

EIRS Guidance

The public interest test in the EIRs

Briefing



Scottish Information
Commissioner

Contents

Glossary and abbreviations	1
The public interest test	2
The main points	2
The public interest in practice	2
What is meant by “the public interest”?	2
Regulation 10(2)(b) – the presumption in favour of disclosure.....	2
Regulation 11 – third party personal data and the public interest test.....	3
The balancing exercise	3
Factors which should be taken into account.....	4
Factors which should not be taken into account.....	4
The two-stage public interest test.....	5
Passage of time	5
The public interest test in decisions	5
Appendices	6
Appendix 1: Resources	6
Appendix 2	7
Regulation 10 – Exceptions from duty to make environmental information available	7
Document control sheet	9

Glossary and abbreviations

Term used	Explanation
DPA 2018	The Data Protection Act 2018
EIRs	Environmental Information (Scotland) Regulations 2004
FOI	Freedom of Information
FOISA	Freedom of Information (Scotland) Act 2002
GDPR	General Data Protection Regulation
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
The Commissioner	The Scottish Information Commissioner
ECJ	European Court of Justice
EU Directive	Directive 2003/4/EC on public access to environmental information

The public interest test

The main points

1. Under regulation 5(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs), a Scottish public authority that holds environmental information must make it available when requested to do so.
2. This duty is not absolute. In some cases, information is excepted from disclosure. The exceptions are listed in regulation 10 of the EIRs. Regulation 11 also covers the situations when personal data can and can't be disclosed under the EIRs.
3. **All** of the exceptions in regulation 10 (and parts of regulation 11) are subject to a public interest test. This means that, even if an exception applies, the public authority must still disclose the information unless the public interest in making the information available is outweighed by that in maintaining the exception.
4. This guidance gives advice to public authorities on how to address the public interest test. It gives examples of the factors they should take into account when deciding where the public interest lies. Requesters may also find the guidance helpful when a public authority refuses to disclose information under the EIRs.
5. The Freedom of Information (Scotland) Act 2002 (FOISA) also contains a public interest test. The Commissioner has issued separate guidance on the public interest test in FOISA (see **Appendix 1: Resources**).
6. Unlike FOISA, a two-stage public interest test can be applied if a public authority is applying more than one exception under the EIRs.

The public interest in practice

What is meant by “the public interest”?

7. The EIRs do not define the public interest, but it has been described elsewhere as “something which is of serious concern and benefit to the public”, not merely something of individual interest. It has also been described as “something that is “in the interest of the public”, not merely “of interest to the public.” In other words, it serves the interests of the public.
8. When applying the test, the public authority is deciding whether it serves the interests of the public better to withhold or disclose information. The “public” in this context does not necessarily mean the entire population. It might relate to a relatively localised public (e.g. a small community or interest group) or to the wider public at large.

Regulation 10(2)(b) – the presumption in favour of disclosure

9. The public interest test in the EIRs is similar to the test in FOISA. However, regulation 10(2)(b) builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed. (See **Appendix 2** for the wording of regulation 10.)
10. The starting position is, therefore, that there is a public interest in disclosure of environmental information (as expressed in the EIRs and associated EU Directive) and that only if there is a stronger competing public interest in withholding the information should exceptions be applied.

Regulation 11 – third party personal data and the public interest test

11. Regulation 11, which deals with personal data, isn't an exception as such. What it does instead is set out the circumstances where the duty to make information available under regulation 5(1) doesn't apply.
12. Under regulation 11, there are two situations where the public interest is considered. In these situations, third party personal data cannot be disclosed if, in all the circumstances of the case, the public interest in making the information available is outweighed by that in not doing so. These are:
 - where disclosure would contravene Article 21 of the GDPR (general processing: right to object to processing) [regulation 11(2), read with regulation 11(3B)] and
 - if the subject of the information were to ask for their information under Article 15(1) of the GDPR (or section 45(1)(b) of the DPA 2018), the information would be withheld from them [regulation 11(2), read with regulation 11(4A)]
13. See **Appendix 1: Resources** for a link to the Commissioner's guidance on regulation 11 of the EIRs.
14. The tests contained in regulation 10(1) do not apply to the exceptions in regulation 11. This means that there is no specific requirement on a public authority to interpret the regulation in a restrictive way or apply a presumption in favour of disclosure. What is important here is to ensure that disclosure does not breach the DPA.

