

FOISA Guidance

Section 39: Health, Safety and the Environment

Exemption Briefing



Contents

Glossary and abbreviations	i
The exemption	1
The exemption: the main points	1
Steps in applying the exemption	1
Section 39(1) – Health and safety	1
Section 39(2) – The environment	3
Appendices	5
Appendix 1: Resources	5
SIC Decisions	5
Other Resources.....	8
Appendix 2: The exemption	9
Appendix 3: Flowchart	10
Document control sheet	11

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 Section 60 Code	The Scottish Ministers’ Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 (December 2016 version)
“The regulations” or “Regulations under section 62”	The EIRs

The exemption

The exemption: the main points

1. Section 39 of the Freedom of Information (Scotland) Act 2002 (FOISA) contains two unrelated exemptions. Information may be withheld if:
 - (i) disclosure would, or would be likely to, endanger the physical or mental health or safety of an individual (section 39(1)); or
 - (ii) it is environmental information and the public authority is obliged to make it available under the Environmental Information (Scotland) Regulations 2004 (the EIRs). This is a technical exemption which allows public authorities to respond to requests for environmental information under the EIRs without considering the request under FOISA.
2. Both of the exemptions are subject to the public interest test. This means that, even if an exemption applies, the information must be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing it.
3. The exemptions in section 39 last in perpetuity. This means they can be applied to information regardless of how old it is.
4. Where the exemption in section 39(1) (**not** section 39(2)) applies, a public authority can refuse to confirm or deny whether it holds the information, provided it is satisfied that revealing whether the information exists or is held would be contrary to the public interest (section 18 of FOISA).

Steps in applying the exemption

5. Once an authority has located the information it must:
 - (i) Decide, does the exemption apply?
 - (ii) If the exemption does NOT apply, the information cannot be withheld under the exemption (although it might be exempt for other reasons).
 - (iii) If satisfied the exemption applies, apply the public interest test.
 - (iv) If the public interest in disclosure outweighs that in maintaining the exemption, the exemption does not apply and the information cannot be withheld under section 39.
 - (v) If the public interest in withholding outweighs that in disclosing the information, it can be withheld.

Section 39(1) – Health and safety

6. Section 39(1) of FOISA allows public authorities to refuse to disclose information if disclosure would, or would be likely to, endanger an individual's:
 - (i) physical health;
 - (ii) mental health;
 - (iii) safety.

“Likely”

7. The exemption can only be applied where disclosure would, or would be likely to, endanger an individual’s health or safety. There must be at least a significant probability that health or safety would be endangered for the exemption to be applied. There must also be a genuine link between disclosure and the endangerment: it cannot simply be a remote or hypothetical possibility.

“Endangerment to health or safety”

8. Danger to physical health could mean danger to someone as a result of physical injury, illness or disease. It could also mean damaging someone’s mental health as a result of the release of information.
9. “Safety” refers to a person’s wellbeing or to their security. It suggests freedom from danger as well as protection from the risk of harm or injury.
10. It may be a single individual whose health or safety is likely to be endangered by the disclosure of information, or it may be a group of people.
11. A public authority must be able to evidence that there will be some endangerment to the health or safety of the person(s) in question. The wider the group which it is claimed will be endangered, the more difficult this is likely to be, particularly when arguing endangerment to mental health. In general, the exemption should not be used to withhold information an authority considers to be “distasteful”, on the basis that one or more members of the public may be distressed by the disclosure of the information.
12. 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. The Commissioner will require the public authority to 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.

Where does the public interest lie in relation to the information?

13. 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”. The public interest does not mean what is of interest to the public, but what is in the interest of the public.
14. If the exemption applies, the authority must go on to consider the public interest in relation to the information – see section 2(1)(b) of FOISA. This means assessing whether, in all the circumstances of the case, the public interest is better served by disclosing the information or by maintaining the exemption. The authority must identify and set out the competing arguments and then carry out an exercise to determine where, on balance, the public interest lies. 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 maintaining the exemption.
15. The Commissioner has produced separate guidance on the public interest test - see **Appendix 1: Resources**. To date, the Commissioner has not required any authority to disclose, on public interest grounds, information which would endanger health or safety. There is clearly a significant public interest in protecting individuals’ health or safety and there would need to be a significant public interest in favour of disclosing the information to

outweigh the public interest in withholding information which would endanger health or safety.

