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Introduction

The Environmental Information (Scotland) Regulations 2004 ('the EIRs') are based on Directive 2003/4/EC ('the Directive'). They give the public rights of access to environmental information held by Scottish public authorities. The EIRs came into force on 1 January 2005 along with the Freedom of Information (Scotland) Act 2002 ('FOISA') and cover any information that is considered to be 'environmental information' as defined by the EIRs.

The EIRs build on previous access to information regimes such as the Environmental Information Regulations 1992, which were amended in 1998. These regulations gave the public the right to ask for information which 'relates to the environment' and which was held by a 'relevant person', such as central and local government and other bodies with responsibilities in relation to the environment.

In 1998, the UK signed the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'), from which the Directive was derived. The EIRs implement this Directive in Scotland. The rest of the UK has its own environmental information regulations in the form of the Environmental Information Regulations 2004.¹

This Guidance is intended to assist Scottish public authorities in their handling of requests under the EIRs. It is important for everyone to understand the distinction between environmental information (which falls within the scope of the EIRs), personal data (which falls under the Data Protection Act 1998) and all other information, in order to deal with requests appropriately. (A table setting out the key differences between FOISA and the EIRs has been included on page 55 at the end of this document.)

This Guidance aims to provide an understanding of what constitutes environmental information, which bodies are covered by the EIRs, and how to handle a request for environmental information appropriately.

¹ These separate regulations are regulated by the UK Information Commissioner and can be accessed using the following link: http://www.ico.uk/Home/what_we_cover/environmental_information_regulation.aspx.



Why Access to Environmental Information Matters

“...every person has the right to live in an environment adequate to his or her health and well-being”²

The Aarhus Convention recognises every person’s right to a healthy environment as well as their duty to protect it. It seeks to ensure that every individual lives in an environment adequate for his or her health and well-being. This applies not only to the present population but also to future generations.

The Aarhus Convention Implementation Guide published by the United Nations Economic Commission for Europe³ (‘UNECE’), states the purpose of access to environmental information is ensuring “that members of the public can understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner”.

To promote this, the Aarhus Convention embraces governmental accountability, transparency and responsiveness. It sets minimum standards for citizens’ rights in the field of environmental decision-making. The UN Secretary–General described this as an ambitious venture in ‘environmental democracy’.

The Aarhus Convention has ‘three pillars’ which form the key principles behind the Convention – the right to know, the right to participate and the right of access to justice.

Access to information is the first of these pillars and forms the basis of the EIRs. Access to information is a pre-cursor to the other pillars, as effective participation in decision-making depends on full, accurate and up-to-date information.

Access to information is regarded as an important aspect of public participation and achieving sustainable development. A public that is well-informed has a lot to offer the decision-making process by contributing a wide range of opinions and views. For example:

- Improved access to environmental information in environmental decision-making enhances the quality and implementation of decisions.
- Individual citizens and non-governmental organisations have an important role in environmental protection, bringing differing views and approaches to the decision-making table.
- Environmental information can fuel environmental education and research, which have key roles in environmental protection.
- For citizens to be able to assert their (and future generations’) right to live in an environment adequate for their well-being, they must have full access to information on the environment.

² Preamble to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998: <http://www.unece.org/env/pp/documents/cep43e.pdf>

³ <http://www.unece.org/env/pp/acig.pdf>



What is Environmental Information?

The following aims to provide an understanding of what constitutes environmental information. However, it should be noted that this Guidance is not intended to be exhaustive. References to the EIRs in this document mean the Environmental Information (Scotland) Regulations 2004 unless otherwise stated.

'Environmental information' has the same meaning as in the European Directive 2003/4/EC ('the Directive'). The Directive closely follows, but expands upon, the definition in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'). To deal with requests appropriately, it is important for Scottish public authorities to understand the distinction between:

- environmental information, which is subject to the EIRs;
- personal data of the requester, which would fall under the Data Protection Act 1998 (exempt under section 38(1)(a) of FOISA and regulation 11(1) of the EIRs);
- all other information, which would fall under the scope of FOISA.

Scottish public authorities are encouraged to consider these definitions, the examples provided and the Commissioner's decisions to understand the wide application of the EIRs.

No types of information are excluded from the potential ambit of environmental information. Environmental information may be used or found in or extend beyond what is not specifically an environmental topic. Court cases have confirmed that environmental information, and the scope of the Directive, should be interpreted broadly.⁴ In the case of any conflict, Directive 2003/4/EC prevails or takes precedence over the EIRs.

The Commissioner has followed this interpretation:

- **Decision 056/2008 Mr Rob Edwards and the Scottish Ministers** The Commissioner considered that information which *in isolation* may not be regarded as environmental can and should be regarded as having the quality of environmental information when read in context.
- **Decision 182/2006 Mr Bruce Sandison and the Fisheries Research Services** The Commissioner determined that the name of the farm, i.e. the site or location of the incident which caused the impact on the environment, was environmental information.

⁴ For example, *Mecklenburg v Kreis Pinneburg*, ECJ C321/96 [1998] ECR 3809; *Glawischnig v Bundeskanzler* C316/01; [2003] ECR I-5995, 12 June 2003 [these decisions concerned Dir 90/313/EEC and not Dir 2003/4/EC]; *The Office of Communications v The Information Commissioner* [2009] EWCA Civ 90; *BERR v Information Commissioner and Friends of the Earth Information Tribunal*, 2008, EA/2007/0072; *Network Rail Ltd v Information Commissioner and Others*; *Information Tribunal*, 2007, EA/2006/0061/0062; *Port of London Authority v Information Commissioner and Another*; 2007; *Information Tribunal*; EA/2006/0083



The definition contained in the EIRs:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;**
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);**
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;**
- (d) reports on the implementation of environmental legislation;**
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and**
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)**

The use of the word 'any' qualifying the word 'information' indicates a legislative intention that environmental information should be interpreted widely. Environmental information can be found in:

- documents, leaflets, reports, books, post-it notes, notes, data sets, memos, meeting notes, maps, diagrams, sketches, graphs, illustrations - basically, anything written down;
- digital and/or analogue records, such as tape recordings, answer phone recordings, recorded presentations, Dictaphone tapes, DVDs, memory sticks, compact discs or any other electronic or optical storage format;
- any type of electronic file, word-processor file, database (including GIS and related data), spreadsheet, computer models (including 3D models) and files, specially written bespoke programs, calendars, emails, archived web pages/sites, temporary or cached files and computer generated images;
- any other material form – that is, other forms not widely available, or not yet developed or invented at the time the EIRs came into force.

Public authorities are not required to acquire or create new information but may be required to compile or otherwise manipulate existing information which they hold to meet the terms of a request.



Example: a public authority could lightly disguise numerical data to prevent the identification of individuals in order to release it, but this would not be likely to require the creation of new data nor would it mean doing fresh research, and would be unlikely to be seen as creating new information. This was confirmed by the House of Lords in **Common Services Agency (Appellants) v Scottish Information Commissioner (Respondent) (Scotland) [2008] UKHL 47** (this was a decision under FOISA, but for these purposes the Commissioner considers it would equally apply to the EIRs).

There is also no geographical restriction: the information may relate to anywhere in the world. So, for example, information on overseas aid programme grants for schemes that impact upon the environment may come within the definition of environmental information for the purposes of the EIRs, if that information is held by a Scottish public authority.

Regulation 2(1)(a) Elements

(a) the state of the elements of the environment, such as* air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements

*Note the use of the words ‘such as’ – this indicates that the elements listed here are purely representative and that these are not the only things which should be considered as elements. The scope of the EIRs is therefore potentially wider than these categories.

There are two elements to this definition; firstly, the state of the elements of the environment and secondly the interaction among the elements of the environment. The state of the elements, or components, of the environment covers both quality and quantity. It will include physical, biological and chemical characteristics. It is not limited to current conditions, but includes past and predicted future conditions.

The interaction of the elements recognises that many aspects of the environment are interlinked.

Air and atmosphere – the atmosphere is the collection of gases that surround the earth which are retained by the earth’s gravitation, forming its gaseous envelope. The distinction between air and atmosphere suggests that ‘air’ refers to that which we breathe which would include air found within buildings and structures.

Water – will mean water in all its forms (vapour, ice, liquid) and is not limited by scale (from oceans to the smallest droplet). It includes water underground or on the surface, water in natural settings (rivers, lakes) and man-made (canals, ponds).

Soil – soil can be taken to mean the unconsolidated mineral or organic material top layer of the earth’s surface in which plants grow.

Land – Land is the solid (as contrasted to the liquid or gaseous) parts making up the earth’s surface, but may also include land under the surface. Land has been described as all land surfaces, buildings, land covered by water, and underground strata⁵. By including underground strata the implication is that land also includes natural minerals and deposits such as salt, coal, limestone, slate, iron etc.

⁵ See the Guidance on the Environmental Information Regulations 1992. “Land” includes building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.”: Schedule 1, Interpretation Act 1978.



Landscape – Landscape is defined by the European Landscape Convention 2000 as “an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors”. A more detailed definition may be of greater use when attempting to ascertain what landscape will mean in terms of environmental information. A specialist environmental definition of landscape is, “the traits, patterns, and structure of a specific geographic area, including its biological composition, its physical environment, and its anthropogenic or social patterns. An area where interacting ecosystems are grouped and repeated in similar form.”⁶

Natural sites, including wetlands, coastal and marine areas – ‘natural sites’ recognises the importance of protected areas such as World Heritage Sites; ‘Natura 2000’ nature conservation sites under European Directives; Sites of Special Scientific Interest (SSSI); National Nature Reserves (NNR) and any other similar sites. However, a site will not need to have been designated to qualify as a ‘natural site’. All natural sites that possess a specific value, local significance, special natural or historic value can be taken to be a natural site. ‘Natural’ does not necessarily mean devoid of human interference, and the protection and/or management of a site will not preclude it from being classified as natural. Wetlands, coastal and marine areas were included specifically (Amendment 15⁷) by the European Parliament as they thought the words ‘natural sites’ did not make it clear that these types of areas were also to be considered.

- **Decision 025/2009 Iain Hogg and the Scottish Environment Protection Agency** Given that the information in this case related to the development on an SSSI and proposed Special Protection Area for the conservation of wild birds, the Commissioner was satisfied that the information fell within the definition of environmental information.

Biological diversity and its components – Article 2 of the Convention on Biological Diversity 1992 defines the term ‘biological diversity’ as the variability among living organisms from all sources including, for example, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part. This includes diversity within species, between species and of ecosystems. The components of biodiversity must be taken to include: genetic diversity – the genetic composition of a species (genes, DNA, RNA, etc.); species diversity - every living thing, every single species (plant, animal, bacteria, viruses etc.), and ecosystem diversity – all habitats whether natural or man-made (from arctic wilderness to urban sprawl). In addition, biological diversity and its components should not be limited in time - for instance, it will include dead and extinct individual organisms and species.

- **Decision 044/2007 Mr G Crole and Transport Scotland** This involved a request for badger surveys and related information. The Commissioner was satisfied that the purpose of the survey was to record badger activity and other wildlife in the areas surveyed and that, as the surveys related to ‘biological diversity and all its components’, the information within them fell within the definition of environmental information.
- **Decision 051/2009 Advocates for Animals and the Scottish Ministers** In this case the request related to the discussions between the UK and Chinese governments about the possibility of Giant

⁶ United States Environmental Protection Agency Terms of Environment – Glossary, Abbreviation, and Acronyms (EPAGLO), EPA, USA: 1993

⁷ A5-0074/2001 Final, European Parliament Report on the proposal for a directive of the European Parliament and of the Council on public access to environmental information (COM(2000) 402 – C5-0352/2000 – 2000/0169(COD)) Committee on the Environment, Public Health and Consumer Policy, 28 February 2001



Pandas transferring from China to Edinburgh Zoo. In this instance, the Commissioner recognised the importance of the political context but concluded that the underlying issue to which the withheld information related was the potential transfer of endangered wild species from one part of the world to another, which the Commissioner concluded must count as a measure likely to affect biological diversity and its components.

'Genetically modified organism' (GMO) – UNECE describe GMOs as “any organism with the exception of human beings that possesses a novel combination of genetic material obtained through the use of modern biotechnology”.⁸

'the interaction among these elements' – this recognises that no one aspect of the environment can be fully understood in isolation and that the interaction between the elements is just as important as the elements themselves.

- **Decision 096/2006 Mr George Waddell and South Lanarkshire Council** Mr Waddell requested a copy of a Loss Adjuster's report. The fact that the report related to the interaction of water (as rainwater) with an infrastructure (the drain or gully) potentially causing damage (flood and erosion) to further built structures brought the contents of the report within the definition of environmental information.

Regulation 2(1)(b) Factors

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

Factor – factor in this sense should be taken to mean simply something that has an effect on an element of the environment.

It is important to note at this stage that it is possible for an 'element' to be a 'factor', for instance, water will become a 'factor' in an incidence of flooding. Equally, a 'factor' may also be an 'element' – for example, radon gas is emitted naturally, and in certain areas it can build up in people's homes and become a health risk, but the radon gas (the factor in this instance) is still also an 'element'.

Substances – includes all material/matter, natural or synthetic, for example, chemicals, pharmaceuticals, hormones, antibiotics, oil, particulates, gases, liquids, etc.

