocence.

Criminal or disciplinary investigations

8. The important point to remember is that the only investigations (or inquiries) covered by this exception are criminal or disciplinary ones. As the Aarhus Implementation Guide notes, again at page 87, information about a civil or administrative investigation will not necessarily be covered.
9. Within these limits, the investigation could be conducted at any level of government, by any institution or public authority – local, regional, national or international. Depending on the circumstances, the investigation may relate directly to the detection of crime or the apprehension or prosecution of offenders, or relate to another form of law enforcement process where there is still a reasonable prospect of criminal proceedings in the event of failure to comply.
10. In this context, the Aarhus Implementation Guide also notes that in some countries, public prosecutors are not allowed to reveal information on their cases to the public. In Scotland, for example, the prosecution may be required to disclose information to the accused which it would not be appropriate to disclose to the public outwith the environment of the trial.
11. With regard to public prosecutors, section 48 of FOISA also applies to cases subject to the EIRs. In other words, the Commissioner will be unable to consider an application deriving from a request made to a procurator fiscal, or to the Lord Advocate/Crown Office where the information relates to criminal prosecution functions.

Legal professional privilege

12. Unlike section 36(1) of FOISA (see **Appendix 1: Resources** for a link to the briefing on section 36), the exception in regulation 10(5)(b) does not apply expressly to documents which could be the subject of a claim to confidentiality of communications in legal proceedings. Depending on the circumstances, the exception (in relating to the course of justice) can apply to information covered by legal professional privilege, particularly litigation privilege. It is less likely, however, to be relevant to cases where the information is subject to

legal advice privilege. The Commissioner has accepted in some cases that the exceptions in regulations 10(4)(e) and 10(5)(d) apply to such information.

Litigation privilege

13. Litigation privilege (also known as “communications *post litem motam*”) is a distinct aspect of legal professional privilege. It is wider than communications between solicitor and client. It applies to documents created in contemplation of litigation (legal proceedings) and to communications when litigation is either pending or being considered.
14. Litigation privilege applies to documents created by the party contemplating the potential litigation, to expert reports prepared on their behalf and to legal advice given in relation to potential litigation. (Note, however, there is a specific exception which relates to routine accident reports prepared as a matter of course at the time of, or shortly after, an accident.)
15. The timing of the creation of the information will be very relevant to whether litigation privilege applies. Note that a general apprehension of future litigation or the possibility that someone might, at some point in the future, raise a court action, is **not** sufficient.
16. Litigation does not actually need to take place for the privilege to apply, and the privilege may continue to apply after any litigation has been concluded. Here, however, it is important to remember the need to establish ongoing harm before this particular exception can apply. When litigation has concluded, it is unlikely to be enough to establish that litigation privilege applies – there will still need to be substantial prejudice to the course of justice before the exception can be engaged.
17. It is important to avoid withholding the whole contents of a legal file, or even those documents which would qualify for litigation privilege, without considering in detail whether the test of substantial prejudice can be met. Information which is wholly factual in nature, for example, may well be capable of disclosure without causing substantial prejudice, even if in other circumstances it might be considered privileged.

Who can claim legal professional privilege?

18. It is only the client who has sought or received advice, or on whose behalf documents have been prepared in contemplation of litigation, who can claim legal professional privilege. Legal professional privilege cannot be claimed by the legal adviser who gave the advice or prepared the document, nor can the legal adviser refuse to disclose it if the client is happy for the information to be disclosed.

Exceptions to legal professional privilege

19. There are some situations in which legal professional privilege will not apply, with the result that privilege cannot be used as a basis for withholding the information in question under regulation 10(5)(b).

Loss of Confidentiality

20. Privilege in a document may be lost as a result of a previous disclosure. Where the whole of the advice, or a comprehensive summary of the advice, has been disclosed, the advice will no longer be confidential. Where only a part of the advice has been disclosed, the rest will remain privileged.

Waiver

21. Loss of confidentiality is to be distinguished from the more restricted concept of waiver. Strictly speaking, waiver exists only in the context of litigation, where one party “deploys”

privileged information in support of a particular position or line of argument. This will generally lead to loss of privilege in the whole of that information. This is a complex area of law, and public authorities considering whether there has been, or will be, a waiver of legal professional privilege may wish to take legal advice.

Disclosure for a limited purpose

22. If advice has been disclosed to another person for a particular, limited purpose, the advice may still be privileged. This may be the case where privileged information is disclosed on the condition that it will remain confidential (e.g. where one public authority shares legal advice in confidence with another authority).
23. Authorities can disclose privileged information to others with a common interest in the information, without losing confidentiality or waiving privilege. This will arise only where the common interest existed at the time the privileged information was created.

“Likely”

24. For this exception to apply, the required harm must be at least likely. There must be at least a significant probability that the harm will occur. There must also be a genuine, demonstrable, link between disclosure and harm: it cannot simply be a remote or hypothetical possibility.

