

# EIRs Guidance

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## Regulation 10(4)(a): Information not held

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### Exception Briefing



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## Glossary and abbreviations

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<b>Term used</b>	<b>Explanation</b>
<b>Commissioner/SIC</b>	The Scottish Information Commissioner, staff of SIC (depends on context)
<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)
<b>Minister of the Crown</b>	The holder of an office in HM Government in the UK, including the Treasury, the Board of Trade and the Defence Council

# The exception

## The main points

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1. Regulation 10(4)(a) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) allows public authorities to refuse to make environmental information available if they don't hold the information when the request is received.
2. "Held" is defined in regulation 2(2) of the EIRs. Environmental information is held by a Scottish public authority if it is –
  - (i) in its possession and it has been produced or received by that authority; or
  - (ii) held by another person on that authority's behalf.
3. Regulation 2(2) also makes it clear that information will not be "held" by a public authority for the purposes of the EIRs if it was supplied by a Minister of the Crown or department of the UK Government and is held in confidence.
4. In common with other exceptions in the EIRs, the exception is subject to the public interest test in regulation 10(1). It is not clear how the public interest test is intended to work where a public authority does not hold information, given that authorities are not required to create new information in order to respond to a request. This point is addressed in more detail below.
5. Good records management is required in order to be sure what information is held within an authority.
6. Regulation 10(4)(a) is, in many respects, similar to section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA) which makes it clear that a public authority does not have to comply with a request if it does not hold the information. See **Appendix 1: Resources** for a link to the Commissioner's guidance on section 17 of FOISA as it contains links to a wider range of decisions on whether information is – or isn't – held by a public authority. (This guidance also contains links to some decisions issued under FOISA.)

## Steps in applying the exception

7. 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)(a) 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

- 8. The EIRs implement Directive 2003/4/EC on public access to environmental information. 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.)

### Information held on behalf of another person

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#### Difference in wording, difference in practice?

- 9. Although both the EIRs and FOISA allow a public authority not to comply with a request if it doesn't hold the information that's been asked for, there is a slight difference in wording between the two provisions. (The exception in the EIRs, unlike the provision in FOISA, is also subject to the public interest test – this is addressed below.)

Regulation 2(2) of the EIRs	Section 3(2) of FOISA
Environmental information is held by an authority if it is in its possession and it has been produced or received by that authority.	Information is held by an authority if it is held by the authority otherwise than on behalf of another person.

- 10. Although there is a slight difference in wording, which has led some to argue that any environmental information in a public authority's possession is "held" by it, in practice there is very little difference between the two provisions. See **Appendix 1: Resources** for a link to some of the Commissioner's decisions on this point.

#### Regulation 2(2) in practice

- 11. Scottish public authorities may have information on their premises or in their systems which they do not hold in their own right, but on behalf of another person. When information is present within an authority's premises and systems only because it is held on behalf of another person, the information is not held by the authority for the purposes of the EIRs.
- 12. For example, Councillors and MSPs are not public authorities in their own right, and do not hold information for the purposes of the EIRs. However, information about their activities is often created and stored by the Council or Parliament. Where this relates to constituency and party political activities, the information is held on behalf of the elected member.
- 13. Where the information relates to activities which the elected member has undertaken on behalf of the authority in connection with its corporate functions, or where the information is intended to represent the authority's views and interests, it is held by the authority in its own right.
- 14. It may be difficult to be sure whether an individual or organisation is truly "another person" separate from the Scottish public authority to which the request was made.
- 15. Some of the situations on which the Commissioner has been asked to decide include:
  - (i) whether local authorities hold councillors' correspondence on behalf of the councillors?

- (ii) whether information about elections is held on behalf of the Returning Officer?
  - (iii) if an employee or elected member serves on a separate board, is information about those activities held on their behalf?
  - (iv) does a public authority hold information on a mobile phone it has provided to an employee?
16. See **Appendix 1: Resources** for links to the Commissioner's decisions on these – and similar – cases.

### **Matters to take into account when deciding if an authority holds information**

17. How can you be sure whether an authority holds information in its own right, or on behalf of someone else? This is not always straightforward: the Commissioner has sometimes investigated cases where two authorities both claim that the other holds the information. Each case must be considered individually, but there are some general factors which often indicate that information is held on behalf of another person.

