

# EIRs Guidance

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## Regulation 10(5)(f): Third party interests

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Exception Briefing



Scottish Information  
Commissioner

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## Glossary and abbreviations

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

# The exception

## The exception: main points

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1. Regulation 10(5)(f) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) allows a Scottish public authority to withhold environmental information if its disclosure would, or would be likely to, cause substantial prejudice to the interests of a person who provided information voluntarily to the authority. The exception can only be applied if all three of the following tests are satisfied:
  - (i) The person was not legally obliged (and could not be legally obliged) to supply the information
  - (ii) The person did not supply it in circumstances such that it could be made available except by making a request for it under the EIRs
  - (iii) The person has not consented to the information being disclosed.
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.
3. This exception cannot be used to withhold information on emissions.

## Steps in applying the exception

4. These are the steps an authority must take once it has located and retrieved the requested information:
  - (i) Decide, does the exception apply? The exception must be interpreted in a restrictive way and the authority must apply a presumption in favour of disclosure (regulation 10(2) of the EIRs).
  - (ii) If the exception does NOT apply, the information cannot be withheld under the exception.
  - (iii) If the exception in regulation 10(5)(f) 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

5. 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.)

6. The exception can only be applied where disclosure would, or would be *likely to*, cause *substantial prejudice*. Both of these phrases are considered in more detail below.

## Applying the exception

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7. This exception is designed to encourage the voluntary flow of information to public authorities, for example:
  - (i) information collected from members of the public through research or surveys
  - (ii) privately owned information deposited in a public record office or archive
  - (iii) information obtained through whistleblowing
  - (iv) pre-planning discussions with planning authorities
8. The exception also aims to ensure the voluntary flow of information between companies and their regulators, for example when collecting statistical data or conducting sample surveys. Automatic disclosure of the information could inhibit open and constructive discussions between environmental regulators (such as the Scottish Environment Protection Agency) and industry.
9. There are a number of different factors that need to be considered when applying this exception:
  - (i) Was the information provided by a third party? (“Person” includes a legal person such as a company as well as individuals.) Internal communications and jointly negotiated wording in a contract cannot be withheld under this exception.
  - (ii) Was the provider, or could the provider, be required by law to provide it? If the public authority has the legal power to order the provider to supply the information, the information will not be covered by the exception – regardless of whether the authority has used its power or not.
  - (iii) Is the information otherwise publicly available? If the public can access the information without making a request for it under the EIRs, the exception will not apply.
  - (iv) Has the provider consented to disclosure? According to the Aarhus Convention Implementation Guide (page 89), it’s not enough that the provider has provided the information voluntarily. The provider must also have denied consent for it to be released to the public before the exception can be applied.
  - (v) Would disclosure of the information cause, or be likely to cause, substantial prejudice to the interests of the provider? This is looked at in more detail below.
10. See **Appendix 1: Resources** for a link to the Commissioner’s decisions on this exception.

## “Likely”

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

## “Substantial prejudice”

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12. There is no definition of substantial prejudice in the EIRs, but the damage caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal.
13. Authorities must avoid classifying classes of documents as potentially falling within the exception. As with all exceptions, the use of regulation 10(5)(f) must be justified on a case by case, and document by document, basis. The decision must consider all relevant circumstances present at the time.

## The public interest test

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14. If the exception applies, the authority must go on to consider the public interest in relation to the information. In terms of regulation 10(1)(b), this means assessing whether – in all the circumstances – the public interest 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. See **Appendix 1: Resources** for a link to the guidance.

## Emissions – an important point

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18. Information relating to emissions is given special status under the EIRs. Regulation 10(6) says 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:
  - (i) Regulation 10(5)(d): substantial prejudice to the confidentiality of proceedings
  - (ii) Regulation 10(5)(e): substantial prejudice to the confidentiality of commercial or industrial information
  - (iii) Regulation 10(5)(f): substantial prejudice to the interests of the person who provided the information
  - (iv) Regulation 10(5)(g): substantial prejudice to the protection of the environment

19. There is no definition of “emissions” in the EIRs, or in the European Directive on which they are based. However, both the Aarhus Convention and Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) define emissions as:

*“the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources ... into air, water or land.”*

See **Appendix 1: Resources** for a link to the Aarhus Convention and the 2010 Directive.

20. This is a broad definition. It’s also worth noting that regulation 10(6) applies to information *on* emissions. Again, this suggests that information will not necessarily need to be directly concerning, but merely “relating to” emissions to fall within this provision. See **Appendix 1: Resources** for decisions from the Commissioner on the definition of emission and for a link to a decision from the EU Court of Justice which concluded that information need only

“relate in a sufficiently direct manner to emissions into the environment”.