The balancing exercise

15. There is a two-step process in considering whether an exception in regulation 10 (or a relevant part of regulation 11) can be applied. The first step is to determine whether the exception actually applies.
16. If the relevant test or tests in the exception are met, then the information is excepted from disclosure. The Commissioner has produced guidance on the exceptions. (See **Appendix 1: Resources** for links to the guidance.)
17. The second step is to go on to apply the public interest test to determine whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. The information can only be withheld if the public interest in maintaining the exception outweighs that in making it available.
18. The authority must identify and set out the competing arguments as to why the public interest would be served by disclosure of the exempt information and by withholding the information. Having identified the public interest arguments on each side, the authority must then carry out a balancing exercise to determine where the public interest lies.
19. This will involve looking at the content and context of the information and at the likely effect of disclosure.
20. Where a public authority decides that the public interest lies in maintaining an exception (or that personal data should be withheld under the relevant part(s) of regulation 11), it must give the requester a written refusal notice under regulation 13 of the EIRs. **Regulation 13(b) makes it clear that where a public authority is withholding information on public interest grounds, the refusal must state how the public authority reached its decision with respect to the public interest test.**

21. This means it is not enough for a public authority simply to tell the requester that the public interest lies in maintaining the exception. The authority must set out the competing public interest arguments and explain why it has concluded that the public interest lies in maintaining the exception as opposed to making it available. Without this information, public authorities are likely to find it difficult to justify their decision on the public interest if an appeal is subsequently made to the Commissioner.

Factors which should be taken into account

22. These are examples of the type of factors authorities should take into account when deciding where the public interest lies. This is **not** an exhaustive list, but gives an indication of the sort of issues authorities should be considering.

- the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation;
- whether disclosure would contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders;
- whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment;
- whether disclosure would impact adversely on safeguarding national security or international relations;
- whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
- whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims;
- whether disclosure would contribute to a debate on a matter of public interest;
- whether disclosure would prejudice the protection of an individual's right to privacy.

Factors which should not be taken into account

23. The following factors should **not** be taken into account when applying the public interest test.

- possible embarrassment to government or other public authority officials;
- the fact that senior persons are involved;
- possible loss of confidence in government or other public authority;
- the risk of the requester misinterpreting the information.

24. Just because information is complex, or might be difficult for the requester to interpret, does not mean that the information should be withheld on public interest grounds. If a public authority is concerned that information might not be easily understood, or would be misinterpreted, there is nothing to stop the authority from explaining the information.

The two-stage public interest test

25. In 2011, the European Court of Justice (the ECJ) considered how the public interest test should be dealt with under the EIRs when a public authority has applied more than one exception to the same piece of information. (See **Appendix 1: Resources**.)
26. The judgement from the ECJ makes it clear that there is a two-stage public interest test involved. The first stage is to consider whether, in relation to each exception applied by the authority, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
27. However, authorities may also go on to carry out a second stage test, which involves weighing all of the grounds for refusing to disclose the information against the public interests served by disclosure. Where they do so, and are satisfied that the public interest favours withholding the information, the information can be withheld.
28. **The judgement only affects requests for environmental information. It does not affect requests made under FOISA.**

Passage of time

29. The need to consider the public interest “in all the circumstances of the case” means that the factors weighing in favour of disclosure or maintaining an exception, or their relative weight in the balancing exercise, is likely to change over time. It is important that the balancing exercise takes into account the circumstances at the time of the information request (or, where relevant, at the review stage). Just as the application of an exception may change with the passage of time, the balance of the public interest will also shift with the passage of time, usually in favour of disclosing the information.

The public interest test in decisions

30. As noted in paragraph 16, the Commissioner has issued guidance on the EIRs exceptions. The guidance contains examples of cases where the Commissioner has concluded whether the public interest lies in withholding the information or in disclosing it.

Appendices

Appendix 1: Resources

Par	Resource	Link
5	FOISA Guidance: The Public Interest Test	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx
13	Commissioner's guidance on Regulation 11: Personal Data	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation11/Regulation11PersonallInformation.aspx
16	Commissioner's guidance on the exceptions in the EIRs (including regulation 11).	The FOISA Exemptions and the EIR Exceptions Briefing Series/guidance can be located by scrolling down on the following link: http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx
25	Office of Communications v Information Commissioner [2011] EUECJ C-71/10	http://curia.europa.eu/juris/liste.jsf?language=en&num=C-71/10

Appendix 2

Regulation 10 – Exceptions from duty to make environmental information available

- (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.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;
 - (b) the request for information is manifestly unreasonable;
 - (c) the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9;
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves making available internal communications.
- (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;
 - (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;
 - (c) intellectual property rights;
 - (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
 - (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or

- (g) the protection of the environment to which the information relates.
- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).
- (7) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is not made available by virtue of these Regulations unless it is not reasonably capable of being separated from that other information.
- (8) For the purposes of this regulation, a Scottish public authority may respond to a request by not revealing whether such information exists or is held by it, whether or not it holds such information, if to do so would involve making information available which would, or would be likely to, prejudice substantially any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).
- (9) For the purposes of a response under paragraph (8), whether information exists and is held by the public authority is itself making information available.

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