# Exemption Briefing Series

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## Health, safety and the environment

## Executive Summary

- This briefing provides guidance on the consideration and application of the exemptions under section 39 (Health, safety and the environment) of the Freedom of Information (Scotland) Act 2002 (FOISA), and the exceptions under regulations 10(5)(a) and (g) of the Environmental Information (Scotland) Regulations 2004 (the EIRs).

- Section 39 contains two quite different exemptions. One applies where disclosure of information would, or would be likely to, endanger the physical or mental health or the safety of any person. The second applies to any information that is "environmental information" as defined in the EIRs.

- The health and safety exemption only applies where it can be demonstrated that a degree of harm would be likely to follow from disclosure, but the test of "endangerment" contained in this test is less demanding than the "substantial prejudice" test which applies in other exemptions contained in FOISA.

- The environmental information exemption provides a mechanism to enable public authorities to fulfil their obligations to meet their duties under both FOISA and the EIRs.

- Each of the relevant FOISA exemptions and the EIR exceptions is subject to the public interest test.

**This briefing is intended to provide *general* guidance on the interpretation and application of the relevant section. Please remember that all requests for information must be considered on a case by case basis, and the Commissioner's decision is made on the basis of the specific circumstances of each case.**

# The FOISA Exemption – Section 39

## Part 1: What does the law say?

**Section 39 (Health, safety and the environment)**

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

(2) Information is exempt information if a Scottish public authority –

(a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or

(b) would be so obliged but for any exemption contained in the regulations

(3) Subsection (2)(a) is without prejudice to the generality of section 25(1).

## Part 2: Background to the exemption

### 2.1 Interpreting the exemption

Section 39 of FOISA covers information which would, or would be likely to, endanger the physical or mental health or the safety of an individual. It also sets in place mechanisms to allow environmental information to be handled in accordance with the EIRs. There are, therefore, **two** distinct exemptions contained within section 39:

**Section 39(1): (Health and safety)**
Section 39(1) provides that information is exempt from disclosure where this would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is not the usual test of substantial prejudice found in a range of other exemptions in FOISA.

**Section 39(2) (Environmental information)**
The EIRs are the means through which European Union Directive 2003/4/EC on public access to environmental information is incorporated into Scots Law. The Directive itself stems from the Aarhus Convention.
FOISA imposes a duty on all Scottish public authorities to respond to information requests for any information which they hold, environmental and non-environmental. So a request for environmental information is also a valid information request under FOISA. Section 39(2)(a) 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.

**Comment [KD1]:** Is this really a sufficient test to satisfy would or would be likely to endanger

**Comment [s2]:** Could we change this to "likelihood"? This would be stronger – and the test in FOISA is of likelihood, which is more about clear anticipation than subjective apprehension.

**Deleted:** By referring instead to the endangerment" of health or safety, the harm test in section 39(1) has been set at a lower level than the test of substantial prejudice found in other exemptions in FOISA. However, there must still be an apprehension of danger before the exemption can be relied upon.¶

**The public interest test**
Each of the exemptions in section 39 of FOISA is subject to the public interest test. This means that even where public authorities consider that the exemption applies, the information should nevertheless be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing it. If the two are evenly balanced, the presumption should always be in favour of disclosure. (See **Part 3: Applying the exemption** for further information on the use of the public interest test).

## 2.2 Glossary of terms

**Regulations under section 62:** this refers to the EIRs.

**Aarhus Convention**: The United Nation's Economic Commission for Europe's (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (known as The Aarhus Convention,) was adopted by the European Community in 1998. It gives the public a right to access environmental information.

## 2.3 Duration of the exemption

There is no limit on the duration of these exemptions, which can apply to relevant information in perpetuity.

**Resources:**

*Environmental Information (Scotland) Regulations 2004*
The full text of the EIRs can be found at:
www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm

*Other resources*
The UNECE has published an Aarhus Convention Implementation Guide. It can be found at
www.unece.org/env/pp/acig.htm

# Part 3: Applying the exemption

Details of the tests and considerations which are required for the application of the exemptions in section 39 of FOISA are set out below.

## 3.1 Section 39(1) – health and safety

### a) Would disclosure endanger any person's health and safety?

The key test which must be considered is whether the release of information would, or would be likely to, endanger the physical or mental health or the safety of an individual.

Danger to physical health could mean danger to someone as a result of physical injury, illness or disease. It could also mean causing someone mental ill health as a result of the release of information.