16. See **Appendix 1: Resources** for examples of decisions where the Commissioner has considered the exemption.

Section 39(2) – The environment

17. Scottish public authorities are required, by FOISA, to respond to requests for information they hold. The definition of “information” in section 73 of FOISA is “information recorded in any form”. The definition of information in FOISA includes environmental information.
18. The Environmental Information (Scotland) Regulations 2004 (the EIRs) require Scottish public authorities to respond to requests for environmental information.
19. This is where section 39(2) of FOISA comes into play. The exemption in section 39(2) is essentially a technical provision. It allows public authorities to exempt environmental information from disclosure under FOISA and allows them to go on to consider the request solely in terms of the EIRs.
20. The Commissioner has created a flowchart to assist public authorities in handling requests for environmental information (**see Appendix 3: Section 39(2) Flowchart**).

Is the information environmental information?

21. 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 in the EIRs is set out in **Appendix 2**.
22. Some types of information (such as water quality or radiation levels) will clearly be environmental. Other types of information, for example, information relating to the planning process, will generally fall within the scope of part (a) and/or (c) of the definition.
23. The following are examples of the different types of information the Commissioner has considered to be environmental information:
 - (i) traffic calming measures (Decision 036/2006)
 - (ii) the name of a fish farm from which salmon had escaped (Decision 182/2006)
 - (iii) a decision to reject the proposed trial reintroduction of the European Beaver (Decision 025/2007)
 - (iv) the Scottish Ministers’ decision regarding the route for the Aberdeen Western Peripheral Route (Decision 218/2007)
 - (v) 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 (Decision 040/2008)
 - (vi) a communication strategy relating to the conservation of the red squirrel (Decision 063/2008)
 - (vii) a policy detailing how compensation claims for pothole damage are handled (Decision 174/2013)

24. When deciding whether a request should be considered under the EIRs, public authorities need to think about the information which answers the request. For example, if a requester asks why a swimming pool was closed on a particular day, and the pool was closed because staff were taking part in industrial action, the request should be responded to under FOISA. If the pool was closed because there had been a chemical leak, then the request should be responded to under the EIRs.
25. The Commissioner has issued separate guidance on the definition of environmental information. See **Appendix 1: Resources** for a link to the guidance,

Where does the public interest lie?

26. The exemption in section 39(2) is subject to the public interest test (see also paragraphs 13 to 14). Given the separate statutory right to access environmental information under the EIRs, the public interest in maintaining the section 39(2) exemption in FOISA will generally outweigh the public interest in disclosing environmental information under FOISA.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision number	Parties	Summary
Section 39(1) Paragraph 16	055/2005	Russ McLean and Caledonian MacBrayne	Mr McLean asked for the detailed plans of a vehicle and passenger ferry. CalMac argued that disclosing the information could reveal sensitive areas of the vessel and could endanger the health or safety of passengers and crew by risking the security of the vessel. We were satisfied that disclosing the information could undermine the operator's responsibilities to ensure the safety and security of the vessel.
Section 39(1) Paragraph 16	030/2006	David Ewen and the Chief Constable of Grampian Police	This decision involved a request for the number of drivers caught speeding at fixed camera locations, where road users don't know if a camera is operational. The Police argued that revealing the number of drivers caught by individual cameras would allow drivers to assess their chances of being caught and encourage them to drive at excessive speeds. We agreed that disclosing the figures would encourage drivers to drive at excessive speed and endanger the health or safety of road users.
Section 39(1) Paragraph 16	034/2007 041/2008	The Sportsman's Association of Great Britain and Northern Ireland and the Chief Constable of Central Scotland Police William Scott and the Chief Constable of Central Scotland Police	We considered whether disclosing photographs taken in Dunblane Primary School following the shootings in 1996 (which killed 16 pupils and a teacher) would endanger mental health. The Police argued that disclosure would cause enormous distress to those affected by the shootings and to the wider Dunblane community. This distress would endanger mental health. We accepted that the exemption applied, noting that the photographs