Energy – can be expressed in traditional scientific language - thermal, chemical, electrical, kinetic, quantum, electromagnetic, laser, potential, light, and sound, etc. Common usage for the term centres on power generation – oil-fired, coal-fired, gas-fired, nuclear energy and renewable energy (wind power, hydro power, wave/tidal energy, solar energy etc). However, energy is not restricted to large-scale power plants and electricity generation. It also includes heat (heat, in the form of hot water emitted into a river for example,

⁸ MP.PP/2003/3 KIEV.CONF/2003/INF/7 Guidelines on Access to Information, Public Participation and Access to Justice With Respect to Genetically Modified Organisms. Submitted by the Secretariat of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters through the Ad Hoc Working Group of Senior Officials. United Nations Economic Commission for Europe (UNECE). Fifth Ministerial Conference Environment for Europe Kiev, Ukraine 21-23 May 2003



can have a drastic effect on the plants, animals and fish living in the vicinity), combined heat and power, renewables (including micro-renewables), biomass, fuel-cells, etc. Energy will also include sunlight, geothermal, radio waves, microwaves, radar waves, etc.

Noise – although noise is itself energy, it is included here separately. It was also specifically mentioned in the original European Directive on Environmental Information in 1990 (1990/313/EEC) and in the original UK EIRs in 1992. Noise may be subjective, localised and transient. A simple dictionary definition of noise is, “a sound, especially one that is loud, unpleasant, or disturbing”. Noise also includes vibrations (Environmental Protection Act 1990, section 79(1)).

Radiation or waste, including radioactive waste – radiation can be natural (sun, cosmic rays, radioactive chemicals and elements, minerals, liquids and gases), or man-made. This includes mobile phone and wi-fi radiation emissions. A surprising variety of materials in regular use in industry, medicine, science and research are radioactive.

Waste – waste has been broadly interpreted under the European Waste Framework Directive (of 2006/12/EC) and also Article 3.1 of the new Waste Framework Directive 2008, to mean any substance or object which its holder intends to, or is required to, or does, discard.⁹

Radioactive waste – radioactive materials are used in many situations, settings and industries and are far more widespread than commonly thought. Radioactive materials are used in common products ranging from the luminous dials on watches, to smoke detectors. Radioactive waste can be generated by: hospitals; the pharmaceutical industry; the oil industry; military establishments; scientific research establishments; industrial radiography equipment manufacture; and, of course, the nuclear power generation industry.

Emissions, discharges and other releases – Directive 2003/4/EC does not offer a definition of emission or discharge. A widely quoted definition of emission comes from the European Integrated Pollution Prevention and Control (IPPC) Directive¹⁰: “emission shall mean the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources ... into the air, water or land”. ‘Discharges’ is not expressly defined in the IPPC Directive; however, common usage of the term in this context suggests it may generally be reserved (although not exclusively) for liquid releases into water. Further useful information helping with definitions may be available under the current Pollution Prevention and Control (Scotland) Regulations 2000 (SSI 2000/32) as amended, which implement this Directive in Scotland.

This approach to interpretation is also supported by the common usage of the term ‘discharge’ in current water pollution legislation and regulation, for example the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (and also, to a lesser extent, in the Water Environment and Water Services (Scotland) Act 2003).

⁹ This covers a wide range of possibilities, including household waste, industrial waste and commercial waste; municipal waste; clinical waste; landfill and construction and demolition wastes, mining and agricultural wastes, sewage sludge and dredged spoils, and Special Waste, hazardous waste, toxic waste, and others.

¹⁰ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ L 257, 10/10/1996 P. 26-40



Releases – a helpful approach to understanding this term may be found in the Environmental Protection Act 1990 section 1(10), which states that:

A substance is ‘released’ into any environmental medium whenever it is released directly into that medium, whether it is released into it within or outside Great Britain. ‘Release’ includes –

- (a) in relation to air, any emission of the substance into the air;
- (b) in relation to water, any entry (including any discharge) of the substance into water;
- (c) in relation to land, any deposit, keeping or disposal of the substance in or on land.

“...affecting or likely to affect the elements of the environment referred to in (a)”

This is a qualification of the understanding of factors. Information about the factor would not be environmental information unless the factor is affecting or likely to affect the elements of the environment. There is no indication that the effect must be detrimental or large scale. The effect in question may be a beneficial one. Note the use of the words ‘likely to’ - this is a higher threshold than is found in (f) below (may be affected by) and suggests that there must be a degree of evidence to suggest that the factor would have the supposed effect. ‘Likely to’ can be interpreted by way of reference to the balance of probabilities.

Regulation 2(1)(c) Measures and activities

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

This section of the definition deals with two aspects – measures and activities.

Information about a measure or activity is environmental information if the measure or activity:

- Affects or is likely to affect the elements of the environment;
- Affects or is likely to affect a factor which itself affects or is likely to affect an element of the environment; or
- is designed to protect the elements of the environment.

The effect need not be detrimental or large scale. Depending on the circumstances, it may be small and/or beneficial. There must, however, be a link between the measure/activity and an element/factor.

Measures – measures will comprise steps taken to secure an effect (past, present or future), and the methods, processes or instruments used. Administrative measures are specifically mentioned, but the interpretation of measures is not restricted to those of an administrative nature. Further explanation is offered by reference to particular examples (see below). Measures will also encompass regulatory, economic and voluntary tools, such as Acts of Parliament, local by-laws, taxes, fines, charges, and voluntary agreements. Note that ‘policies’ will not be restricted to specifically ‘environmental policies’, but will also take into account development policies, economic policies, transport policies, health and safety policies etc., if they satisfy the definition. This category will include certain planning tools, including development (local and structure) plans by local authorities and other plans or documents, such as Environmental Impact Assessments and Strategic Environmental Assessments under the relevant legislation (as set out in the Commissioner’s [**Decision 102/2009 Councillor David Alexander and Falkirk Council**](#)).



The Commissioner's view is that, where a measure is being proposed or being carried into effect, then the EIRs provide that 'any information ... on' those measures is environmental information. This includes information, not only about what the measure is, but also who was involved in the decision, when it was taken and what process led to the decision. However, the extent to which the information relates to the measure is a matter of judgement.

- **Decision 094/2008 Mr Rob Edwards and the Scottish Ministers** This case considered a request for information relating to the finalisation and publication of the 2006 bathing water pollution results. The Commissioner noted that the documents contained information planning the announcement of the bathing water test results and information about water quality at various sites, progress on sampling and analysis, discussion and interpretation of the results. The Commissioner considered that the information provided considerable insight into the measurement and matters influencing bathing water quality around Scotland. The Commissioner took the view that the Ministers' publication of bathing water testing results formed part of a programme of measures designed to monitor and improve Scotland's bathing water standards in line with European law, and the monitoring and reporting of bathing water quality. While some of the information might have been narrowly viewed as simply containing information relating to the publication of data, the Commissioner concluded that the clearly environmental nature of the data meant that the information relating to its publication should also be viewed as environmental information.

Activities – activities are not described in the definition, but the Aarhus Implementation Guide¹¹ refers to "...decisions on specific activities, such as permits, licenses, permissions..." Therefore, if the permit (or equivalent authorisation) can be viewed as the decision to allow the activity to proceed, then the activity must be the process, operation, actions or procedure for which the permit is required. However, it should not be assumed that a permit or authorisation is required in order for an action to be considered an activity. Some activities which bear upon the environment may not require authorisation, or be conducted under general binding rules which may arguably fall short of being a permit or authorisation. The interpretation of activities is likely to be broad and ranges, for example, from the construction of a bypass, to agricultural practices.

- **Decision 218/2007 Professor A D Hawkins and Transport Scotland and Decision 014/2008 Mr John McIntosh and Transport Scotland** The Commissioner concluded that the documents in question comprised information about measures and activities, in respect of a road building programme, which are likely to affect the state of the elements of the environment, principally the air and landscape, and information about factors such as emissions likely to affect the elements of the environment. He concluded that the information about the costs and financing of this project should also be viewed as environmental information.
- **Decision 033/2009 Mr Paul Drury and East Renfrewshire Council** This involved a contract which, whilst referring to the broad outline of the remediation for a disused quarry site, comprised largely contractual legal clauses relating to the relationship of the parties, and various obligations, agreements and financial provisions appropriate to the proposals. The Council did not, in the circumstances, agree that such complex legal documentation fell within the definition of environmental information. The Commissioner's view was that the withheld information related to proposed

¹¹ The Aarhus Convention: An Implementation Guide. Prepared by Stephen Stec and Susan Casey- Lefkowitz in collaboration with Jerzy Jendroska, Editorial Adviser for the Regional Environmental Center for Central and Eastern Europe with the financial support of the Danish Environmental Protection Agency. UNECE, United Nations Economic Commission for Europe, New York and Geneva, 2000.



measures, the ultimate intention of which was to bring about changes to the land in question, which constituted environmental remediation, and included information on current environmental conditions in and around the site in question.

“ ...affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements”

As with the previous section there is a qualifying statement associated with measures and activities. The measure or activity must affect, or be likely to affect, either the elements of the environment or the factors. Or alternatively, in this case, be specifically designed to protect them.

- **Decision 039/2008 Mr Rob Edwards and the Scottish Ministers** This decision considered a request for a draft response to the UK Energy Review consultation. The Commissioner accepted that the UK Energy Review was a strategic review of energy policy. The information was created for the purposes of contributing to that Energy Review and would not have been held in this form otherwise. The Commissioner concluded that the Energy Review itself was undoubtedly a measure or activity of the kind envisaged by regulation 2(1)(c) and that, in all the circumstances, information held for the purposes of and/or connected with the Energy Review fell within the definition of environmental information, particularly if it was held for the purposes of making a substantive contribution to that review.
- **Decision 056/2008 Mr Rob Edwards and the Scottish Ministers** The Commissioner took the view that the process of decision making on environmentally significant schemes (in this instance the M74 completion scheme) was environmental information. The Commissioner concluded that the documentation of the processes which considered the environmental, legal and administrative components of bringing such a scheme to fruition should be regarded as environmental information encompassed by regulation 2(c) of the EIRs.

Planning - The Commissioner has found that information relating to planning applications will commonly fall under the definition of environmental information contained in the EIRs, given that that information will, in most circumstances, explicitly relate to plans and developments which will have a direct impact on the land use and landscape of a particular area (**Decision 045/2008 Dr Alex Morrow and the City of Edinburgh Council**).

This is primarily because the built environment and changes to it, by definition, will impact substantially on the environment in many ways, both directly and indirectly. Further, buildings are increasingly subject to audits and surveys of environmental performance, including energy consumption. Environmentally-relevant aspects will extend to design, performance, construction, contamination, demolition, waste disposal and almost all other aspects of the life-cycle of a building. Planning matters will also go beyond buildings to include other infrastructure such as roads, bridges, transport, mobile phone masts, etc.

As indicated above, planning policies, development plans, environmental assessments and similar information are likely to be considered ‘measures’. Reasons for or against planning decisions, and conditions attached to grants of permission, are also likely to be covered by this part of the definition.

Planning matters, therefore, are likely to fall principally within the definition of measures (including administrative measures) forming part (c) of the definition of environmental information in regulation 2(1) of



the EIRs, which includes policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors within the definition of environmental information in paragraphs (a) and (b), etc. Planning matters may also fall into paragraph (e) and/or (f) of the definition, however (see below).

- **Decision 101/2008 Mr Alistair Johnson and East Renfrewshire Council** While the Council took no issue with the view that planning application information would often constitute information on plans affecting or likely to affect the land and landscape, and potentially other environmental elements and factors, it did not accept that this could be the case in relation to pre-application discussions which related to nothing more than initial concepts. However, the Commissioner took the view that the withheld information was held by the Council by virtue of its functions in relation to the determination of applications for planning permission and would not have been held by the Council unless such an application was considered a possibility. The Commissioner was in no doubt that discussion of the concept at pre-application stage can involve consideration of its potential effects on the elements of the environment (as defined in regulation 2(1)). He considered that the withheld information in this case did involve such consideration of the potential implications of the proposed development for the landscape and flooding.
- **Decision 102/2009 Councillor David Alexander and Falkirk Council** The Commissioner decided (amongst other things) that a Local Plan would fall within the definition of environmental information, as would officers' observations on the comments/objections of Councillors and others on the Local Plan proposals (with supporting information such as maps), together with Councillors' requests for advice on these.

Regulation 2(1)(d) reports on the implementation of environmental legislation

This paragraph was added by the European Parliament (Amendment 15²). This constitutes, for instance, any reports reviewing or monitoring the operation, performance, success or failure of environmental legislation. Information in this category may also fall within the definition in paragraph (c).

Regulation 2(1)(e) Costs Benefit and other Economic Analyses

(e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);

The desire to include economic and financial information in the definition stems from the recognition that it is important to integrate environmental and economic considerations in decision-making. This section is qualified by referring back to paragraph (c) 'measures and activities', and therefore to the economic and financial aspects taken into account during the framing of measures or activities.

Regulation 2(1)(f) The State of Human Health

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).



In contrast to the definitions in (a), (b) and (c), this definition refers to specific fields. It can be broken down into two main areas:

- the state of human health and safety (including the contamination of the food chain where relevant to the state of human health and safety) and conditions of human life; and
- the state of cultural sites and built structures.