**Deleted:** Mental health should not be confined to a medical diagnosis of mental illness, but may also include consideration of a person's mental wellbeing.

Generally, there is little difference between endangerment to someone's "physical or mental health" or to their "safety". However, the two separate terms do have slightly different definitions. "Safety" refers to a person's wellbeing or to their security. It suggests freedom from danger as well as protection from, or not being exposed to, the risk of harm or injury.

The person concerned may be a single individual, or a member of a group or class of people with similar interests, all or any of whose health and safety is likely to be endangered by the disclosure of information. However, a public authority must be able to evidence that there will be some endangerment to health and safety (see below) and the wider the group which it is claimed will be endangered, the more difficult this is likely to be. This is particularly the case when considering endangerment to mental health and where the public authority would be expected to provide evidence or indicate the qualified authority which would lead to a conclusion that that there will be endangerment to mental health. In general the exemption should not be relied upon to withhold what an authority may considers to be distasteful information from release, on the basis of a general claim that one or more members of the public may be distressed by the information; nor should it be claimed that the prospect of disclosure may be stressful to individuals and as such would or would be likely to endanger a person's mental health. Authorities would have to consider whether they would be in a position to substantiate such claims without a professionally qualified opinion regarding a specific individual that the effect of disclosure amounted to endangerment

The term "endanger" is not defined in FOISA, but the Commissioner's view is that it is broad enough to apply where there is the threat to the health or safety of a person which would foreseeably arise in the future as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. There must, however, be some well-founded apprehension of danger.

The meaning of the word "likely" is open to interpretation. The general legal principle was explained by Chadwick LJ (in Three Rivers District Council v Governor and Company of the Bank of England (No 4) [2002] EWCA Civ 1182, [2003] 1 WLR 210) when he said that "likely" does not carry any necessary connotation of "more probable than not". It is a word which takes its meaning from the context. In other judgements "likely" has been taken to mean "may well", or it has been held that "likely" implies a substantial rather than a merely speculative possibility, a possibility that cannot sensibly be ignored.

In line with this interpretation, the Commissioner considers that for him to conclude that endangerment would be likely, he will require there to be a well-founded apprehension of actual harm, such that the prospect of harm could be regarded as a distinct possibility.

Where there is a real possibility that disclosure of information would, or would be likely to, endanger the physical or mental health or the safety of an individual, the Commissioner would clearly wish to safeguard against that eventuality. However, he will require the public authority to provide him with evidence not just that such an eventuality is within the bounds of possibility, but that such an eventuality has some realistic prospect or degree of likelihood of occurring.

Key cases where the Commissioner has considered Section 39(1) include:

- In **Decisions 033/2005: Mr Paul Hutcheon and the Scottish Parliamentary Corporate Body** and **198/2007: Mr Simon Johnson and the Scottish Ministers** the Commissioner considered whether disclosure of information relating to travel by two MSPs (one a former Transport Minister) would be likely to endanger their health and safety. In each case, it was argued that disclosure would reveal a pattern of movement by the individual, which would in turn be likely to compromise the safety of these recognisable individuals. The Commissioner did not accept the application of section 39(1) in either decision. He noted that no specific threat to the individuals concerned had been raised. He also considered the extent to which patterns of movement could be deduced from the information, and in particular noted that this was limited when information about times of journeys was not also available.

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**Comment [KD3]:** Is it possible to endanger the mental health of a group. Are we effectively saying that if release would cause distress or alalrm to (individually unidentified ) members of a group eg to the familiy friends and relatives of a deceased person, then this would be sufficient to endanger an individuals mental health? This is the basis of the Decision 34/2007 but I am uncomfortable with it being used as the basis for future arguments for collective mental health endangerment

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**Comment [m4]:** Kevin – not sure if this goes far enough for you. MK

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**Comment [s5]:** Suggest change to "real likelihood" as p2

**Deleted:** reasonable

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**Deleted:** The Commissioner has adopted similar reasoning in his consideration of the test required under this exemption, and requires that authorities are able to

**Deleted:** will look for some

**Deleted:** evidence, in the event of an application, that there is a real likelihood of the risk cited

**Deleted:** is real and not just hypothetical

**Deleted:** . He has rejected the use of this exemption in cases where authorities have provided only assertions of an apprehension of danger without substantive evidence of the likelihood that damage will occur. In general, providing evidence to support the likelihood of danger to safety is more straightforward than demonstrating danger to health. In the Commissioner's experience, authorities often find it particularly difficult to support assertio ... [1]