Reference	Decision number	Parties	Summary
			revealed the scene of a crime that caused shock and revulsion, and which remained an emotive subject for the people directly involved.
Section 39(1) Paragraph 16	182/2014	Andrew Picken and the Scottish Ministers	Mr Picken wanted to know about Scottish Government Ministers' (excluding the First Minister) travel and subsistence. The Ministers argued that this could endanger their (and others') safety, given that they often used the same hotels when travelling. This could allow patterns of movement to be identified. We recognised that, where potential security risks are concerned, it is appropriate to take a cautious approach. However, the Ministers did not satisfy us that disclosure would increase the risk of endangerment.
Section 39(1) Paragraph 16	200/2014	Eddie Nisbet and Police Scotland	Mr Nisbet asked the Police about incidents which had taken place at a night club which had since closed. The Police argued that disclosing information would endanger health or safety – they were concerned that licensees would be less likely to work with them in the future, for fear of giving their premises a bad reputation. In turn, safety in licensed premises would decrease. We recognised the concerns raised by the Police, but did not agree that disclosing the particular information Mr Nisbet had asked for would cause the necessary harm.
Section 39(2) Paragraph 20	218/2007	Prof AD Hawkins and Transport Scotland	This decision was the first to set out our understanding of the relationship between FOISA and the EIRs – and how the exemption in section 39(2) works in practice. Our key conclusions were: <ul style="list-style-type: none"> • there are two separate frameworks for access to environmental information and an authority is required to consider any request for environmental information under

Reference	Decision number	Parties	Summary
			<p>both FOISA and the EIRs;</p> <ul style="list-style-type: none"> • 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 claim the section 39(2) exemption, it must deal with the request fully under FOISA as well as under the EIRs; • where a request for environmental information has been dealt with under FOISA, the Commissioner is required to consider how it should have been dealt with under the EIRs; • if the EIRs require a public authority to make environmental information available, the information must be disclosed, even if it could be withheld under FOISA.

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
15	Public interest test guidance	FOISA: http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx EIRs: http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx
25	"What is environmental information?"	http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx

Appendix 2: The exemption

Freedom of Information (Scotland) Act 2002

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 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).

Environmental Information (Scotland) Regulations 2004

Regulation 2: Interpretation

- (1) In these Regulations –

...

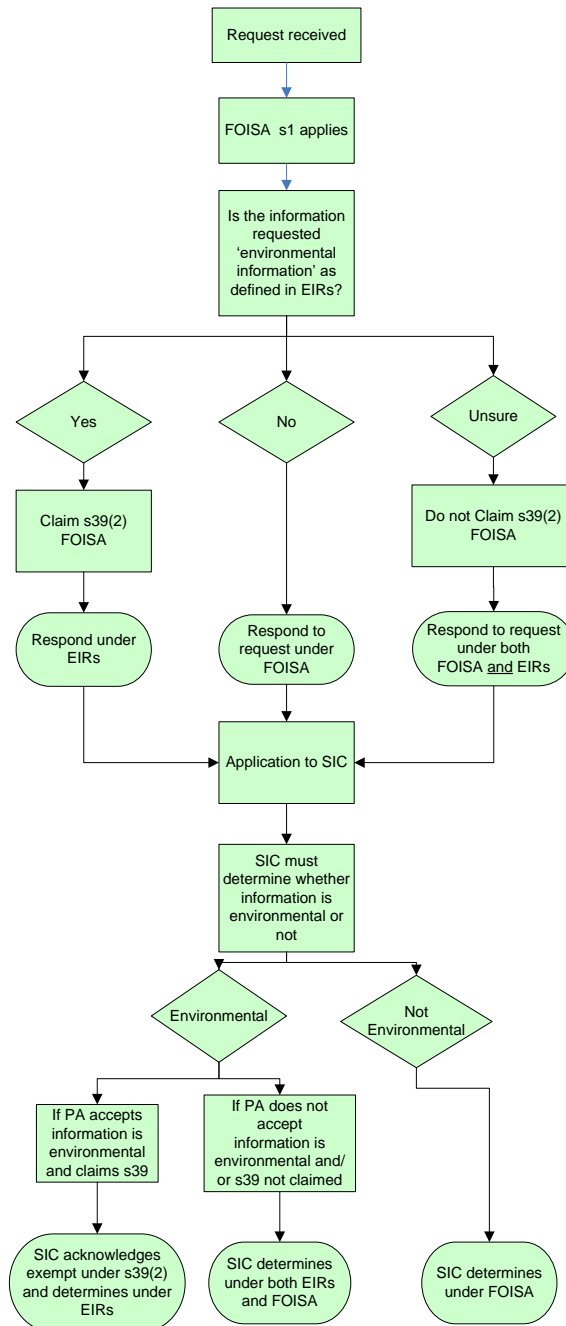
“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (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);

...

Appendix 3: Flowchart

Should I respond under FOISA or the EIRs?



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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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