However, these specific fields fall within the definition of environmental information only to the extent that:

- they are or may be affected by the state of the elements of the environment; or
- through those elements, they are or may be affected by factors, measures or activities affecting or likely to affect the elements of the environment.

“the state of human health and safety, including contamination of the food chain” – information about the state of human health or safety insofar as they are or may be affected by the state of the elements of the environment, factor, measure or activity. This could include information about public health affected or endangered by e.g. air, water and soil pollution. It could include information on respiratory conditions caused by particulate matter, or the endangerment to human health from land contaminated by toxic metals. Special mention has been made of the contamination of the food chain, and this follows concerns over BSE and other health issues.

Conditions of human life – this aspect acknowledges the connection between social and environmental factors. As with human health and safety, this appears to be intended to apply to large-scale factors, e.g. information on housing, poverty, employment, social welfare, heating, access to clean water, sanitation, healthcare, education, justice, etc., rather than information on an individual scale.

- **Decision I 20/2008 Mr Rob Edwards and the Scottish Ministers** This case considered a request for papers relating to the development of an environmental justice strategy. The Commissioner considered that environmental justice is concerned with the effects of the environment on people and communities, and seeks particularly to identify and eliminate injustices where certain groups bear a disproportionate burden of environmental risk. The Commissioner was satisfied that all the information in this case fell within the definition of environmental information, and that, because of the connection between the environment and its effect on people, much of the information concerned the state of human health and conditions for human life.
- **Decision I 29/2007 MacRoberts Solicitors and Aberdeenshire Council** This case considered the request for copies of notices pursuant to section 80 of the Environmental Protection Act 1990 (EPA). An abatement notice under section 80 of the EPA will be served “in circumstances where the local authority considers that the by-products of human activity, such as fumes, odour, smoke, dust, effluvia, insects, light or noise may be prejudicial to health or a nuisance”. The Commissioner determined that the notices were substantially composed of information relating to noise and odour emissions, factors which will affect the elements of the environment, and as such fall within the definition contained in regulation 2(1)(b). The Commissioner also noted that the fact that these factors were having an effect on the surrounding environment, which in turn affected others, led to the Council issuing the notice in the first place. The Commissioner acknowledged that a notice would only be issued where the nuisance affects another person, and concluded that the nuisances concerned were specifically of an environmental nature. He therefore concluded that the notices fell under the definition of environmental information in regulation 2(1)(f).



Cultural sites – cultural sites will constitute places which are recognised to have a particular literary, educational, artistic, anthropological or historical value, or have religious, ethnic, or social significance. For example, World Heritage Sites (such as St Kilda), scheduled monuments, listed buildings, archaeological sites, castles, parks, gardens and buildings. These sites can be modern or historical, and urban as well as rural locations.

Built structures – As mentioned above, buildings in a general sense are included as part of the definition of land as an element, therefore, built structures allow a specific focus on particular buildings, as well as other infrastructure. According to the Aarhus implementation guide, ‘built structures’ refers to man-made constructions. It is not limited to large buildings and objects such as dams, bridges, highways etc. but also covers small constructions and even landscaping or other transformation of the natural environment.

“...inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) –“

This paragraph is also subject to qualifications, in order to place boundaries on what is considered environmental information as opposed to (for example) social or economic information. However, note that this qualification is not the same as those in earlier parts of Regulation 2. The earlier qualification in paragraph (c) refers to ‘affecting or likely to affect’, whereas paragraph this refers to ‘as they are or may be affected by’. This test is therefore weaker. This is because ‘affecting’ indicates an actual, tangible effect, and ‘likely’ to affect implies a significant probability of doing so in future. This is in contrast to the wording ‘as they are [affected] or may be affected by’, which includes a much more hypothetical and thus less definite element in the test.

Regulation 5(5)

‘Where information of the kind referred to in paragraph (b) of the definition of “environmental information” in regulation 2(1) is made available, the authority shall, if the applicant so requests, provide such information as is available to it of the place where information can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used’.

Regulation 5(5) requires a Scottish public authority, when providing information covered by paragraph (b) of the definition of environmental information (i.e. information about factors affecting the elements of the environment), to supply further information on the place where information can be found about the measurement, analysis and sampling methods used in compiling the information. Alternatively, authorities can refer the applicant to the standardised procedure which was used. This regulation only applies when a request is made for that information and only to the extent it is available to it.



The Commissioner's interpretation of 'Environmental Information'

The Commissioner has made it clear that the definition of what constitutes environmental information should not be viewed too narrowly, but that the interpretation must be in line with the definition in the EIRs. Authorities should not restrict themselves to instances where the information relevant to the request is observably environmental e.g. it is for 'data derived from the monitoring of activities that affect or are likely to affect the environment'. (regulation 4(2)(e)). Some areas where the Commissioner has found authorities to have difficulty are where:

- the request itself does not specifically make reference to the environment;
- the request itself does not specifically make reference to the EIRs or makes reference to FOISA instead;
- the information found to be relevant to that request is not exclusively environmental;
- the information is found to be environmental by virtue of being 'policies, plans and programmes relating to the environment'.

Some key cases which consider the Commissioner's wide interpretation of 'environmental information' are highlighted below:

- **Decision 056/2008 Mr Rob Edwards and the Scottish Ministers** This related to the M74 completion scheme. The Commissioner took the view that information held about the process of decision making on such an environmentally significant scheme was environmental information. Documentation of the processes which considered the environmental, legal and administrative components of bringing such a scheme to fruition should be regarded as information encompassed by regulation 2(c) of the EIRs. This case considered information which was largely concerned with the preparation and drafting of the Ministers' response to the Hickman Report. It included observably environmental concerns with specific aspects of the Report, such as emissions or loss of habitat. The Commissioner concluded, in the context of the request (which sought to understand how this controversial decision was arrived at) and in the context of the significant environmental impact which this scheme would have in the wake of such a decision, that all of the information was environmental.
- **Decision 105/2008 Mr Rob Edwards and the Scottish Ministers** Mr Edwards requested information relating to the handling of a previous information request. The Ministers argued that, given the subject matter of the original request for information (ministerial flights, an incidental activity of Ministers in carrying out their routine functions), the information was too far removed from any possible effect of the environment. The Commissioner considered that the fact that the request was not manifestly for environmental information was not the issue. What mattered was whether the information which is involved in responding to that request is environmental. In this case, the context of the request, albeit that it related to the handling of an information request, was Ministerial and civil service travel. The information contained comment and discussion on media and handling issues, lines to take and advice to Ministers. It anticipated follow-up questioning about environmental impact. The Ministers argued that the relationship of the information to the environment was remote. The Commissioner did not accept that information becomes any less environmental in character by virtue of the circumstances in which it came to be considered by him. Considerations of remoteness were accepted to be relevant in appropriate circumstances, but in this instance he did not consider them to be so, given the character of the information in question.



- **Decision 119/2008 Mr James Paul Kelly and Dundee City Council** In this case, the withheld information consisted of a quote for a pest control programme in Dundee. It was the Commissioner's view that although the requested information consisted only of a monetary figure, when considered in the context of the remainder of the document, it was clearly environmental information. The Commissioner reached this conclusion because the quote was an integral part of information concerning the measures to be taken to protect built structures and human health from the effects of gulls. Additionally, it also represented an integral part of the information on measures or activities which affect biological diversity, given the impact on the gull population.
- **Decision 063/2008 Mr Rob Edwards and the Scottish Ministers** The information concerned an ongoing presentation and communications strategy relating to the conservation of the red squirrel in Scotland. It was concluded that the handling and promotion of this subject, with the resulting coverage, would have a direct impact on the raising of public awareness in this area. Therefore, the content of the media handling strategy could provide the public with an indication of the importance given to this subject by the Ministers. It was concluded that, when this document was considered in context, it directly related to a subject matter which is clearly within the remit of the EIRs, principally regulation 2(c) and biological diversity.
- **Decision 051/2009 Advocates for Animals and the Scottish Ministers** In this case, the request related to the introduction of Giant Pandas to Edinburgh Zoo. The Commissioner recognised the importance of the political context, but concluded that the underlying issue to which the withheld information related was the potential transfer of endangered wild species from one part of the world to another, which the Commissioner concluded counted as a measure likely to affect biological diversity and its components.

Cases where the Commissioner concluded that the information was not environmental and that FOISA was therefore the correct regime:

- **Decision 073/2008 Mr Pritam Chita and Dundee City Council** Although the information related to planning matters (which would normally suggest the information was environmental) it specifically related to a minor alteration of an existing building. The Commissioner did not consider that it related to a measure affecting, or likely to affect, the elements and factors referred to in paragraphs (a) or (b) of the definition of environmental information. Nor did he consider that it related to the state of a built structure insofar as it is or may be affected by the state of the elements of the environment referred to in paragraph (a) of the definition or, through those elements, by any of the matters referred to in paragraphs (b) and (c) of the definition.
- **Decision 098/2008 Mr Rob Edwards, of the Sunday Herald and the Scottish Ministers** The information sought by Mr Edwards related to the Forth Estuary Transport Authority's ('FETA') application to initiate Road User Charges ('RUC') on the Forth Road Bridge. The underlying reasons behind the application to introduce RUC were many, but significant factors were the desire to encourage car sharing as a method of limiting emissions and congestion, and also as a method of reducing the load on the Bridge following the discovery of corrosion and broken wires in the Bridge's main cables. This corrosion is responsible for the declining state of the Bridge and has also led to calls for a replacement crossing to handle the growing levels of traffic. It was the Commissioner's view that emissions data or information concerning the effect of corrosion on a main traffic crossing, would be environmental information and would fall under the remit of the EIRs. However, the information



sought in this case was limited in scope to documents relating to the Ministers' decision to reject FETA's Application in Principle for road user charging, the content of which did not include the wider environmental issues. The Commissioner therefore concluded that the information was not environmental.



Which bodies are covered by the EIRs?

Regulation 5(1) of the EIRs (the duty to make environmental information available on request) applies to a 'Scottish public authority'.

Regulation 2 (interpretation) sets out the definition of a 'Scottish public authority':

"Scottish public authority" means-

- (a) any body which, any other person who, or the holder of any office which is-**
 - (i) listed in schedule 1 to [FOISA] (but subject to any qualification in that schedule),**
or
 - (ii) designated by order under section 5(1) of [FOISA];**
- (b) a publicly-owned company as defined by section 6 of [FOISA];**
- (c) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998[4]); and**
- (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and-**
 - (i) has public responsibilities relating to the environment;**
 - (ii) exercises functions of a public nature relating to the environment; or**
 - (iii) provides public services relating to the environment;**

The definition of a Scottish public authority is wider than that under FOISA as it encompasses any Scottish public authority with mixed functions or no reserved functions which is not included in Schedule 1 of FOISA and any person 'who is neither a public body nor the holder of a public office' who is under the control of a person or body falling within parts (a) – (c) of the definition and has public responsibilities, functions or provides public services relating to the environment. This means private companies may also, in limited circumstances, be covered by the EIRs.

There is no definitive list of bodies that fall under this part of the definition but a number of factors may be taken into consideration by the Commissioner when determining whether an organisation falls within the scope of the EIRs. These are set out below.

Listed in Schedule 1, designated under section 5 of FOISA, or a publicly- owned company

- (a) any body which, any other person who, or the holder of any office which is –**
 - (i) listed in schedule 1 to [FOISA] (but subject to any qualification in that schedule),**
or
 - (ii) designated by order under section 5(1) of [FOISA];**



Any authority already listed as a public authority for the purposes of FOISA is automatically subject to the EIRs. Bodies which are designated by the Scottish Ministers under section 5 of FOISA are also automatically subject to the EIRs.

The provisions of FOISA can be extended to bodies that appear to the Scottish Ministers to exercise functions of a public nature; or who are providing, under contract with a Scottish public authority, any services whose provision is a function of that public authority (section 5(1)).

(b) a publicly-owned company as defined by section 6 of the Act

Publicly-owned companies, as defined by section 6 of FOISA, are also covered by the EIRs under regulation 2(1)(b). However, section 6 of FOISA only covers companies which are *wholly* publicly-owned. This provision therefore covers companies that are wholly owned by one or more public authorities. These include, for example, companies set up by local authorities to explore new economic and transport initiatives and companies set up by universities to develop the products of their research commercially. The Clyde and Western Isles ferry operator, Caledonian MacBrayne, is an example of a body covered by this provision.

Scottish public authority with mixed functions or no reserved functions

(c) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998)

The Scotland Act 1998 ('Scotland Act') defines the scope of the legal competence of the Scottish Parliament and Scottish Ministers and defines the powers which are reserved to the UK Government and Westminster Parliament. Bodies with no reserved functions within the meaning of the Scotland Act are those which operate exclusively in Scotland and their function is within the legislative competence of the Scottish Parliament and Scottish Government.

Bodies with mixed functions are those which conduct public functions assigned to them by both governments. Local authorities, for example, have mixed functions. They, however, are already designated through schedule 1 of FOISA and so fall into the first category of Scottish public authorities. To date, no public authority has been identified as being subject to the EIRs purely on this basis.

