

EIRs Guidance

Regulation 10(4)(e): Internal communications

Exception Briefing



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Glossary and abbreviations

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

The exception

The exception: main points

1. Regulation 10(4)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) allows a Scottish public authority to withhold internal communications.
2. In common with other exceptions in the EIRs:
 - (i) the exception is subject to the public interest test in regulation 10(1). This means that, even if the exception applies, the information should still be disclosed unless the public interest in withholding the information outweighs the public interest in making it available.
 - (ii) the exception can be relied on regardless of the age of the information.

Steps in applying the exception

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

General points about interpreting the exception

4. The EIRs implement Directive 2003/4/EC on public access to environmental information. The EIRs don't define any of the other terms used in the exception. However, the Aarhus Convention Implementation Guide, named after the Convention on which the Directive was based, contains useful guidance on interpreting the EIRs and references to the Implementation Guide are contained throughout this guidance. (See **Appendix 1: Resources** for a link to the Directive and Implementation Guide.)

Applying the exception

5. Regulation 10(4)(e) allows authorities to refuse to disclose internal communications. This is a class-based exception, meaning that there is no need to consider whether disclosure of the communication would cause harm before applying the exception. Provided the information is an internal communication, the exception will apply.

What is a communication?

6. The exception only applies to internal *communications*, so it can't apply to information only used by its author, for example as an aide-memoire, unless it also records the content of other communications, such as a note of what was agreed at a meeting.

What is an internal communication?

7. The following are examples of internal communications:
 - (i) Internal email exchanges
 - (ii) File notes prepared for internal use
 - (iii) Notes of meetings
 - (iv) Documents which have been circulated internally
8. Drafts of documents will also be internal communications, provided the document hasn't been sent to a third party. (When responding to requests for draft documents, it might be more appropriate to consider the exception in regulation 10(5)(c), which covers material which is still in the course of completion, unfinished documents, etc.)
9. The exception will apply to communications which record discussions with third parties, or which contain information received from third parties, provided it is then communicated internally.

What is not an internal communication?

10. The Aarhus Convention Guide says, at page 85, that the following types of documents should not be treated as "internal communications":
 - (i) Factual materials, even when they are still in preliminary or draft form
 - (ii) Opinions or statements expressed by public authorities when acting as statutory consultees during a decision-making process
 - (iii) Studies commissioned by public authorities from related, but independent, entities
 - (iv) Information once it has been disclosed to a third party – so communications sent both internally and externally won't be internal communications

Communications with third parties

11. Very occasionally, communications between two separate public authorities or communications between an authority and an external adviser can be treated as "internal communications." However, the public authority 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.
12. See **Appendix 1: Resources** for a link to some of the Commissioner's decisions on internal communications.

The public interest test

13. The exception covers all internal communications, even if no harm would be caused by disclosure. This is different from the exemption in section 30 of the Freedom of Information (Scotland) Act 2002 (FOISA) (Prejudice to effective conduct of public affairs). Section 30 can only be applied where disclosure would, or would be likely to, cause substantial harm or inhibition.
14. However, the exception is subject to the public interest test. This means assessing whether – in all the circumstances – the public interest in making the information available is better served by withholding the information or by making it available. The authority must identify the competing arguments for these two outcomes and must carry out a balancing exercise to determine where the public interest lies in that particular case.
15. In carrying out the balancing exercise, the authority must take account of the explicit presumption in favour of disclosure in regulation 10(2)(b).
16. The EIRs do not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public”. It has also been said that the public interest means what is in the interests of the public, rather than what is of interest to the public (although the two are not always mutually exclusive).
17. The Commissioner has published guidance on the public interest test in the EIRs. Authorities might also find it useful to read our guidance on section 29 (Formulation of Scottish Administration policy etc.) and section 30 of FOISA, as similar considerations are likely to apply. See **Appendix 1: Resources** for a link to the guidance.
18. **Appendix 1: Resources** also contains information about some of the Commissioner’s decisions on the public interest test and regulation 10(4)(e).

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision Number	Parties	Summary
12	044/2009	Rob Edwards and the Scottish Ministers	The Commissioner accepted that communications between the Ministers 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, were internal.
12	102/2009	David Alexander and Falkirk Council	The Commissioner accepted that communications on the Falkirk Local Plan between the Council and elected members were internal communications as they related to the development of policy. (Correspondence between the Council and an elected member on behalf of a constituent is unlikely to be "internal".)
12	136/2014	Gavin Doig and Glasgow City Council	A planning report which had been published online was not an internal communication.
12	033/2015	Paul Hutcheon and Historic Scotland	Correspondence between the Ministers and Historic Scotland was internal, as Historic Scotland is an executive agency of the Scottish Government.
12	089/2016	Thomas McFadden and East Dunbartonshire Council	This request was for correspondence between the Council and a company which had carried out asbestos sampling on its behalf. The Commissioner found that the communications with the company weren't "internal." A contractual relationship with a third party didn't automatically mean that communications would be viewed as internal.
18	130/2015	Animal Concern and the Scottish Ministers	This involved sea lice infestations at marine salmon farms. The Commissioner agreed, on public interest grounds, that the Ministers could withhold information where disclosure would adversely affect the policy making process. However, the Ministers were ordered to disclose information which was of a factual nature or already public knowledge.
18	039/2016	Tommy Kane and the Scottish Ministers	The Commissioner accepted that, on balance, the public interest lay in withholding the information. The Ministers were at an early stage of policy development on fracking and this work could be side-tracked by the disclosure of the information.

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

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

Other Resources

Paragraph	Resource	Link
4	Directive 2003/4/EC on public access to environmental information	http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF
4	The Aarhus Convention: An Implementation Guide (2 nd edition)	https://www.unece.org/env/pp/implementation_guide.html
17	The Commissioner's guidance on the public interest test in the EIRs	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx
17	Commissioner's guidance on section 29 of FOISA (Formulation of Scottish Administration Policy)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx
17	Commissioner's guidance on section 30 of FOISA (Prejudice to the effective conduct of public affairs)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx

Appendix 2: The exception

Regulation 10

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that -
 - ...
 - (e) the request involves making available internal communications.
- ...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info

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