#### *Evidence of separate identity*

18. The Interpretation Act 1978 (which applied to the interpretation of Acts of the Scottish Parliament when FOISA was enacted) states that the definition of "person" includes "a body of persons corporate or unincorporated". The definition of "person" in the Interpretation and Legislative Reform (Scotland) Act 2010 is in the same terms. It may be possible to show that the information belongs to a completely separate organisation.

#### *Control*

19. If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would if it held the information in its own right. The authority may not have power to delete or amend the information without the owner's consent, or to apply its own policies and procedures to the information. It might have restricted access to the information.
20. Although control of the information is a factor, it is not a conclusive test. There may be situations in which an authority cannot amend or process information, or is limited (e.g. by contract) in what it can do with information, but still holds it in its own right. This may include information obtained from a third party.

#### *Functions of the authority*

21. Another question to consider is whether the information relates to the authority's functions: if it does, then it is likely that the information is held by the public authority in its own right.

#### *Connection between the information and the authority*

22. The (English and Welsh) Court of Appeal applied this test when determining whether the Department of Health (DoH) held the diaries of former Health Minister, Andrew Lansley under the (UK) Freedom of Information Act 2000. (See **Appendix 1: Resources** for a link to the judgment). The Appeal Court was clear that the Ministerial diary was held by the DoH even if the diary entries included personal and constituency matters for Mr Lansley. The diary was set up and maintained by DoH staff and concerned matters relating to government policy, etc. The Appeal Court judgment confirmed that there must be an appropriate connection between the information and the authority for the information to be held for the purposes of FOI.

23. This can mean that information may be held both on behalf of someone else and by the authority in its own right. This point was considered by the Court of Session in an appeal against a decision of the Commissioner (under FOISA, but still considered relevant here), where the information requested related to contracts for the provision of electoral services to the Returning Officer.
24. While the Court acknowledged that the purpose of the contracts was the provision of services for the Returning Officer, it also found that the contracts were procured, entered into and monitored by the Council, in its own right. To fulfil its own responsibilities under the contracts, it needed full information about them (including the information requested) and this would have been the case even if it were simply acting as an agent on behalf of the Returning Officer: it would only cease being the case if the Council had no material interest of its own in the contracts.
25. Similarly, the Commissioner also found that information could simultaneously be held by Nicola Sturgeon both as a Scottish Minister and in a party political or private capacity. In coming to this conclusion, the Commissioner considered the connection between the information and the Ministers, the substantive content of the information and the circumstances in which the information was created. (See **Appendix 1: Resources** for a link to the decision.)
26. This test is also relevant where personal and business information are held together: for example, where the same mobile phone is used to create and send both personal emails and emails relating to the business of the public authority.

#### *Duplication of information*

27. It's important to consider whether information held on behalf of another organisation is duplicated in information which the public authority holds in its own right: for example, where the public authority is involved or has an interest in the activities of the other organisation.

### **Information supplied by the UK Government and held in confidence**

28. Information is not held for the purposes of the EIRs if it was supplied by a Minister of the Crown or a department of the UK Government and is held in confidence by the authority.
29. This is most likely to apply to information held by the Scottish Government, but there may be cases where other Scottish public authorities hold information or have been supplied with confidential information from a UK Government department or a Minister of the Crown.
30. There are three points to consider when determining whether regulation 2(2) applies:
  - (i) **Was the information provided in circumstances giving rise to (or at least implying) a specific obligation to keep it confidential?**

In most cases, there should be a clear indication that information was intended to be treated as confidential, for example with a protective marking (“restricted”, “secret” or “top secret”) or some other express statement.
  - (ii) **Is the information still confidential at the time of the request?**

This will depend on the nature of the information. In order to be confidential, it needs to have a necessary quality of confidence – the information must not be common knowledge or otherwise publicly available. For example, a document supplied to a

public authority may subsequently have been published, in which case it is no longer confidential.

(iii) **Would any damage result from the disclosure of the information?**

In general, if no damage would follow from disclosure, there is no need to keep information confidential.

31. See **Appendix 1: Resources** for a link to a decision of the Commissioner on a case where information has been supplied in confidence.