As an example, the Forestry Commission Scotland is funded by the Scottish Parliament; however, despite its separate funding, it is part of the Forestry Commission of Great Britain, which has reserved functions. It is therefore covered by the UK-wide Environmental Information Regulations 2004, rather than the Environmental Information (Scotland) Regulations 2004.¹²

A body 'under the control of'

- (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and –**
- (i) has public responsibilities relating to the environment;**

¹² Decision by the UK Information Commissioner: http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50176016.pdf



- (ii) exercises functions of a public nature relating to the environment; or**
- (iii) provides public services relating to the environment**

This is a complex provision which has no equivalent under FOISA. It is therefore useful to explain the background to this provision to understand its intent. Whilst there have been some determinations by the UK and Scottish Information Commissioners as to whether particular bodies are subject to the EIRs, case-law may also help to consider whether a body falls within the scope of the EIRs.¹³

The EIRs evolved from an international Treaty sponsored by the United Nations Economic Commission for Europe (UN ECE), called the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).

The European Union enacted Directive 2003/4/EC to give effect to the information pillar of the Aarhus Convention in European Law in January 2003. In turn, the Scottish Parliament made the EIRs.

Recital II of the European Directive states:

“To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of [European] Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control, and having public responsibilities or functions relating to the environment”

The definition of public authorities under the Directive therefore encompasses a wide range of bodies which would have the duty to respond to requests for environmental information.

The Directive’s reference to “public administrative functions under national law, including specific duties, activities, or services in relation to the environment” is not directly transposed into the EIRs. By contrast the UK EIRs do include this specific reference and this has been material in decisions taken by the (UK) Information Commissioner:

Port of London Authority:

http://www.ico.gov.uk/upload/documents/decisionnotices/2006/fer0086096_dn001.pdf

Network Rail:

http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fer0071801.pdf

Looking at the Directive, the definition would indicate that the functions of bodies such as public utility companies providing water and energy services, might fall within the definition. The interpretation of this definition reflects a trend towards the privatisation of public functions.

¹³ E.g. *Foster v British Gas*, [1990] ECR I-3313 ; [1991] 2 AC 306; *Griffin v South West Water Services Ltd* [1995] IRLR 15; *Poplar Housing and Regeneration Community Housing Association Ltd v Donoghue* [2002] QB 48; *R v Leonard Cheshire Foundation* [2002] EWCA Civ 366



In line with the definition of a Scottish public authority in the EIRs, any private company, body, person or organisation which is 'under the control of' a Scottish public authority may have responsibilities under the EIRs. This could include private contractors involved in PPP/PFI or similar contracts and other bodies with environmental functions, e.g. functions relating to waste disposal, energy production, drainage, transport or environmental consultancy. To fall within part (d) of the definition, there must be a link between the Scottish public authority (as defined in parts (a), (b) or (c) of the definition) and the organisation under consideration. This link should be in the form of 'control'.

How to decide whether an organisation is covered by the EIRs?

There is a twofold test to determine if bodies are covered by part (d) of the definition of Scottish public authority. Firstly, they must be under the 'control' of a Scottish public authority and secondly the body must demonstrate that it has or performs public responsibilities, functions or services relating to the environment.

Note that the request must be for 'environmental information'

Before considering any of these matters, an organisation should consider whether the request is for 'environmental information', as defined above.

Part I - Control

'Control' should be taken to mean a relationship, which is constituted by statute, regulations, rights, licence, contracts, financial or other means, that either singly or jointly confer the possibility that a body or organisation may directly or indirectly exercise a decisive influence on other bodies/authorities or organisations. The Commissioner may take into account any of the following factors (amongst others) to establish whether 'control' exists:

- Regulatory control, including the issuing (or refusal) of permits or licences
- Investment (both financial and non-financial)
- Contractual relationships and obligations
- Environmental function and public responsibility in relation to that function
- Governance and accountability
- Legal duties

The level of control should be sufficient to exert a significant or decisive influence, effect or direction on the body under consideration. A range of factors will be taken into account, and each case will be considered on its own merits. It is expected that the influence exerted will be by a Scottish entity or one of Scottish origin, and that this will be one distinguishing factor from control under the UK Environmental Regulations 2004.

To understand the relationship between the organisation under consideration and the Scottish public authority (as determined by parts (a)-(c) of the definition of a Scottish public authority), the Commissioner may need to request, for example, contracts and memoranda of understanding between the bodies. The Commissioner will also be required to consider the statutory duties conducted by, or powers invested in, both entities involved. Where relevant, other responsibilities of the organisations in question, and the regulatory framework, will be taken into account.

When determining whether the body falls under the scope of the EIRs or the UK EIRs, the Commissioner will take into account the status of the controlling authority in determining whether that body falls under the



scope of FOISA or FOIA. Where there is ambiguity regarding the appropriate jurisdiction for any such body, the Commissioner will consult with the UK Information Commissioner. A body cannot fall under both the EIRs and the UK EIRs (see regulation 2(3) of the UK EIRs). If the UK Regulations apply, the Scottish EIRs will not.

Part 2 – Public responsibilities, functions of a public nature and public services

To fall within the scope of this part of the definition, the organisation in question must have either public responsibilities, exercise functions of a public nature or provide public services relating to the environment.

Public responsibilities

‘Public responsibilities relating to the environment’ is a term which is broader in nature than the term ‘public administrative functions’ as set out in the UK EIRs. Private individuals’ actions impacting on the environment are often set by government, e.g. the use of fertilisers and pesticides is controlled by both criminal and civil law. However, the Commissioner takes the view that the term ‘public responsibility’ as a criteria for determining whether a body is subject to the EIRs is intended to be interpreted more widely. Where the environment has to be *managed* or *safeguarded*, the public responsibility is clearer.

Public services

The notion of what constitutes ‘public services’ may vary over time. However generally this will include those services provided by national or local government to its citizens whether directly, through arms length agencies or even through private providers. They may be provided for the common good without regard to income (e.g. paid for out of general taxation) such as health care, social services etc. They may also involve payment or subsidy from the public purse e.g. social housing, public transport, even where directly related payment for the service is required.

Public Functions

This term is also used in section 5 (Further power to designate Scottish public authorities) of FOISA which applies to persons who appear to ‘exercise functions of a public nature’. Bodies which are designated under section 5 of FOISA would automatically be subject to the EIRs. This provision therefore is likely to apply to bodies which *could be* designated under section 5 (the Commissioner has suggested that bodies such as Local Authority Trusts should be considered for designation under section 5 of FOISA).

The notion that there are ‘functions’ which should be delivered in a ‘public’ way is a difficult concept to pin down. The Commissioner will therefore consider each application on a case-by-case basis.

The House of Lords Joint Committee on Human Rights has produced a series of reports entitled ‘The Meaning of Public Authority under the Human Rights Act’. Some of its findings may assist in the interpretation of ‘public function’ under the EIRs. The key test it sets out is whether the ‘public function’ is one for which the Government has assumed responsibility in the public interest. For the purposes of the EIRs, the devolved matters for which the Scottish Parliament currently has legislative competence would dictate the scope of this interpretation.



Tests for the consideration of public function under the EIRs can therefore include:

1. Is the body delivering a function which is a statutory responsibility of a Scottish public authority (as defined in paragraph (a), (b) or (c)) in relation to the environment?
2. Is the body delivering a function which will enable a Scottish public authority (as defined in paragraph (a), (b) or (c)) to meet a statutory requirement in relation to the environment?

“...relating to the environment”

The public responsibilities, functions or services need only ‘relate to’ to the environment. In other words, do the public responsibilities, functions or services, viewed objectively, have an impact on the environment, or does the environment impact on them?

Bodies which fall under the scope of this part of the definition will only be covered to the extent of that environmental function, service or responsibility. The Aarhus Implementation Guide gives examples of water management functions which might be provided by a government institution or a private entity (in Scotland, Scottish Water is already listed as a Scottish public authority in schedule I of the FOISA). Another example would be the provision of waste collection services outsourced by a local authority. The incumbent contractor would be covered by the EIRs to the extent that the function is carried out for the local authority to fulfil a statutory duty.

To date the Commissioner has not determined any bodies fall within this part of the definition and are therefore subject to the EIRs.

If any individual/body or organisation is unclear as to its status under the EIRs then it should seek legal advice. Any disputes will be considered by the Commissioner and ultimately the Courts. Each case will be considered on its own merits, and whether a body is wholly or partly covered by the EIRs may change over time as regulation, the operation of markets, legislation, public policy on the delivery of public services and devolution affect matters.

Therefore there can be no comprehensive list of authorities which will fall within this part of the definition, as the relationship between private entities and the public sector is complex and subject to developments over time, which may result in bodies being drawn within or falling outwith the scope of this definition.

For some bodies, if greater powers are devolved from Westminster to Holyrood in the future, this may require a re-assessment of whether the body, and/or its functions so far as the EIRs are concerned, fall under the EIRs or whether its functions fall to be covered by the UK EIRs.

Some UK Information Commissioner examples:

The UK Information Commissioner decided that when Environmental Resource Management Ltd (ERM)¹⁴ carried out and prepared an environmental assessment and report at the request of the Regional Assembly for the North East of England (RANE) it was covered by the UK EIRs in that it was exercising functions of a

¹⁴ ICO case reference **FER0090259**



public nature in relationship to the environment. In addition, the Commissioner found that ERM was under the control of RANE – a UK public authority ([FER0090259](#)).

The UK Information Commissioner has also concluded that two Northern Irish housing associations are public authorities for the purposes of the UK EIRs.

One of these cases involved the Belfast Improvement Housing Association¹⁵, which was registered under a Government Department's list of housing associations and which was eligible for a certain type of grant. These grants contribute about 70% toward the capital cost of developing general-purpose housing for rent and a higher percentage of the cost of developing accommodation for those in need of specialist accommodation, for instance the elderly and disabled. Grants had environmentally-related conditions attached. Although an independent entity, the Association had to account to the Government Department for its use of these grant monies, and the Department had the power to intervene if dissatisfied, e.g. mismanagement. The Association provided housing services to the public.

The definition of public administration which was considered in this case is 'the development, implementation and study of government policy'. Public administration is linked to pursuing the public good by 'enhancing civil society and social justice' and the UK Information Commissioner decided that the Housing Association was covered by the Environmental Information Regulations 2004. He also noted that 'control' can be defined in several ways. However, the legal definition the Commissioner has considered in this case is 'the power to direct, manage, oversee and/or restrict the affairs, business or assets of a person or entity'.¹⁶ ([FER0152607](#))

This does not mean that housing associations in Scotland will necessarily be subject to the EIRs.

Resources:

Directive 2003/4/ EC:

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

The Aarhus Convention:

<http://www.unece.org/env/pp/documents/cep43e.pdf>

The meaning of public authority under the Human Rights Act:

<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf>

The Scotland Act 1998:

http://www.opsi.gov.uk/Acts/acts1998/ukpga_19980046_en_1

¹⁵ ICO case reference **FER0152607**

¹⁶ http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fer_0152607.pdf



What do the EIRs require public authorities to do?

The EIRs require Scottish public authorities to:

- actively disseminate information, particularly by electronic means (regulation 4(1));
- make environmental information available to any person who requests it within 20 working days or, in exceptional cases where the request is both voluminous and complex, within 40 working days (regulation 5(1) and regulation 7(1));
- publish a schedule of charges and information on the circumstances in which a fee may be charged, waived or required to be paid in advance (regulation 8(8));
- provide advice and assistance to someone who has made, or wishes to make, a request for environmental information (regulation 9);
- refuse requests for environmental information only in accordance with the limited exceptions available, giving reasons and details of the mechanisms for review and appeal (regulations 10, 11, 13, 16 and 17);
- transfer requests for environmental information if they do not hold the information but believe another authority does (regulation 14);
- where requested, carry out a review of a decision not to make environmental information available (regulation 16).

Active dissemination of environmental information

Where a Scottish public authority is also subject to FOISA, this requirement can be met in part by the authority's publication scheme in terms of section 23 of FOISA. There is no equivalent requirement under the EIRs for a publication scheme, but all bodies which are Scottish public authorities for the purposes of section 3 of FOISA are also Scottish public authorities covered by the EIRs.

Section 23 of FOISA makes no distinction between environmental and non-environmental information in publication schemes. Therefore, the Commissioner expects that, to the extent Scottish public authorities hold environmental information, it should feature in the content of publication schemes.

Regulation 6(1)(b) of the EIRs allows an authority to refuse to provide information in a particular form or format requested by the applicant if the information is already publicly available and easily accessible to the applicant in another form or format.

However, reference to 'active dissemination' in regulation 4 means more than just recording information which is already available. The use of this terminology indicates a clear intention to promote and develop dissemination.

Scottish public authorities are encouraged to make information more easily available by means of websites, telecommunications and electronic technology. Regulation 4 refers to specific types of information which are to be made available in this way:

- (a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;**
- (b) policies, plans and programmes relating to the environment;**



- (c) progress reports on the implementation of the items referred to in sub paragraphs (a) and (b) when prepared or held by a Scottish public authority in electronic form;
- (d) reports on the state of the environment;
- (e) data or summaries of data derived from the monitoring of activities that affect or likely to affect the environment;
- (f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found;
- (g) environmental impact studies and risk assessments concerning those elements of the environment referred to in paragraph (a) of the definition of “environmental information” in regulation 2(1); and
- (h) facts and analyses of the facts which the authority considers relevant and important in framing major environmental policy proposals.