- In **Decisions 034/2007: The Sportsman's Association of Great Britain and Northern Ireland and the Chief Constable of Central Scotland Police** and **041/2008: Mr William Scott and the Chief Constable of Central Scotland Police** the Commissioner considered whether the release of photographs taken in Dunblane Primary School following shootings (which killed 16 pupils and a teacher) in 1996 would be likely to endanger an individual's mental health. In both cases, the police argued that disclosure would be likely to cause enormous distress to those affected by the shootings and the wider Dunblane community, and that that distress would, or would be likely to, endanger the mental health of some of people concerned. The Commissioner accepted that the exemption applied on this basis, noting that the photographs collectively revealed the scene of a crime that caused shock and revulsion, and which remains an emotive subject for people directly involved.

- In **Decision 178/2006: Mr John Rowbotham and the Chief Constable of Strathclyde Police** the Commissioner considered the effect of the release of statistical information relating to sex offenders. The police submitted that release of the information may encourage members of the community to try and identify the offenders in question and that this would be likely to lead to disorder which could be harmful to public safety. The Commissioner considered that, given the size and nature of North and South Lanarkshire (which each contain a number of sizeable towns), he did not consider that the anticipated endangerment to individuals was likely and he did not consider that the release of the information would assist anyone in attempting to identify individual offenders. Consequently, he did not accept that disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual. He required the police to release the information.

- **Decisions 030/2006: Mr David Ewen and the Chief Constable of Grampian Police** and **139/2006: Mr James Robertson and the Chief Constable of Lothian and Borders Police -** consider whether the section 39(1) exemption applies to information about the number of drivers caught by individual speed cameras. In both cases the Police argued that revealing the number of drivers caught by individual cameras would be likely to enable drivers to assess their chances of being caught and encourage them to drive at excessive speeds in the presence of certain cameras. This was claimed to be likely to endanger the health and safety of road users. The outcome in the two cases differed in the light of the Commissioner's analysis of the nature of the safety camera and the associated deterrent effect they created.
  The first of these decisions (Grampian Police) concerned the number of drivers caught speeding at fixed camera locations, where road users do not know whether a camera is operational at any given time. The Commissioner accepted the argument that disclosure of the information requested would allow drivers to assess their chances of being caught and encourage them to drive at excessive speeds. As a result, the Commissioner agreed that disclosure of the information would be likely to endanger the health and safety of road users.
  That decision can be contrasted, however, with the second decision (Lothian and Borders Police) which concerned data relating to a mobile safety camera. The police argued that disclosure of the information would allow users to identify the deployment strategy for these units. In this case, the Commissioner did not accept that the exemption applied. He pointed out that a mobile camera is always operational when it is present at a site, creating a deterrent as a result of its visible presence. The Commissioner did not accept that the type of analysis described by the police would be likely to endanger the health and safety of road users, since whatever the outcome of that analysis, a mobile unit will always be visible wherever it is used.

- In **Decision 055/2005: Russ McLean and Caledonian MacBrayne** the Commissioner considered a request for a copy of detailed plans of a vehicle and passenger ferry. Caledonian MacBrayne argued that release of the information could reveal sensitive areas of the vessel that could endanger the health and safety of passengers and crew by risking the security of the vessel. The Commissioner was satisfied that release of the information could undermine the operator's responsibilities to ensure the safety and security of the vessel and that the exemption had been correctly applied.

**b) Where does the public interest lie in relation to the information?**

Even in circumstances where the section 39(1) exemption is found to apply, the authority must nevertheless go on to consider the public interest in relation to the information. This public interest test assesses whether, in all the

circumstances of the case, the public interest is best served by disclosing or withholding the information. This involves a balancing exercise. There is an in-built presumption in FOISA that it is in the public interest to disclose information unless a public authority can show why there is a greater public interest in withholding the information.

FOISA does 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 held that the public interest does not mean what is of interest to the public, but what is in the interest of the public.

To date, the Commissioner has not required disclosure of any information that was found to be exempt under section 39(1). In each case where he has considered the public interest in relation to relevant information, he has found that the public interest favours withholding the information concerned. The Commissioner has recognised that there is a significant public interest in protecting individuals' health and safety and it is clear that there would need to be significant public interest in favour of disclosure to outweigh the public interest in withholding information which would endanger health and safety.

The Commissioner has produced separate guidance to assist with the consideration of the public interest test. This is available from the Commissioner's website (see **Resources** box at the end of this section).