### **Advice and assistance**

32. If regulation 2(2) applies, public authorities should, under their duty to give advice and assistance to requesters (regulation 9 of the EIRs) advise requesters to make a new request, this time under the (UK) Environmental Information (Scotland) Regulations 2004, to the UK Government department that supplied the information
33. The authority should therefore issue a notice:
- (i) applying the exception in regulation 10(4)(a) – this will include specifying how it came to the view that it doesn't hold the information and specifying its conclusions on the public interest (all required by regulation 13 of the EIRs);
  - (ii) advising the requester that this information is covered by the (UK) Environmental Information Regulations 2004; and
  - (iii) referring the requester to the relevant UK Government Department.
34. If regulation 2(2) does not apply, for example because the information is no longer confidential, the public authority may wish to consider the exception in regulation 10(5)(f) of the EIRs (Third party interests). See the **Appendix 1: Resources** for a link to the Commissioner's guidance on this exception.

### **Information held on behalf of the authority**

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35. Information which is held by another person or body on behalf of the public authority is held by the authority for the purposes of the EIRs, even though it may not be physically within its control. Examples of the situations which the Commissioner has considered include information held by a law firm on behalf of its public authority client; and information which one public authority held on behalf of another for the purposes of a procurement exercise.
36. In some situations, it will be clear that information is held on behalf of the authority: for example, where the authority has stored documents with a commercial storage company. Where information is held by a third party as a result of contractual arrangements, the contract may (and should) indicate whether or not the contractor holds information on behalf of the contracting public authority.
37. However, the question of ownership is not always straightforward. Issues relating to control and business relevance have been considered above. Some other factors to consider are listed below. **Appendix 1: Resources** contains links to decisions issued by the Commissioner on this point.

### *The relationship between the parties*

38. The relationship between two bodies may not be immediately obvious, but may determine whether information is held on behalf of the public authority. For example, a public authority may be represented on a board or committee, or may have formed a consortium or partnership with other public authorities for a particular purpose. It may have outsourced some of its functions to a separate organisation. Sometimes it will be necessary to look at the terms on which a body was set up, to establish whether it is a separate organisation holding information on its own behalf, or is wholly-owned by a public authority.
39. As noted in paragraph **25** above, it is also possible for information to be held simultaneously by a public authority and by a third party.

### *Existing agreements*

40. It is good practice for contracts to include provisions about the ownership of information, and for tendering authorities to make sure that bidders or suppliers understand the extent to which their information may be disclosed in response to a request. Sometimes the provisions about information ownership in contracts leave unanswered questions: for example, they may not cover a situation where the contractor has sub-contracted work to another body. Where possible, such situations should be anticipated and covered in the agreement about ownership of information relating to the contract.
41. Similarly, when more than one public authority is involved in a partnership or consortium which is not a public authority in its own right, each authority needs to be sure what information is held on behalf of the other partner(s) or member(s). This is particularly so when each participant holds copies of the same documents. It is good practice to have agreements in place about information ownership and arrangements for responding to information requests.

### *Purpose for which information created*

42. Information which is generated in a private email account in the course of conducting public authority business is held by the account owner on behalf of the authority. It is the purpose of the communication which matters, not the method by which it was created or delivered, or where it is stored. For example, councillors may hold information on behalf of a local authority in their personal email accounts, if it relates to the business of the local authority and not to the councillor's political or constituency business.
43. It is therefore important for authorities and their staff to observe good records management practice, to ensure that they are able to comply with their obligations under the EIRs. It is easier to comply with requests for information which is held elsewhere, on behalf of the authority, if the authority knows what the information is and has arrangements in place to allow it to retrieve the information.

## **Information held at the time the request is received**

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44. The information to be given by the authority is that held by it at the time the request is received.
45. "Information" is defined in the EIRs as "information in written, visual, aural, electronic or any other material form" (regulation 2(1)). In practice, as with FOISA, this means information in

any recorded form<sup>1</sup>, so an authority should identify and consider all recorded information covered by a request when responding. In addition to searching the more obvious records, such as casefiles and handwritten notes, information held in other formats, such as WhatsApp exchanges or recordings of Zoom meetings, may also contain information falling with the scope of the request.

46. The information does not have to be accurate or comprehensive before it can be disclosed. Authorities may choose to provide a commentary which places the information in context or explains its limitations.
47. The EIRs do not cover unrecorded information. This may include opinion, advice, explanation or commentary which hasn't been recorded. It also includes information which can only be inferred by the absence of recorded information, e.g. where information hasn't been entered in the relevant section of a form. (See **Appendix 1: Resources** for details of a case which considers this point.)
48. Of course, unrecorded information can be provided outwith the EIRs process. Authorities providing unrecorded information in response to an information request must make sure that they notify the requester that no recorded information is held.
49. Public authorities are not required to create information in order to answer a request. There's a distinction between creating new information, and compiling information. Where a request can be answered by compiling information from readily-available resources held by the public authority, this is not the same as creating new information. However, if compiling information in order to respond to a request would require skill and complex judgement, it is less likely that the information can be said to be held for the purposes of the EIRs. (See **Appendix 1: Resources** for details of a case which considers this point. See also the consideration of the public interest test test.)
50. Whether a public authority *should* hold information which it doesn't hold is not a matter for the Commissioner to decide.