The EIRs do not require information to be made available in electronic format if it is dated prior to 14 February 2003 (unless it was already available in that form), although the Commissioner would consider this good practice where reasonable.

The regulation also states that authorities shall make that information ‘progressively’ available to the public by electronic means. Developments in information technology are constantly changing the way in which information is created, stored and transferred, and the use of this term takes account of these possible changes in technology.

Where there is a requirement under any other legislation for a Scottish public authority to maintain an accessible register containing environmental information, these registers must be kept up to date and accurate and ‘comparable’ (regulation 5(4)). Access to such registers must be free (regulation 8(2)(a)).

Regulation 6(1)(b) provides that a public authority shall comply with a request unless the information is already available and easily accessible to **the applicant** in another form or format. Public authorities should also be aware that providing the environmental information by electronic means only may limit its accessibility to those members of the public who do not have access to the internet and the appropriate technology. So, authorities should make arrangements for providing information in a hard copy to anyone who cannot access it by electronic means.

Resources:

Environmental Protection Act 1990:

http://www.opsi.gov.uk/ACTS/acts1990/ukpga_19900043_en_1

‘Inspire’ directive:

<http://inspire.jrc.ec.europa.eu/>



Schedule of charges

Regulation 8 provides that where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it *may* charge a reasonable fee for doing so. However, the authority cannot charge a fee for allowing an applicant to access any public register or lists of environmental information held by it (regulation 8(2)(a)). Equally, the authority cannot charge an applicant to examine the information requested at a place which the authority makes available for that purpose (regulation 8(2)(b)).

There is no definition of what is considered to be 'reasonable' or of what charges can be taken into account, although regulation 8(3) provides that where an authority charges a fee, it shall not exceed a reasonable amount and must not exceed the costs to the authority of supplying the information requested. However, as with FOISA, a public authority can charge for the location or retrieval of the information sought.

Regulation 8(8) specifically requires the authority to publish and make available to applicants a schedule of its fees (regulation 8(8)(a)) and information on the circumstances in which a fee may be charged, waived or required to be paid in advance (regulation 8(8)(b)). A public authority which has not published a schedule of charges cannot make a charge under the EIRs.

Resources:

The Commissioner's briefing on Fees and Excessive Costs: <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees/FeesOverview.asp>

SEPA charging policy:

http://www.sepa.org.uk/about_us/access_to_information/charging_policy.aspx

Duty to provide advice and assistance

Regulation 9(1) provides that a Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Appropriate assistance might include:

- assisting in defining the information required;
- providing the outline of the different types of information that meet the terms of the request (noting however, that the applicant is under no obligation to state why they want the information);
- providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority.

In seeking to clarify a request, the authority should always bear in mind that applicants cannot reasonably expect to possess identifiers such as file reference numbers or the description of a particular record. Equally the applicant is not expected to have the technical knowledge or terminology to identify the information required.



Readers are also referred to the Code of Practice made under sections 60 and 62 of FOISA (links to Codes are available from the Commissioner's website:

http://www.itspublicknowledge.info/Law/FOISA-EIRsLinks/FOISA_Links.asp or from the Scottish Government's FOI website at:

<http://www.scotland.gov.uk/About/FOI>).

Responding to requests and the limited circumstances in which information can be withheld in response to request is discussed in the next section of this Guidance.



Handling requests for environmental information

The Request

Regulation 5(1) – Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by the applicant.

Unlike FOISA, which requires a request for information to be in writing or in another form capable of being used for subsequent reference (FOISA section 8(1)(a)), the definition of a request under the EIRs is completely unqualified.

This means that any request, in any form, whether it is verbal, written or recorded, will be a valid request under the EIRs.

Although public authorities would probably prefer requests to be in writing (particularly if the request is complex), they cannot insist that an applicant makes the request in writing. In cases such as this, it will often be a good idea to write down the request, date it, and then confirm with the applicant whether this is an accurate record of their request. However, it is the date on which the authority receives the verbal request, and not the date of confirmation, that will count as the date of receipt.

As with FOISA, authorities should be aware that a request left on voicemail or a telephone answering machine is a valid request and the date of receipt is the date when the message was left.

As with FOISA, anyone or any organisation, irrespective of geographical location, can ask for environmental information.

Applicants are not required to state their interest in the information sought, although there may be occasions where it could help to deal with the request to know the applicant's interest or reasons for the request, if the applicant is willing to provide this information. Public authorities cannot insist that applicants state their interest or reasons for their request. Public authorities must treat all requests equally, regardless of any reasons or interest which the applicants state in relation to their request, including any instances when no reason or interest is given.

A Scottish public authority 'holds' information for the purposes of the EIRs if it is:

- (a) in its possession and has been produced or received by that authority; or**
- (b) held by another person on that authority's behalf,**

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence. (Regulation 2(2))

The EIRs therefore apply to any information held by or on behalf of a Scottish public authority whether or not it was obtained as a direct consequence of that body's environmental, or other, responsibilities. It therefore includes information held by:

- a Scottish public authority on its own behalf (within the authority's buildings or elsewhere),



- the authority on behalf of others;
- others on behalf of the Scottish public authority (e.g. by consultants, private companies or in archives);

except where the information is held in confidence having been supplied by a UK Minister or government department.

In terms of regulation 2(2) of the EIRs, information is not considered to be held by a Scottish public authority if it holds that information in confidence, having been supplied it by a Minister of the Crown or by a department of the Government of the United Kingdom. This does not mean, however, that the information is necessarily inaccessible under freedom of information legislation, because a request for that information can still be made to the relevant Minister of the Crown or UK Government department under the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004.

- **Decision 036/2009 Mr Rob Edwards and the Scottish Ministers** In this case the Commissioner took the view that regulation 2(2), although framed in slightly different terms, had substantially the same effect as section 3(2)(a)(ii) of FOISA. Accordingly, for this provision to apply, the information in question must not only have been supplied under an obligation of confidentiality, but must still be confidential at the time the request was received. In addition, the Commissioner considers authorities using this provision to be required (under regulation 9(1)) to provide applicants with reasonable advice and assistance on making a request for the information to the relevant UK Minister or department.

Further information on the application of section 3(2)(a)(ii) of FOISA is to be found in the Commissioner's briefing on the section 28 exemption:

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2651&SID=113>

Note that the exception contained in regulation 10(4)(a) (Information not held), which should be applied where the authority claims that the information has been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence (and therefore is not held in terms of regulation 2(2)), is subject to the public interest test.

Remote storage of information, however it is held or retrieved, would be caught by the above definition of information held for the purposes of the EIRs.

This regulation differs from the provisions in FOISA, which define information as being held by a Scottish public authority if it is held by the authority *otherwise* than on behalf of another person. Unlike FOISA, therefore, environmental information in the possession of a Scottish public authority will be held by the authority in its own right under the EIRs, irrespective of the source, author, owner, or whether/how the authority makes use of the information.

Clarifying the request

Regulation 9(2)

“Where a request has been formulated in too general a manner, the authority shall –

- ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and**
- assist the applicant in providing those particulars.”**



Where a request is unclear, e.g. where the applicant has not described the information sought in a way which would enable a Scottish public authority to identify or locate it, or if the request is ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him/her to describe more clearly the information they want to request. Authorities should also bear in mind that applicants cannot reasonably be expected to possess identifiers such as file reference numbers or descriptions of particular records. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or email, in cases where more information is needed, to clarify what is sought.

In seeking to clarify what is sought, authorities should bear in mind that applicants are not required to disclose their aims or motivation for seeking the information.

The Commissioner would encourage authorities to retain a record of any clarification sought and received from the applicant.

Scottish public authorities will have a maximum of 20 working days from receipt of the clarified request to provide the applicant with a response (regulation 9(4)).

Regulation 10(4)(c)

“A Scottish public authority may refuse to make environmental information available to the extent that –

...

(c) the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9”

Once a Scottish public authority has provided advice and assistance to an applicant whose request is unclear, and where the request continues to be formulated in too general a manner to enable an authority to identify any relevant information, the authority is not expected to seek further clarification and the request may be refused. However, the Scottish public authority must explain to the applicant why it cannot take the request any further and provide details of the authority’s review procedure. Scottish public authorities should also note that regulation 10(4)(c) is subject to the public interest test and that, in line with the other exceptions in the EIRs, it must be interpreted in a restrictive way and there should be a presumption in favour of disclosure (regulations 10(1) and (2)).

A Scottish public authority must also, under regulation 5(1), disclose any information it has been able to find relating to the request and to which no exception applies.

Form and Format of Information

Regulation 6

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless -

- (a) it is reasonable for it to make the information available in another form or format; or**
- (b) the information is already publicly available and easily accessible to the applicant in another form or format**



Regulation 6(1)(a) requires the Scottish public authority to give the applicant information in a particular form or format as requested, unless there is another reasonable approach to supplying the information. A Scottish public authority should be helpful, as far as reasonable, taking into account that e.g. some IT users may not be able to read attachments in certain formats and that some members of the public may prefer paper to electronic copies. Authorities should also bear in mind their obligations under the Disability Discrimination Act to provide information in accessible formats.

Regulation 6(1)(b) is similar to section 25 of FOISA, which allows a Scottish public authority to refuse a request for environmental information where that information is otherwise accessible to the applicant in another form or format.

Resources :

Commissioner's Guidance on section 25 of FOISA and regulation 6(1)(b) of the EIRs:
<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2663&slID=107>

Transfer of request

Regulation 14

(1) Where a Scottish public authority has received a request to make environmental information available and does not hold that information but believes that another public authority holds the information requested then it shall either-

- (a) transfer the request to the other authority; or**
- (b) supply the applicant with the name and address of that other authority,**

and inform the applicant accordingly with the refusal sent in accordance with regulation 13.

Unlike FOISA, the EIRs make provision for the transfer of a request from one authority to another. This regulation applies only if the authority does not hold the information in its own right and it is not held on its behalf by another body.

If the Scottish public authority to whom the initial request was made knows that it does not hold the information but believes that some or all of the information requested is held by another Scottish public authority, the authority should consider what would be the most helpful and prompt way of assisting the applicant with his or her request. The EIRs set out two options.

- The original request can be transferred to the other authority. Before doing this, the authority who originally received the request should always consult with the other authority to check that it does hold the information. A request or part of a request should not be transferred if there is any reason to doubt that the second authority holds the information.
- Alternatively, the public authority may give the applicant the name and address of the other authority to allow the applicant to make the request to that authority. In many cases, this will be



the preferable option, as the person who made the initial request may not wish to have the request transferred to another authority, particularly where personal data (which would be protected under the Data Protection Act 1998) may be concerned.

If an authority decides to transfer a request (regulation 14(a)) or provide the applicant with the name and address of that other authority (regulation 14(b)), it must still issue a refusal letter within 20 working days of receipt of the request to explain that it does not hold the information. That refusal notice must contain details about the review procedure and the applicant's right of appeal.

Records transferred to the Keeper (regulation 15)

The EIRs make special provisions in relation to environmental information contained in a record which a Scottish public authority has transferred to the Keeper of the Records of Scotland at the National Archives of Scotland (NAS). Such information is deemed to be held by the Keeper on behalf of the authority.

Where a request is made to the Keeper for such a record and the record has not been designated as open for public access, the Keeper must send a copy of the request to the authority as soon as possible after receiving it. It is then for the authority to decide whether the information is subject to an exception under regulation 10(1)(a), to apply the public interest test under regulation 10(1)(b) and to notify the Keeper whether s/he can make the information available. If the record has already been designated as 'open', the Keeper may make it available without reference to the authority which transferred the record.

Extension of Time

Unlike FOISA, the EIRs (regulation 7(1)) allow public authorities to extend the time for complying with a request by up to 20 working days if the request is both voluminous and complex. The Scottish public authority should inform the applicant as soon as possible, and no later than 20 working days from the date of the request, that an extension is considered necessary (regulation 7(2)). This notice must be in writing and must give the authority's reasons for considering the information to be both voluminous and complex. The notice must also tell the applicant of their rights to require the authority to review its decision to extend the time period, and of their rights to appeal to the Scottish Information Commissioner to investigate whether the authority was entitled to extend the time limit to 40 working days (regulation 7(3)).

Charging

The EIRs provide that no fee should be charged for:

- inspection of public registers, or examination in situ for information;
- examination of the information requested at a place that the authority makes available for that purpose (regulation 8(2)(a) and 8(2)(b))

Where information is made available either by permitting access to public registers or lists, or through inspection, no charge can be levied. In terms of inspection, Article 3(5) of the Directive introduces the requirement for arrangements to be made which ensure that the right of accessing information "can be



effectively exercised, such as...the establishment and maintenance of facilities for the examination of the information required”.

There will be circumstances where an applicant asks to be provided with information held on the register/list. Where this happens, the charging regime under regulation 8 will apply.

Regulation 8

8(1) Subject to paragraphs (2) to (8), where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for doing so.

...

8(3) Fees charged under paragraph (1) shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.