### 3.2 Section 39(2) – environmental information which authorities are required by the EIRs to make available

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 (see **Resources** box below). 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 AD Hawkins and Transport Scotland**. *The key* conclusions about the relationship between FOISA and the EIRs set out in this decision were:

- The definition of what constitutes environmental information should not be viewed narrowly.
- There are two separate frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
- Any request for environmental information must be dealt with under the EIRs.
- In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
- If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 of FOISA.
- The Commissioner is entitled (and indeed obliged), where he considers that a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
- If environmental information is required to be disclosed under the EIRs, it must be supplied, even if it could be withheld under the terms of FOISA.

The Commissioner has created a flowchart with associated guidance to assist public authorities in handling requests for environmental information (See Resources box below).

The following sets out the key considerations when applying the exemption in section 39(2) of FOISA.

**a) Is the information environmental information?**

The key question that must be considered when applying this exemption is whether (some or all of) the information requested is environmental information for the purposes of the EIRs. The definition of environmental information contained in regulation 2 [see **Resources** box at the end of this section] is broad, and the Commissioner has made clear that it should not be construed narrowly, but in line with the wide definition in regulation 2.

Some types of information (such as water quality or emissions data) will clearly be environmental. Other types of information will also generally be environmental, for example, that information relating to the planning process, will generally fall within the scope of part (a) and/or (c) of the definition. However, it is important to remember that the test of whether information is environmental information requires consideration of the **content** of the information requested rather than making a judgement on the basis of the request alone.

The Commissioner has accepted that a range of information falls within the scope of the definition of environmental information in the following cases:

- **Decision 036/2006 - Mr Gary Bellfield and Fife Council** – information relating to traffic calming measures.
- **Decision 182/2006 – Mr Bruce Sandison and the Fisheries Research Service** – name of a fish farm from which salmon had escaped.
- **Decision 025/2007 – Mr Rob Edwards and the Scottish Executive** - information relating to a decision to reject the proposed trial reintroduction of the European Beaver.
- **Decision 129/2007 MacRoberts Solicitors and Aberdeenshire Council** – notices or orders (concerning nuisances such as noise or odour) made under the Environmental Protection Act 1990.
- **Decision 218/2007: Professor AD Hawkins and Transport Scotland** – information relating to the Scottish Ministers' decision regarding the route for the Aberdeen Western Peripheral Route.
- **Decision 040/2008: Mr Rob Edwards and the Scottish Ministers** – communications between the Scottish and UK Governments concerning the possibility of building new nuclear power stations or proposals to extend the lives of existing nuclear stations.

In other cases, the Commissioner has considered whether information is environmental information, but concluded that it is not, for example:

- **Decision 224/2006: Mr Alex Gordon-Duff and the Scottish Executive** and **126/2007: Mr Rob Edwards and the Scottish Executive** – payments made under agricultural subsidy and grant schemes.
- **Decision 030/2005: Millar and Bryce Ltd and East Renfrewshire Council** – list of ('adopted') public roads

If an authority decides that the information which has been requested is environmental information, it should apply the exemption in section 39(2) and consider the information request under the EIRs. If it does not consider that the information is environmental information, it should respond to the request under FOISA.

**b) Where does the public interest lie?**

As with section 39(1), even in circumstances where the section 39(2) exemption is found to apply, the authority must

nevertheless go on to consider the public interest in relation to the information. However, the Commissioner has noted that it is difficult to see how the Scottish Parliament intended in practice that the public interest test should be applied to information falling under the scope of this exemption. He has made clear, for example in **Decision 230/2007 Mr Gordon Watson and Scottish Water**, that since there is a separate statutory right of access to environmental information, it is his view that the public interest in maintaining the section 39(2) exemption in FOISA (so allowing disclosure or refusal in line with the requirements of the EIRs) generally outweighs the public interest in the disclosure of information under FOISA.

This same view is likely to be taken in future cases where public authorities apply section 39(2) of FOISA and go on to consider a request for environmental information fully in terms of the EIRs. It should be noted that this view on the public interest in maintaining the exemption in FOISA is entirely separate from any separate consideration of whether the information should be supplied or withheld under the EIRs.

**c) What next?**

As noted above, section 39(2) is a technical exemption. Its application does not mean that a requestor is not entitled to access the information concerned, but that the authority will go on fully to consider the information and whether it should be disclosed solely in terms of the EIRs.

Authorities can choose not to rely upon any exemption in FOISA and so can choose not to apply section 39(2) to information that is environmental information. However, where they adopt this approach, authorities will need to ensure that their decision has regard to the requestor's rights under both FOISA and the EIRs. These are entirely separate, and so if one law allows information to be withheld but the other requires disclosure, the information must still be disclosed to the requestor.

