

EIRs Guidance

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

Exception Briefing



Scottish Information
Commissioner

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Glossary and abbreviations

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

Cross-referenced VC documents (for internal use)

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

The exception

The exception: main points

1. Regulation 10(5)(c) 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 intellectual property (IP) rights. IP rights include things like copyright.
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(5)(b) 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.)
5. The exception can only be applied where disclosure would, or would be *likely to*, cause *substantial prejudice*. Both of these phrases are considered in more detail below.

What are intellectual property rights?

6. There are lots of different types of intellectual property (IP) rights. IP rights give the owners of certain intangible (incorporeal) assets an exclusive right to those assets. The types of IP rights which are likely to be most relevant when considering requests under the EIRs are:
 - (i) Copyright
 - (ii) Database rights
 - (iii) Copyright in databases.
7. Copyright covers a wide range of recorded information, including original literary work (this includes computer programs and databases) and original musical or artistic works.
8. Databases contain existing information that has been collated and presented in a way that makes it more useful. As well as the actual contents of the database attracting copyright, the way the information has been collated and presented can also attract copyright.
9. Database rights protect the significant work that goes into gathering the material to be included in the database, verifying and presenting that information in the database, and then maintaining the database.
10. There are two important pieces of legislation concerning IP rights. The Copyright, Designs and Patents Act 1988 (the CDPA) deals with copyright, including copyright in databases, and defines what a database is. The Copyright and Rights in Databases Regulations 1997 (CRDR) establish what database rights are. See **Appendix 1: Resources** for a link to the legislation.
11. As a general rule, IP rights belong to the author or creator of the asset (unless the asset is created in the course of employment, in which case the IP rights will belong to the employer). This means that a public authority will generally own the IP rights to any information created by its staff. However, public authorities will not own the copyright for information they receive from third parties. For example, a local authority's Planning Department is likely to hold plans produced by architects in private practice. The copyright in the plans will belong to the architect, not to the local authority.
12. Where a public authority has commissioned a third party to carry out work on its behalf, the terms of the contract between it and the third party will set out who owns the IP rights. It's worth noting that, if a third party owns the IP rights and a public authority makes the information available under the EIRs, making the information available will not of itself breach the rights of the third party. This is because of regulation 5(3) of the EIRs, which states:

Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.
13. Although public authorities are allowed to disclose information protected by IP rights without breaching the rights of the third party, the IP rights continue to exist after the information has been disclosed. This means that the requester will be limited in what they can do with the information because it is still protected.
14. However, because of what is known as the "fair dealing provisions", requesters will be able to use IP protected information for certain, limited purposes, provided the holder of the IP right is credited. See **Appendix 1: Resources** for a link to further guidance on the fair dealing provisions.

Applying the exception

15. In order to apply the exception in regulation 10(5)(c), a public authority must be able to demonstrate that:
 - (i) The environmental information is protected by IP rights
 - (ii) The IP right holder would suffer harm. It is not enough to show that IP rights would be infringed – disclosure must either prejudice substantially, or be likely to prejudice substantially, the IP rights.
 - (iii) The harm would result from the infringement of the IP right, for example by the third party losing control over how the information is used and by whom; and
 - (iv) The harm could not be prevented by enforcing the IP rights. In many cases, in order to exploit the material, it will be necessary to market whatever product or service has been developed using the information. This means that any infringement will often be easy to detect.
16. The Commissioner has issued only one decision on the exception in regulation 10(5)(c) – see **Appendix 1: Resources** for a link to the decision.

“Likely”

17. 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”

18. 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.
19. Authorities must avoid classifying classes of documents as potentially falling within the exception. As with all exceptions, the use of regulation 10(5)(c) 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

20. If the exception applies, the authority must go on to consider the public interest in relation to the information. In terms of regulation 10(1)(b), this means assessing whether – in all the circumstances – the public interest in making the information available is better served by withholding the information or making it available. The authority must identify the competing arguments for these two outcomes and must carry out a balancing exercise to determine where the public interest lies in that particular case.
21. In carrying out the balancing exercise, the authority must take account of the explicit presumption in favour of disclosure in regulation 10(2)(b).

22. 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).
23. The Commissioner has published guidance on the public interest test. See **Appendix 1: Resources** for a link to the guidance.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision Number	Parties	Summary
16	049/2016	Victor FJ Jordan and Scottish Environment Protection Agency	This involved a request about a flood map. SEPA withheld some information on the basis that it had obtained the relevant datasets under licence and disclosure under the EIRs would breach the terms of that licence. We agreed that disclosure would substantially prejudice the rights of the person who held intellectual property rights in the database. We also agreed that, on balance, the public interest lay in maintaining the exception. If SEPA were to breach the terms of their licence, there was a real risk that licensors would, in future, refuse to provide data to SEPA. This would harm SEPA's ability to carry out its functions related to assessing flood risk and providing expert advice to communities and planners about flood risk.

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

10	Copyright, Designs and Patents Act 1988	http://www.legislation.gov.uk/ukpga/1988/48/contents
10	Copyright and Rights in Databases Regulations 1997	http://www.legislation.gov.uk/uksi/1997/3032/contents/made
14	UK Government advice on the fair dealing provisions	https://www.gov.uk/guidance/exceptions-to-copyright
23	The Commissioner's guidance on the public interest test in the EIRs	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx

Appendix 2: The exception

Regulation 10

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

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