Regulation 8 of the EIRs permits public authorities to charge a ‘reasonable amount’ for accessing environmental information. The EIRs specifically say that the fee charged must not exceed the costs to the authority of producing the information requested. The Commissioner takes the view that, unlike under FOISA, public authorities can only charge for supplying the information requested, and that this does not include the staff time taken in the location and/or retrieval of that information. It is therefore likely that the costs will be limited to the actual cost of photocopying (or equivalent) and the staff time taken to undertake that copying.

Some guidance as to what a public authority can reasonably charge is offered by the UK Information Tribunal decision [*David Markinson v Information Commissioner \(EA/2005/0014; 28 March 2006\)*](#), the leading case to date on charging for environmental information under the UK EIRs. The Information Tribunal indicated that a reasonable charge would comprise the costs of producing copies of the information requested. The Tribunal concluded that:

- an authority must satisfy itself that a charge is reasonable. It must do this by only taking into account relevant considerations and ignoring any irrelevant ones.
- for example, the cost of paper and printing is a relevant factor and can be included in the charge. However, the cost of staff time in identifying, locating and retrieving the information is an irrelevant factor and cannot be included. As these staff costs must be disregarded when the information is inspected by the applicant (in accordance with Regulation 8(2)(b)), it is unreasonable to include them when calculating the cost of copying the same information.

The effect of regulation 8 is that, unlike with FOISA, a charge can be made for providing a relatively small amount of information. However, given that the charge must be reasonable and must not exceed the actual costs to the authority of providing the information, that charge is likely to be small. It is often not cost effective to charge a fee for the supply of environmental information and some Scottish public authorities adopt a policy of not charging for information if the fee falls below a certain cost level.

There is no upper fees limit for responses to requests for environmental information and where the applicant is willing to pay a reasonable amount then the information should be provided.



As with FOISA, when a public authority issues a fees notice the 20 working day clock (this can be extended to 40 working days under the EIRs in limited circumstances) stops until the fees notice has been paid. Applicants have up to 60 working days to pay the fees notice under the EIRs.

As noted above, the EIRs impose a duty on public authorities to publish and make the following available to applicants:

- a schedule of the fees that charge for accessing environmental information and
- information on the circumstances in which a fee may be charged, waived or required to be paid in advance (regulation 7(8)).

A public authority which has not published a schedule of charges specific to the EIRs cannot make a charge under the EIRs.

Resources:

Commissioner's guidance: Fees and Excessive costs

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2670&slD=2748>

Decision 095/2007

<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200601199.asp>



Refusal of Request

The EIRs work on the presumption that environmental information will be made available on request. However, an authority can refuse to provide environmental information if an exception applies under regulation 10 and if, in all the circumstances, the public interest in disclosing the information is outweighed by the public interest in maintaining the exception (regulation 10(2)). An authority may also refuse to provide information if it includes personal data (regulation 11).

The exceptions in regulation 10 must be interpreted in a restrictive way and with a presumption in favour of disclosure (regulation 10(2)).

It is important to note that environmental information which relates to information on emissions is given a special status under the EIRs as the exceptions contained in regulations 10(5)(d) to (g) cannot be used to withhold information on emissions (regulation 10(6)).

Where a request for environmental information covers some information which can be released and other information which the authority believes is subject to one or more exceptions, the public authority must disclose the information which is not subject to any exceptions, unless the authority is not reasonably capable of separating that information out (regulation 10(7)):

- **Decision 141/2007 Integra Compliance and the Scottish Environment Protection Agency**
“This means that, wherever possible, information which is subject to an exception must be separated out or redacted and the remaining part of any environmental information requested should be made available. Whether information can be separated out is a practical test, but in many cases it will be possible for excepted information to be separated from other information. “

Where the public authority intends to refuse all or part of a request, or refuses to make the information available in a particular format, the refusal notice must:

- be in writing;
- state clearly the reasons for refusal, citing the relevant exception(s);
- state the basis for applying any exception (including regulation 11), if it would not otherwise be apparent;
- where appropriate, specify how the public authority reached its conclusion with respect to the public interest test contained in regulation 10(1)(b);
- where environmental information is incomplete and the exception in regulation 10(4)(d) is relied on, state the time by which the Scottish public authority considers that the information will be complete;
- provide details of the provisions for a review by the authority and subsequent appeal to the Commissioner and the Court of Session (regulation 13).



The purpose of providing reasons to an applicant is to enable him/her to determine whether the refusal is well founded in fact and law, or whether s/he wants to challenge the decision for refusal. It is important that applicants understand why they are being refused the information, and authorities should therefore ensure that the reasons for withholding information are clear.

- **Decision 141/2007 Integra Compliance and the Scottish Environment Protection Agency**
In this instance, the Commissioner noted that the purpose of providing detailed reasoning is to enable the applicant to determine whether the decision made by the authority is well-founded and to provide the applicant with the information required to challenge or accept that decision.



The Exceptions

The EIRs permit Scottish public authorities to refuse a request if an exception under regulation 10(4) or (5) applies and the public interest in making the information available is outweighed by that in maintaining the exception. (Regulation 11, although not an exception as such, permits a public authority to withhold personal data in certain circumstances. Regulation 11 is dealt with below.)

Unlike the exemptions in FOISA, all exceptions are subject to the public interest test. In addition, public authorities must interpret all of the exceptions in a restrictive way and must apply a presumption in favour of disclosure (regulation 10(2)). Scottish public authorities are encouraged to consider the Commissioner's guidance on the public interest when considering this test:

<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTest.asp>

The Commissioner encourages Scottish public authorities to consider this guidance alongside his detailed guidance notes in relation to the application of each exception. These guidance notes are updated to reflect new decisions and can be found on his website:

<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.asp>

Regulation 10 provides two categories of exception from duty to provide information on request. The first category is 'class' exceptions. The second category can only be applied if disclosure of the information would, or would be likely to, cause substantial prejudice to a particular interest.

Class exceptions

The first category is contained in regulation 10(4), which provides a number of exceptions from the duty to provide information on request based upon the **type** of information held or the **nature of the request** rather than upon the **content** of the information. Content, however, may still be relevant in considering the public interest test.

Regulation 10(4)(a) - Information not held

When considering the application of this exception, public authorities should bear in mind the differing definitions of what is 'held' under FOISA and the EIRs (see section on page 30 'Handling requests for environmental information').

This exception **only** applies if the public authority receiving the request does not hold the information, or make use of the services of another body or person to hold the information on its behalf. Where the exception does apply, the public authority would have to provide advice and assistance to the applicant and, if the likely holder of the information is known, ask the applicant if s/he would like the request to be transferred (see earlier sections on providing advice and assistance (p25) and transferring requests (p33)).

Note that this exception is subject to the public interest test, although the Commissioner recognises that where the Scottish public authority can provide sufficient reasoning to satisfy him that it does not in fact hold



the information in question, the application of the public interest would appear to be somewhat superfluous. However, there may be instances, for example where the information requested is in the physical possession of the public authority but the authority determines that it is not held on the basis that it was supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence (regulation 2(2)). Here, the application of the public interest test will be more than simply academic (although in such cases the public interest in maintaining confidentiality will always be strong – see, for example, *Decision 036/2009 Mr Rob Edwards and the Scottish Ministers*).

Manifestly unreasonable requests (regulation 10(4)(b))

A ‘manifestly unreasonable’ request could include a request for information which places a substantial and arduous burden on a Scottish public authority. ‘Manifestly unreasonable’ is not defined in the EIRs. However, the Aarhus Implementation Guide makes it clear that volume and complexity alone do not make a request manifestly unreasonable. While the Commissioner has not yet published any decisions dealing with whether a request for environmental information is manifestly unreasonable, he is likely to take into account the same kinds of considerations as he would in reaching a decision as to whether a request is vexatious under FOISA. There may also be instances where it is appropriate for the Commissioner to consider the proportionality of the burden on the public authority in terms of the costs and resources involved in dealing with a request when considering the application of this exception.

The UK Information Commissioner, applying the equivalent exception under the UK EIRs, considered the Department for Environment, Food and Rural Affairs’ argument that compiling a list of 133 pieces of correspondence (including date, type of correspondence, sender, recipient and title) would be so time-consuming that the request for the information was manifestly unreasonable. (FS50078600 http://www.ico.gov.uk/upload/documents/decisionnotices/2007/decision_notice_fs50078600.pdf) The Commissioner estimated that it would take approximately ten hours to produce the list requested. Whilst he agreed that the time involved in complying with the request was not negligible, he did not believe that the request could be regarded as manifestly unreasonable on the basis of the time required to comply with it.

Resources:

Scottish Information Commissioner’s guidance on Vexatious or Repeated requests:
<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&slD=2591>

Regulation 10(4)(c) - Formulated in too general a manner

A Scottish public authority may refuse a request for information if it is formulated in too general a manner and the authority has complied with its duty under regulation 9. Therefore, before refusing a request under regulation 10(4)(c), a Scottish public authority is obliged to communicate with the applicant to offer advice and assistance to find out if the request can be more closely defined before refusal is considered.

Resources:

Scottish Information Commissioner’s guidance on ‘Vexatious and repeated requests’:
<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&slD=2591>



Regulation 10(4)(d) - Material which is still in the course of completion, unfinished documents or incomplete data

- **material which is still in the course of completion**

The Aarhus Implementation Guidance (page 58) says that 'in the course of completion' suggests that a document will have more work done on it within some reasonable time-frame:

The Convention does not clearly define "materials in the course of completion". However, the mere status of something as a draft alone does not automatically bring it under the exception. The move from the language of Directive 90/313/EEC on the freedom of access to information on the environment of "unfinished documents" to "materials in the course of completion" suggests that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the "course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. "In the course of completion" suggests that the document will have more work done on it within some reasonable time-frame. Other articles of the Convention also give some guidance as to how Parties might interpret "in the course of completion". Articles 6, 7 and 8 concerning public participation require certain draft documents to be accessible for public review. Thus, drafts of documents such as permits, environmental impact assessments, policies, programmes, plans, and executive regulations that are open for comment under the Convention would not be "materials in the course of completion" under this exception.

- **unfinished documents**

The Aarhus Convention does not include this as an exception. However, Article 4 of Directive 2003/4/EC provides that member states may provide for a request for environmental information to be refused if (amongst other things) the request concerns material in the course of completion or unfinished documents or data.

This wording suggests that unfinished documents are distinct from material in the course of completion. From existing decisions of the Commissioner (see, for example, [Decision I01/2008 Mr Alistair Johnson and East Renfrewshire Council](#)) it appears unlikely that this category would include any document on which no further work was intended.

- **Incomplete data**

Whether or not a document can be categorised as incomplete data will depend on the circumstances and should be considered on a case to case basis. Data which is part of routine monitoring should not be regarded as part of an ongoing unfinished set, but should normally be released as soon as practicable after collection.

A Scottish public authority relying upon the exception in regulation 10(4)(d) must (under regulation 13(d)) state the time by which the authority considers that the information will be finished or completed, when issuing its refusal. This allows the applicant to make a new request for the information once the information is finished or completed.



- **Decision 070/2008 Mr James Grant and Aberdeen City Council** The information requested in this case represented a report from the District Valuer to the Council; there was no indication that the report was either incomplete or unfinished. The document did not appear to be in a preparatory state; it appeared to be a complete report with a clear start and end point. Whether the content represented advice or fact was not relevant to the consideration of this exception. The Commissioner accepted that the advice and opinion detailed in the report could be subject to change. However, the report was clearly a completed document which aimed to provide guidance based on the information available to the District Valuer at the time.
- **Decision 101/2008 Mr Alistair Johnson and East Renfrewshire Council** provides further guidance on each of these categories of document.

Resources:

Scottish Information Commissioner's guidance on 'Information intended for future publication':
<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2650&SID=111>

Regulation 10(4)(e) - Internal Communications

Regulation 10(4)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.

In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.

- **Decision 141/2007 Integra Compliance Limited (trading as Compliance Link) and the Scottish Environment Protection Agency** The Commissioner accepted that 'internal communications' could cover a wide range of documents, including internal e-mail exchanges, draft letters to an external organisation, and a file note prepared for internal use. The Commissioner reached this view after satisfying himself that the documents had been exchanged between officials in SEPA, rather than being created and used by one person.

This exception is potentially very wide and includes information contained in any internal communications of or between Scottish public authorities, including any correspondence between officials in the same authority and its agencies.

Unlike the equivalent provision in the UK EIRs, regulation 10(4)(e) does not specifically state that internal communications includes communications between government departments (in the case of the UK EIRs, UK Government departments are treated as separate public authorities).

The Commissioner accepts that it is possible for communications between two or more separate public authorities be treated as 'internal communications' for the purposes of regulation 10(4)(e). However, any public authority applying the exception in these circumstances must be able to demonstrate particular aspects of the administrative and legal relationship between the two bodies to show why communications between them should be considered to be internal. This will include consideration of matters such as the nature and context of the particular relationship and the nature of the communication itself.



For example, in **Decision 044/2009 Mr Rob Edwards of the Sunday Herald and the Scottish Ministers**, the Commissioner accepted that communications between the Government and the Radioactive Waste Advisory Committee, established by the Government in 1978 to provide independent advice to Ministers on matters concerning the management of radioactive waste, was internal.

The exception in regulation 10(4)(e) covers all internal communications, regardless of their content or the level of harm that disclosure would be likely to cause. This differs from FOISA, where, for example, the exemptions in section 30 (Prejudice to the effective conduct of public affairs) only apply to information if its disclosure would be likely to have harmful consequences.