21. Emissions will include information on past, current and projected future emissions.

# Appendices

## Appendix 1: Resources

### SIC Decisions

Reference	Decision Number	Parties	Summary
10	101/2008	Alistair Johnson and East Renfrewshire Council	This looked at pre-application discussions about a planning application. The Council was unable to show that the third party had refused to consent to the information being disclosed.
10	094/2009	Brian McGregor and Highland Council	This involved a request to the Council for a copy of the business plan for the Highland Housing Fair (HHF). The Commissioner accepted that the information came from a third party who couldn't be required to provide the information. However, the Commissioner didn't accept that disclosure would substantially prejudice Highland Housing Fair's interests.
10	046/2010	Fish Legal and Scottish Natural Heritage	This dealt with a request about salmon farming in Loch Ewe. SNH withheld some information from the Area Management Group (AMG). The Commissioner was satisfied that the information came from the AMG and that the AMG couldn't be legally obliged to provide the information. The Commissioner recognised the need to maintain trust between the AMG and SNH and agreed that some information should be withheld. However, some information was already in the public domain and the Commissioner concluded that that information was not excepted from disclosure.
10	128/2015	James McLean and City of Edinburgh Council	We accepted that information identifying complainants was excepted from disclosure: disclosure would cause substantial prejudice to their interests (such as their right to privacy and to make a complaint to the Council about an issue of concern to them).
10	032/2016	Stewart Dickson and Aberdeenshire Council	Here, the Council argued that the exception could apply to internal communications. The Commissioner disagreed. The Aarhus Convention makes it clear the exception applies only to information from third parties.
10	076/2016	Rob Edwards and the Scottish Ministers	This involved a request for correspondence between Prince Charles and the Alex Salmond. There was no evidence that Prince Charles had refused to consent to the correspondence being disclosed or that

			disclosure would cause substantial prejudice to his rights.
20	242/2014	Friends of Loch Etive (FLE) and Argyll and Bute Council	This involved a planning application for a fish farm at Loch Etive and looked in some detail at the definition of emissions. FLE argued that the operation of marine-cage fish farms involves the discharge of waste food, faeces, chemical therapeutants, etc. into the wider environment and that the Council could not apply the exception in regulation 10(5)(e). The Commissioner concluded that the withheld information – a planning agreement – did not relate in a sufficiently direct manner to emissions into the environment and that regulation 10(6) did not apply.
20	191/2017	Salmon and Trout Conservation Scotland and the Scottish Ministers	The Commissioner was satisfied that information about anti-parasitic medicinal compounds used against sea-lice was information about emissions in line with regulation 10(6) of the EIRs. This meant that the exception in regulation 10(5)(f) could not apply.

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to [www.itspublicknowledge.info/decisions](http://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
5	Directive 2003/4/EC on public access to environmental information	<a href="http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF">http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF</a>
5, 19	The Aarhus Convention: An Implementation Guide (2 <sup>nd</sup> edition)	<a href="https://www.unece.org/env/pp/implementation_guide.html">https://www.unece.org/env/pp/implementation_guide.html</a>
17	The Commissioner's guidance on the public interest test in the EIRs	<a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx">http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx</a>
19	Directive 2010/75 on industrial emissions (integrated pollution prevention and control)	<a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0075">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0075</a>
20	Stichting Greenpeace Nederland and PAN Europe v European	<a href="http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d50ffe3a3616264ce38aaba75a1a47300c.e34KaxiLc3eQc40LaxqMbN4PaxuPe0?text=&amp;docid=1427">http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d50ffe3a3616264ce38aaba75a1a47300c.e34KaxiLc3eQc40LaxqMbN4PaxuPe0?text=&amp;docid=1427</a>



	Commission T-545/11	<a href="#">01&amp;pageIndex=0&amp;doclang=EN&amp;mode=lst&amp;dir=&amp;occ=first&amp;part=1&amp;cid=355040</a>
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## Appendix 2: The exception

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### Regulation 10

- (1) A Scottish public authority may refuse a request to make environmental information available if-
  - (a) there is an exception to disclosure under paragraphs (4) or (5); and
  - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.
- ...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
  - ...
  - (f) the interests of the person who provided the information where that person –
    - (i) was not under, and could not have been put under, any legal obligation to supply the information;
    - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
    - (iii) has not consented to its disclosure; ...
- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).

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