“Substantial prejudice”

25. 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.
26. Authorities must avoid classifying classes of documents as potentially falling within the exception. As with all exceptions, the use of regulation 10(5)(b) must be justified on a case by case, and document by document, basis. The decision must consider all relevant circumstances present at the time.

The public interest test

27. 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.
28. In carrying out the balancing exercise, the authority must take account of the explicit presumption in favour of disclosure in regulation 10(2)(b).
29. 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).
30. The Commissioner has published guidance on the public interest test. (See **Appendix 1: Resources** for a link to the guidance.)

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision Number	Parties	Summary
Paragraphs 7, 9	125/2007	Robert Hogg and City of Edinburgh Council	The information related to a live planning enforcement case, which had the potential to lead to criminal prosecution. The evidence in the enforcement file would form the basis of that prosecution and the Commissioner was satisfied that disclosure would prejudice substantially any future criminal investigation and the site operator's ability to receive a fair trial.
Paragraph 9	038/2009	Fish Legal and the Scottish Environment Protection Agency	SEPA withheld witness statements, obtained from both its own staff and third parties for the purposes of criminal proceedings (which had since concluded). The Commissioner accepted that there was still sufficient scope for harm to SEPA's ability to gather information from third parties (and thus to its ability to carry out criminal inquiries), but was unable to reach the same conclusion in relation to statements gathered from its own staff.
Paragraph 9	001/2010	Argyll District Salmon Fishery Board and Loch Awe Improvement Association and the Scottish Ministers	The decision considered information about enforcement action taken in relation to fish farms, which could lead to criminal prosecution. Having considered the withheld information, the Commissioner could not accept that there was a reasonable prospect of a criminal inquiry or proceedings. The mere theoretical possibility of prosecution was not enough to sustain the exception.
Paragraph 9	009/2011	Jim Keir and Loch Lomond and the Trossachs National Park Authority	The Commissioner was critical of the authority for not taking a case-specific approach to the withheld information. The enforcement action in question (and the breach which led to it) had ceased some time before the request under consideration, and any future criminal proceedings would have to be based on a fresh investigation in new circumstances. The exception was not upheld.
			While the withheld information was prepared

Paragraphs 6, 16,17	019/2012	Paul McGowan and Fife Council	in contemplation of litigation, the Commissioner did not agree that its disclosure would cause the required harm to the course of justice. The Commissioner described the document as a “factual report, containing the most basic information, [with] nothing beyond the circumstances of its preparation to support the application of the exception” – that was not enough.
Paragraphs 9, 26	093/2012	Bruce Thomson and City of Edinburgh Council	The Commissioner highlighted the importance of demonstrating substantial prejudice, and not simply confirming that a relevant investigation was ongoing. In the absence of a satisfactory, reasoned explanation, the Commissioner was unable to uphold the exception (noting that the information was largely factual and known to the affected property owners or the wider public).
Paragraph 9	165/2012	Peter Verity and City of Edinburgh Council	The request sought information about staff subject to disciplinary and criminal proceedings. The Commissioner accepted that its disclosure would be likely to cause substantial prejudice to the relevant investigations, bearing in mind that the appeal periods for the decisions in question had not yet expired.
Paragraphs 6, 13 - 15	186/2013	Tim Quelch and Donald Keith and the City of Edinburgh Council	The Commissioner was not satisfied that a report prepared in response to a complaint was prepared in contemplation of litigation. However, it did contain details of the authority’s likely position should it have to raise or defend proceedings arising from the dispute in question. This information – but not other, largely factual, information in the report – would substantially prejudice the Council’s position in defending litigation (and thus the course of justice).
Paragraphs 13 – 18, 20	142/2013	Diana Cairns and East Renfrewshire Council	The Commissioner was satisfied that the requirements of litigation privilege were met. Litigation was in genuine prospect at the time and, although the Council’s position on the matter was summarised in a published minute, the Commissioner did not consider this to be a sufficiently comprehensive summary for it to be said that confidentiality had been lost.
			Here, the Commissioner was asked to

Paragraph 7, 9	129/2016	Dominic Kennedy and the Chief Constable of the Police Service of Scotland	consider information relating directly to a criminal investigation carried out by the police. The information was less than a year old at the time of the request and the Commissioner was satisfied that it could still be relevant to current investigations. The Commissioner considered the importance of avoiding “trial by media” and of securing the co-operation of witnesses and the presumption of innocence of accused persons. The information provided insight into tactics and methods used to investigate specific crime and could prejudice future, related investigations. The exception was upheld.
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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
4	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
5, 6, 7, 8, 10	The Aarhus Convention: An Implementation Guide (2 nd edition)	https://www.unece.org/env/pp/implementation_guide.html
12	The Commissioner’s guidance on section 36 of FOISA	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx
30	The Commissioner’s guidance on the public interest test 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-
 - ...
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
 - ...

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