However, internal communications cannot be withheld under regulation 10(4)(e) unless there is a greater public interest in keeping the information secret than in disclosing it (regulation 10(1)(b)). In assessing the public interest, both the harmful and beneficial consequences of disclosure will be considered, and here, generally, the same considerations apply as with information withheld under section 30(b) or (c) of FOISA.

Resources:

Scottish Information Commissioner's guidance on 'Prejudice to effective conduct of public affairs':
<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2582&slD=117>

Substantial prejudice exceptions

The second category of exceptions is contained in regulation 10(5), and is based upon the **content** of the information requested. These are all subject to a harm test of substantial prejudice to certain issues, processes or persons and, as mentioned already, to the public interest test. In practice, there may be a number of overlaps between exceptions, for instance between different categories of information for which confidentiality is provided by law.

When applying the harm test, authorities should consider the following questions, and should be prepared to provide evidence to demonstrate their reasoning in the event of an appeal to the Commissioner. This list of questions is not exhaustive:

- Would disclosure of the information cause, or to be likely to cause, substantial harm to any of these matters i.e. issues, processes, persons or the public interest?
- Have circumstances changed since the information was created (in relation to when the request was made)?
- Is the information publicly available? Information which is available in the public domain will be less likely to be excepted under regulation 10(5)(a).

Regulation 10(5)(a) - International relations, defence, national security or public safety

- **international relations**

Information may be withheld under this exception if, for example, it contains confidential information obtained from (or which relates to) a foreign state, an international organisation or overseas territory, where disclosure might compromise any future co-operation with the UK in areas of vital interests to the UK.



- **defence**

This may include information regarding military establishments, military exercises or the nature of military assets. To the extent that these affect or are likely to affect the elements of the environment then this would be environmental information.

- **national security or public safety**

The environmental information covered by this exception may include, for example, information on the protection of critical national infrastructures such as water supply. A certificate by Scottish Ministers under regulation 12 stating that disclosure of the information would prejudice substantially national security would be sufficient to conclude that this exception applies. However, such a certificate is not conclusive in relation to the public interest test, so the applicant can ask for a review of the application of the public interest test and could subsequently make an application to the Scottish Information Commissioner.

- **Decision 108/2008 Mr Simon Brogan and Highland & Islands Fire Board** In this decision, a balance was struck between reassuring the public that adequate measures were in place to deal with potentially catastrophic adverse events, and ensuring that the tactical and detailed contingency plans contained within such measures were safeguarded against potential threats which could undermine or disrupt such plans. The Commissioner decided that the public interest in the effective conduct of the Fire & Rescue Service in relation to the health and safety of its staff and other emergency services, the safety of members of the community, the need to consider ongoing public safety issues, as well as the need to consider the current terrorist threat assessment, clearly outweighed the public interest in disclosing the Site Specific Fire/Incident Plan.

Resources:

Scottish Information Commissioner's guidance on:
'National security and defence'

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2662&slD=121>

'International relations'

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2659&slD=119>

'Health, Safety and the Environment'

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2726&slD=135>

Regulation 10(5)(b)- The course of justice

A request for environmental information may be refused where the disclosure of the information would, or would be likely to, substantially prejudice:

- the course of justice, including law enforcement;
- the ability of a person to receive a fair trial;
- the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.



The Aarhus Convention: An Implementation Guide says (at page 59):

“Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation. In some countries, public prosecutors are not allowed to reveal information to the public pertaining to their cases. The Convention clearly does not include all investigations in this exception, but limits it to criminal and disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered”.

This exception applies to investigations or enquiries conducted by any level of government, and to any institution or public authority (local, regional, national or international), and may relate to present proceedings or proceeding likely to take place in the future. It could include any information which, if disclosed, could prejudice the enforcement or appropriate administration of law, which includes the prevention, investigation or detection of a crime, or the apprehension or prosecution of offenders. Every effort should however be made to make information available once the proceedings have been completed.

Unlike section 36(1) of FOISA, neither the wording of regulation 10(5)(b), nor the definition in the Implementation Guide to the Aarhus Convention explicitly excepts documents to which a claim to confidentiality of communications in legal proceedings could be maintained (subject to the public interest test). However, the Commissioner takes the view that this particular exception will cover information which is covered by legal professional privilege, particularly where a public authority is or is likely to be involved in litigation ([**Decision 096/2006 Mr George Waddell and South Lanarkshire Council**](#)). However, the Commissioner has in the past also accepted legal professional privilege under regulation 10(5)(d) (see below).

Regulation 10(5)(c) - Intellectual property rights

This exception will protect information that forms the basis of registered rights - such as patents, trademarks and designs – and unregistered rights - such as copyright, and unregistered design rights. It does not cover confidential information that does not benefit from such legal protection. The exception should only be applied where there is a real risk that the disclosure (or further dissemination after disclosure) would, or would be likely to, seriously undermine the rights concerned. If the information would enjoy protection, even after disclosure, from the Copyright Designs and Patents Act, for instance, the case against disclosure would be considerably weaker.

Regulation 10(5)(d) - The confidentiality of the proceedings of any public authority where such confidentiality is provided by law

This exception may apply to information relating to certain proceedings of any public authority where such proceedings are considered to be confidential. Confidential information need not be released, but this exception should not cover transactions or business activities of an administrative or routine nature.

The proceedings in question may be those of the public authority receiving the request, or those of any other public authority. The meaning of the term ‘proceedings’ is not entirely clear, but will include a range of investigative, regulatory and administrative/governance processes and other activities carried out according to a statutory scheme.



In most cases where this exception will apply, there will be a specific statutory provision prohibiting the release of the information. However, there may also be cases where the common law of confidence will protect the confidentiality of the proceedings ([Decision 069/2008 Robin Thompson and the Scottish Environment Protection Agency](#)). In common with other decisions, this decision has accepted the application of the exception to information protected by legal professional privilege, although in many cases the exception in regulation 10(5)(b) may be more appropriate).

Regulation 10(5)(e) - Confidentiality of commercial or industrial information

Again, confidentiality may be provided either by explicit statutory restrictions on disclosure or by the common law of confidentiality. The information covered by the exception will include a range of commercially sensitive information such as trade secrets, information supplied by contractors, information supplied as part of a tendering or procurement process and information held by regulators.

Before regulation 10(5)(e) can be engaged, therefore, authorities should consider the following questions, and should be prepared to provide evidence to demonstrate their reasoning in the event of an application being made to the Commissioner:

- Is the information publicly available? Information which is available in the public domain will be highly unlikely to engage the exception under regulation 10(5)(e).
- Is the information commercial or industrial in nature?
- Does a legally-binding duty of confidence exist in relation to the information - express or implied?
- Does this duty of confidence protect a 'legitimate economic interest'?
- Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?
- Does the public interest in maintaining the exception outweigh the public interest in disclosure?

The term 'legitimate economic interest' is not defined within the EIRs. However, the Commissioner considers that 'legitimate economic interest' implies that the exception may be invoked only if disclosure would, or would be likely to, significantly damage the interest in question. It can also cover requests for information such as cost benefit or other financial analysis, if disclosure would, or would be likely to, substantially prejudice the confidentiality of matters to which any commercial or industrial confidentiality applies (see [Decisions 141/2007 Integra Compliance Ltd and the Scottish Environment Protection Agency](#) and [119/2008 Mr James Paul Kelly and Dundee City Council](#)).

In applying this exception, an authority may have regard to provisions such as section 22 of the Environmental Protection Act 1990, which excludes information from a public register about the affairs of any individual or business where that information is commercially confidential. Where information is kept off the public register this may provide an indication as to whether that information is commercially sensitive, and therefore whether the exception in regulation 10(5)(e) is applicable.

Confidentiality may also be based on the common law of confidence. This may be acknowledged in a contract, although merely stating that certain information is confidential within a contract does not necessarily make it so.



Generally the protection of information under this exception should be limited to the minimum time necessary to safeguard the commercial or industrial interest in question.

Regulation 10(5)(f) - Interests of the individual providing the information

This exception applies in situations where the information was supplied on a voluntary basis in the expectation that it would not be disclosed to a third party and where the supplier has not consented to disclosure. Examples of the information potentially covered by this exception include information collected from members of the public in research or surveys, or privately owned information which has been deposited in a public record office or archive.

In that context, the purpose of this exception is, for example, to ensure the continuation of the flow of voluntary information between companies and their regulators when collecting statistical data and conducting sample surveys. Making such information available to the public could possibly inhibit open and constructive discussions between environmental control authorities and industry.

This exception only applies where:

- the environmental information was provided voluntarily, i.e. the supplier was not under, and could not have been under, any legal obligation to supply it to the Scottish public authority;
- there are no other circumstances that entitle the Scottish public authority to disclose it; AND
- the supplier has not consented to its disclosure.

Because the harm test also applies to this exception, it only applies where disclosure of the information would, or would be likely to, substantially prejudice the interests of the person who provided the information.

If a Scottish public authority is able to require the information to be provided under statutory obligation (whether used or not) then that information will not fall within this exception.

Regulation 10(5)(g) - Protection of the environment

A Scottish public authority may refuse to supply information in order to protect the environment to which it relates, e.g. the nesting location of rare birds. The ultimate aim of the EIRs is to increase the protection of the environment by ensuring greater access to environmental information. It would clearly be inconsistent with the purpose of the EIRs if disclosure of information would lead to damage to the environment.

- **Decision 071/2009 Fish Legal and the Scottish Ministers** This case related to the escape of farmed fish. The Ministers argued that disclosing the information would harm their relationship with the aquaculture industry, and that, in turn, this would have other consequences which would ultimately be harmful to the environment. The Commissioner noted that the information withheld had been voluntarily provided by the fish farm operator, but that the Ministers had the power, under existing legislation, to require the operator to provide them with the information. The Commissioner did not accept that the regulation, which has to be interpreted in a restrictive way, could be applied with such a broad hypothesis or that the Ministers had adequately demonstrated that disclosure of the information would, or would be likely to, substantially prejudice the environment to which the information relates.



- **Decision 044/2007 Mr G Crole and Transport Scotland** The Commissioner accepted that the measures practiced by environmental and other bodies to restrict the availability of information about badger setts amounted to a degree of protection for their habitat. The Commissioner therefore accepted that disclosure of the information contained in badger surveys would diminish the current level of protection for the badgers' habitat.



Personal Data – regulation 11

Regulation 11(1) provides that, to the extent that the environmental information requested includes personal data about the applicant, then the duty under regulation 5(1) to make that environmental information available will not apply. However, in line with the duty to advise and assist under regulation 9, the applicant should be advised how to make a subject access request for their personal data under section 7 of the DPA.

To the extent that the environmental information requested includes personal data about an individual other than the applicant (third party personal data), the data does not have to be made available if any of the following circumstances apply:

- Disclosure would breach any of the data protection principles contained in the DPA (this is an absolute exemption);
- Disclosure would contravene a section 10 notice under the DPA (right to prevent processing likely to cause damage or distress) and, in all the circumstances of the case, the public interest in making the information available is outweighed by the public interest in not making the information available;
- The information is exempt from disclosure under section 7(1) of the DPA and, in all the circumstances of the case, the public interest in making the information available is outweighed by the public interest in not making the information available.

Regulation 11 of the EIRs is very similar to the personal data exemptions contained in section 38(1)(a) and (b) of FOISA, and the Commissioner therefore expects Scottish public authorities to have regard to his detailed guidance on the application of section 38 of FOISA when considering this regulation.

Resources:

Scottish Information Commissioner's briefing on 'Personal information':

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=133>



Emissions

Information relating to emissions is given special status under the EIRs. Regulation 10(6) provides that to the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority cannot rely on the following exceptions:

- Regulation 10(5)(d) – the confidentiality of proceedings
- Regulation 10(5)(e) – the confidentiality of commercial or industrial information
- Regulation 10(5)(f) – the interests of the person who provided the information
- Regulation 10(5)(g) – the protection of the environment

Emissions are not explicitly defined in the regulations, or in the European Directive on access to environmental information (2003/4/EC). However, a commonly cited definition is found within the European Directive on Integrated Pollution Prevention and Control. An emission is defined here as the ‘direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources (...) into the air, water or land’. This very broad definition captures a great deal of information. In addition, regulation 10(6) applies in relation to any information on emissions. This is again very broad terminology and suggests that information will not necessarily need to be directly concerning, but merely ‘relating to’ emissions to fall within this provision. It will be important to ensure, when considering the application of one of these four exceptions, that the information cannot be categorised as relating to an emission.

The Commissioner’s view is that emissions referred to in regulation 10(6) includes information on past, current and projected future emissions.

Resources:

ICO Decisions:

http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fer_0066052.pdf

http://www.ico.gov.uk/upload/documents/decisionnotices/2007/fer_0073984.pdf

Information Tribunal Decision:

http://www.informationtribunal.gov.uk/Documents/decisions/OFCOMvinfoComm_TMobile_4Aug07.pdf



An exception that isn't - regulation 5(3)

Regulation 5(3) provides that any enactment or rule of law which would prevent information from being made available in accordance with the EIRs shall not apply. This regulation can be contrasted with section 26(a) of FOISA, which provides that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment.