In **Decision 218/2007 Professor AD Hawkins and Transport Scotland**, the authority did not accept the Commissioner's view that the information under consideration (communications relating to the choice of route for a significant road development) was environmental information, and so declined to apply the exemption in section 39(2) of FOISA. The Commissioner concluded that the information was environmental information nonetheless, and as a result went on to consider the request in terms of both FOISA and the EIRs. He found that none of the exemptions cited under FOISA, nor any exception under the EIRs, applied to the information under consideration. He consequently found that Transport Scotland had breached the requirements of both Part 1 of FOISA and the EIRs in responding to the information request.

In many cases, public authorities have considered requests for environmental information solely under the EIRs, without explicitly stating that they had applied the exemption in section 39(2) of FOISA. In such cases, the Commissioner will generally seek confirmation that the public authority has relied upon the exemption in section 39(2) when considering the request under FOISA. When a request is made for environmental information under FOISA and the authority is correctly responding under the EIRs, it is still good practice to tell the requester that the FOISA exemption has been applied.

**Resources: Section 39**

*Commissioner's Decisions:*
The full text of all of the Commissioner's decisions, including those referenced above, can be viewed on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 0xx/200x) in the 'Search' bar.

*The Public Interest Test:*
The Commissioner's briefing on the public interest test is available at www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest.

*Environmental Information (Scotland) Regulations 2004:*
The full text of the EIRs can be found at: www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm#2

*Flowchart*
The Commissioner has produced a flowchart to assist authorities to manage the relationship between the EIRs and FOISA when responding to requests for environmental information.
www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?lID=2593&sID=87

*Definition of environmental information*

Regulation 2(1) of the EIRs states that "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);

*If you do not have access to the internet, then you can contact our office to request a copy of any of the Commissioner's briefings or decisions. Contact details are available at the end of this document.*

## The EIR Exceptions – Regulation 10(5)(a) and 10(5)(g)

The EIRs contain two exceptions from disclosure which are related to, but are not direct equivalents of, those contained in section 39(1) of FOISA:

**Regulation 10(5)(a)** of the EIRs provides that 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 public safety. The Commissioner has not yet dealt with any applications where an authority has cited regulation 10(5)(a). However, it should be noted that the test required for applying this exemption is much higher than the test of "endangerment" contained in section 39(1) of FOISA.

**Regulation 10(5)(g)** provides that 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 the protection of the environment to which the information relates. Regulation 10(5)(g) is subject to the provisions of regulation 10(6), which states that this (and a number of other exceptions) cannot be applied to information on emissions. The term "emissions" has been defined in Council Directive 96/61/EC of 24 December 1996 as "a direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land".

**FOISA and EIRS: The differences**

Whereas FOISA refers to "exemptions" which an authority may apply to information, these are referred to as "exceptions" under the EIRs in relation to environmental information. All of the exceptions in the EIRs are subject to the public interest test under regulation 10(1)(b).

Regulation 10(2) states: "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".

The public interest test is similar to that in section 2(1)(b) of the FOISA. Under the EIRs, a Scottish public authority may only refuse to make environmental information available if the public interest in making it available is outweighed by that in maintaining the relevant exception.

This regulation builds in a presumption in favour of disclosure which means that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed.

The exemption in regulation 10(5)(g) and public interest test were considered in **Decision 044/2007: Mr G Crole and Transport Scotland**

An application for information concerning badger surveys was refused under regulation 10(5)(g). The public authority was concerned that the information might fall into the hands of people who would abuse the animals and that any diminution of a natural resource was against the public interest.

In this case, the Commissioner accepted that the information could, if misused, endanger the badgers' habitat and increase the likelihood that the badgers' habitat would be endangered. The Commissioner concluded that the public interest arguments put forward by the public authority were compelling and outweighed any public interest in disclosure of the information.

**Resources: EIRs**

*Environmental Information (Scotland) Regulations 2004:*
The full text of the EIRs can be found at: www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm#2

*Commissioner's Decisions:*
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. He has rejected the use of this exemption in cases where authorities have provided only assertions of an apprehension of danger without substantive evidence of the likelihood that damage will occur. In general, providing evidence to support the likelihood of danger to safety is more straightforward than demonstrating danger to health. In the Commissioner's experience, authorities often find it particularly difficult to support assertions that release of information would be likely to endanger mental health.