This important distinction is illustrated in the Commissioner's decision **182/2006 Mr Bruce Sandison and the Fisheries Research Services (the FRS)**. The FRS argued that the information which Mr Sandison had requested fell under section 26(a) of FOISA. Although the Commissioner agreed that the prohibition on disclosure existed, he went on to conclude that the information requested was environmental and was therefore subject to the EIRs rather than to FOISA. As a result, the Commissioner found that no statutory bar applied and ordered the FRS to disclose the information.



Requests under FOISA and the EIRs – use of section 39(2) of FOISA

FOISA imposes a duty on all Scottish public authorities to respond to requests for any information they hold, even when the information is environmental.

This means that when a request is made for environmental information, regardless of whether it is expressly made under either EIRs or FOISA, a Scottish public authority must consider the request under both FOISA and the EIRs.

However, section 39(2)(a) of FOISA allows an authority to exempt information from disclosure under FOISA if it is environmental information which Scottish public authorities are obliged, under the EIRs, to make available to the public.

Section 39(2) (b) provides that if the information is subject to one of the exceptions under the EIRs, the authority is not obliged to disclose it.

- **Decision 051/2009 Advocates for Animals and the Scottish Ministers** As the Commissioner commented in this decision, “Advocates for Animals made their information requests under FOISA, at least to the extent that they referred to ‘Freedom of Information’ and ‘FOI’ rather than making any explicit reference to the EIRs. This is hardly unusual, however, and does not absolve the public authority of responsibility for considering whether the information requested is in fact environmental.”

The exemption in section 39(2) is essentially a technical provision. It creates an exemption from disclosure under FOISA where information is environmental information as defined in the EIRs. It allows authorities to manage the complex relationship between these two laws, both of which give individuals rights to request environmental information. By using the exemption under section 39(2), an authority can go on to consider whether the information needs to be disclosed solely in terms of the EIRs. The exemption is subject to the public interest test.

The Commissioner set out his understanding on the relationship between FOISA and the EIRs in some detail in **Decision 218/2007 Professor A D Hawkins and Transport Scotland:**

“...if the information falls within the definition of environmental information, authorities have both an obligation and an option. They have the obligation of dealing with the request under the EIRs and they have the option of claiming the exemption at section 39(2) of FOISA, which means they do not, at the same time, have to respond to the request under FOISA.”

If a Scottish public authority claims the exemption under section 39(2), it also needs to consider the public interest test under section 2. As there is a separate statutory right of access to environmental information, the Commissioner considers that the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs will generally outweigh the public interest in the disclosure of information under FOISA. (**Decision 120/2008 Mr Rob Edwards and the Scottish Ministers**).

The effect of claiming section 39(2), so far as FOISA is concerned, is that a Scottish public authority is obliged only to consider whether there is a public interest in relation to which regime should be used to deal with the request i.e. FOISA or EIRs. The Commissioner acknowledges that it would be difficult to envisage



circumstances in which there would be a prevailing public interest in disclosing the information under FOISA where the request could be dealt with under the EIRs.

Where section 39(2) is not claimed

There is no obligation on a Scottish public authority to claim the section 39(2) exemption. Where section 39(2) is not claimed, a Scottish public authority must consider the application under FOISA. However, this does not detract from the Scottish public authority's obligation to also consider the request under the EIRs, to the extent that the information requested is environmental information – accordingly, in such circumstances, the Scottish public authority is required to consider the request under both regimes.

FOISA and the EIRs are not identical and it is possible for different results to be reached under each regime.

Where applications are made to the Commissioner under section 47 of FOISA, these applications necessitate a decision on whether a request for information has been dealt with in accordance with Part I of FOISA (and under regulation 17(2)(b) of the EIRs, s47 applies equally to appeals made under the EIRs). Where a public authority has not claimed the exemption under section 39(2) the Commissioner is therefore also obliged to consider the application under both regimes.

Therefore, where the request concerns environmental information, Scottish public authorities are required to consider the request under the EIRs whether or not the section 39(2) exemption is claimed and where there is a conflict, the provisions of the EIRs will prevail. Scottish public authorities should therefore note that there is no advantage to be gained by relying on the provisions of FOISA.

Where, during the course of an investigation, it is the Commissioner's view that a request encompasses environmental information, which has previously been considered under FOISA, the Commissioner will discuss this with the public authority in question and offer it an opportunity to apply section 39(2) of FOISA.

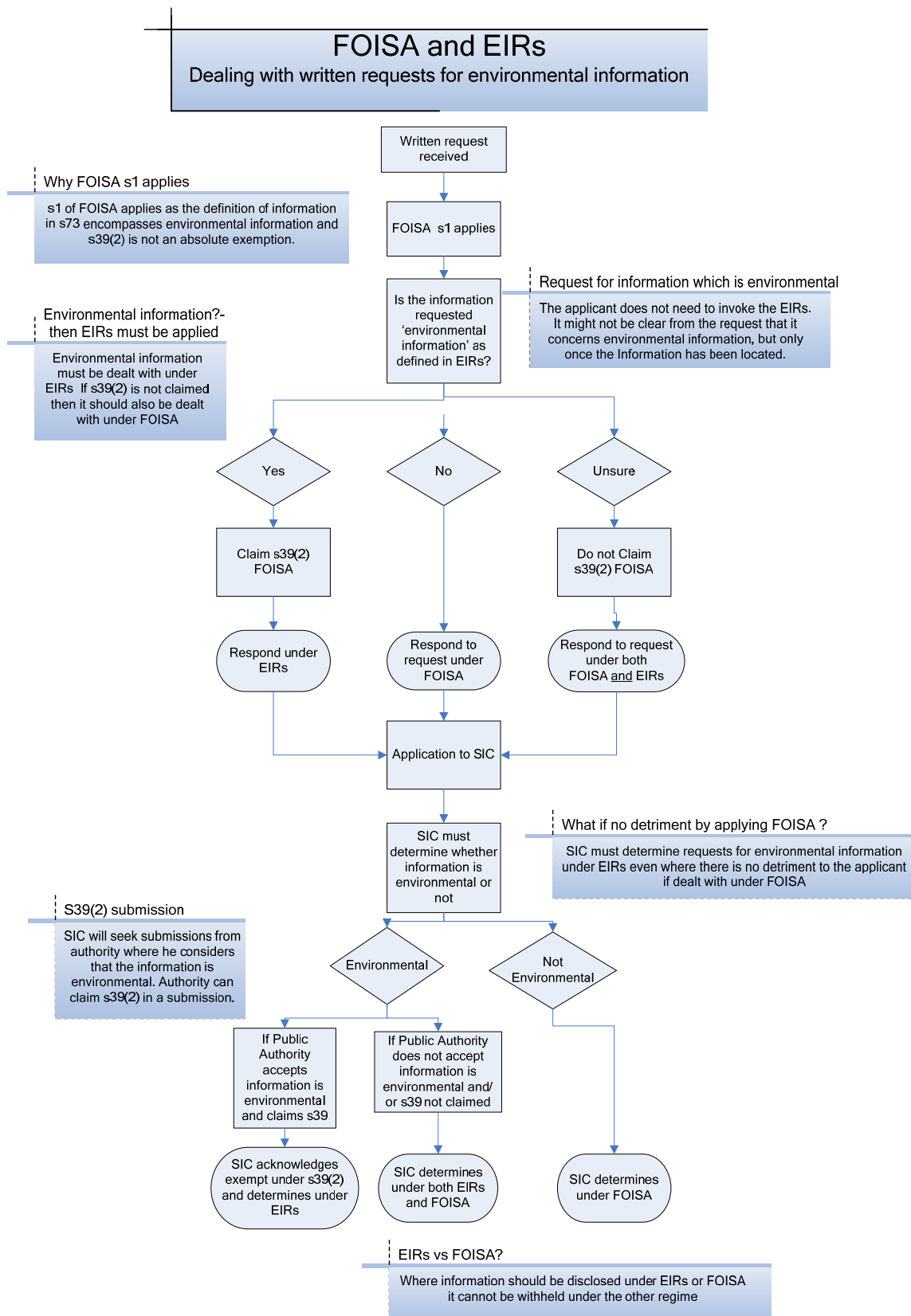
Where an authority declines to apply section 39(2) of FOISA, the Commissioner will require full submissions from that authority with its reasons for withholding information under both regimes.

Where the request encompasses both environmental and non-environmental information, the EIRs will only apply to the extent that the information is environmental and the provisions of FOISA will apply to the remainder.

Public authorities may find it useful to refer to the [Environmental Process Flowchart](#) when dealing with requests for information.



Environmental Information Process Flowchart





EIRs v. FOISA – The Key Differences

	EIRs	FOISA
Format of request	There is no requirement under the EIRs that requests should be made in a format capable of having some permanency. Verbal requests are valid request for environmental information, although Scottish public authorities are encouraged to record any verbal requests for reference.	FOISA requires requests to be in writing or any other format capable of having some permanency (section 8).
The definition of a Scottish public authority	The definition of a Scottish public authority is wider under the EIRs than FOISA.	Those bodies listed in schedule 1 of FOISA, designated by order under section 5 of FOISA, or publicly-owned companies as defined by section 6 of FOISA (section 3).
Charging	<p>Scottish public authorities may charge only for producing (i.e. supplying) the information requested (regulation 8(3)).</p> <p>Charges may be made only in accordance with a published schedule of charges (regulation 8).</p>	<p>Scottish public authorities may charge for locating, retrieving and providing the information (Fees Regulations).</p> <p>No provision for schedule of charges, although this is expected in respect of information provided under a publication scheme.</p>
Cost limit	<p>The EIRs do not have an upper or lower cost limit, effectively meaning that a request could be made for a larger amount of environmental information (subject to regulation 10(4)(b)). Scottish public authorities should note therefore that section 12 of FOISA will not be applicable to a request for environmental information.</p> <p>With no lower cost threshold, a Scottish public authority may make a reasonable charge for the provision of information under the EIRs.</p>	<p>Section 12 of FOISA provides that a Scottish public authority is not obliged to respond to a request if it estimates that the cost of complying with the request would exceed a prescribed amount (currently £600).</p> <p>A Scottish public authority may make a charge for information between specified limits (section 9).</p> <p>Section 13 allows Scottish</p>



		public authorities to charge for the provision of information it is not necessarily obliged to provide under FOISA.
What information is 'held'	Regulation 2(2)(a) provides that information is held by a Scottish public authority if it is in its possession and it has been produced or received by that authority. Unlike FOISA the EIRs do not specifically exclude information held on behalf of another person.	Section 3 of FOISA defines what is considered to be 'held' information for the purposes of FOISA. Section 3 specifically excludes information held on behalf of another person.
Transfer of request	Unlike FOISA, the EIRs make provision for the transfer of a request from one body to another. This regulation applies only if the body does not hold the information or makes use of the services of another body to hold this information on its behalf (regulation 2(2)).	FOISA does not allow for the transfer of requests between Scottish public authorities. A refusal notice must be served under section 17 of FOISA and fulfilling duties under section 15 of FOISA, the applicant advised of which body does hold the information.
Extension of 20 working day period	Regulation 7 provides that a Scottish public authority may extend the 20 working day period by a further 20 working days only if the volume <i>and</i> complexity of the information requested makes it impractical for the authority to comply with the request or to make a decision to refuse to do so.	There is no extension to the 20 working day period in which a Scottish public authority must respond to a request under FOISA.
Active dissemination	Regulation 4 provides that a Scottish public authority must organise and keep up to date environmental information with a view to active and systematic dissemination of that information.	Although there is no direct equivalent under FOISA, section 23 does require Scottish public authorities to adopt and maintain a publication scheme. Scottish public authorities are encouraged to include environmental information in their publication scheme.
Prohibitions on disclosure	Regulation 5(3) specifically provides that any enactment or rule of law which would prevent the making available of	Section 26 of FOISA specifically provides that information is exempt information if its disclosure



	information in accordance with the EIRs shall not apply.	is prohibited by or under an enactment.
Emissions	Special status is given to information relating to emissions (regulation 10(6)). Essentially there will be very limited situations in which information relating to emissions can be withheld by a Scottish public authority.	There is no equivalent under FOISA, but information relating to emissions would generally fall under the definition of environmental information and therefore the EIRs.
Discretion to accept representations/requests for review	Unlike section 20(6) of FOISA, there is no discretion afforded to Scottish public authorities under the EIRs to accept representations for review where they fall outwith the timescales set out in the EIRs.	Section 20(6) of FOISA provides that a Scottish public authority may comply with a requirement for review made after the expiry of the time allowed if it considers it appropriate to do so. Unlike the EIRs, any subsequent application to the Commissioner will be valid where this provision is invoked.
Public interest and restrictive interpretation	All exceptions under regulation 10(4) and 10(5) of the EIRs are subject to the public interest test as set out in regulation 10(1)(b); should be read in a restrictive way (regulation 10(2)(a)) and presumption in favour of disclosure should be applied (regulation 10(2)(b)). (Regulation 11 is a quasi-exception to which the public interest test applies only in parts.)	The public interest test only applies to certain exemptions under FOISA, as set out in section 2.
Historical records	There is no equivalent exception under the EIRs but timing of the request should be a factor taken into account when dealing with a request.	Certain exemptions cannot be applied to a 'historical record' as defined by section 57 of FOISA.