### **Identifying the information an authority holds**

51. In order to respond to a request, a public authority must be able to identify all relevant information which it holds. This includes any recorded information covered by the request, from key documents to informal emails, from formal reports to handwritten notes.
52. When answering requests, it can be just as important to be sure what information isn't held, as what is. This underlines the importance of having good records management policies and procedures in place, including a records retention schedule. Understanding what information *should* be held can be helpful when establishing what is actually held.
53. It's also good practice to have procedures in place for carrying out the searches and enquiries which will establish what information is held, when dealing with a request. Authorities should keep a record of these searches, in case the requester seeks a review or appeals to the Commissioner.
54. The searches required to identify relevant recorded information will vary from request to request. In all cases, authorities should take adequate and proportionate steps to establish

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<sup>1</sup> In very limited circumstances, the definition includes *unrecorded* information. For example, the Commissioner can require authorities to provide him with unrecorded information in response to an information notice (see section 50 of FOISA as read with regulation 17 of the EIRs).

what information is held (or isn't held). They should be able to explain, if challenged, why the searches they carried out were reasonable and likely to identify all relevant information.

55. Where an authority has told a requester that it doesn't hold information, requesters can ask the Commissioner to investigate whether this is, in fact, the case. The Commissioner will come to a view, based on the balance of probabilities. Evidence of the authority's searches will usually be a key consideration during the investigation. As a minimum, authorities should be able to provide the Commissioner with the following information:
- (i) details of the records or locations which were searched;
  - (ii) why these were the relevant records and locations;
  - (iii) the keywords used;
  - (iv) the staff who were involved;
  - (v) the outcome of the searches;
  - (vi) evidence that the searches have been carried out, including the outcome of the searches.

## The public interest test

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56. As with the other exceptions in regulation 10, the exception in regulation 10(4)(a) is subject to the public interest test. Applying the public interest test normally means assessing whether, in all the circumstances, the public interest is better served by withholding information or by making it available.
57. Where a public authority does not hold environmental information for the purposes of the EIRs, it is difficult to think how there could be a public interest in the authority making the information available: after all, regulation 5(1) of the EIRs makes it clear that the duty to make information available is limited to the information an authority holds when a request is received.
58. The Commissioner is not aware of any case law arising from the Directive which would assist. The public interest in making information available might be relevant when considering what steps it is reasonable to expect a public authority to take to compile information in order to respond to a request, but this is not a point which the Commissioner has addressed in any decisions.
59. Regulation 13(b) of the EIRs requires authorities wanting to apply the exception in regulation 10(4)(a) to specify in their refusal notice how they have reached their decision with respect to the public interest test. Failure to address the public interest test will be a breach of the EIRs. (See **Appendix 1: Resources** for a link to a decision showing how the Commissioner has generally addressed this point.)

## Other common questions about whether information is held

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### Responding to requests for a yes/no answer

60. Sometimes a public authority will receive an information request which can be answered with a yes/no – for example, “Did you contact X before you did Y?” These sorts of requests are

valid under the EIRs, so long as it's clear what information is being asked for and provided the answer is clear from recorded information held by the public authority.

61. See **Appendix 1: Resources** for a link to some of the Commissioner's decisions on this point.

### **Is deleted information still held by a public authority?**

62. Information which has been deleted but which can be restored is held by a Scottish public authority for the purposes of the EIRs. Searches should therefore include folders for deleted emails, or the "recycling bin" on the computer. However, the authority will be able to charge a reasonable fee for doing this and, if the costs are going to be unreasonable, refuse the request on the basis that it is manifestly unreasonable. See **Appendix 1: Resources** for links to the Commissioner's guidance on charging under the EIRs and on manifestly unreasonable requests, and for a link to a decision involving information which was restored after deletion.

### **Who holds information in solicitors' files?**

63. Where a public authority instructs in-house solicitors, any information held by the solicitors will be held by the authority for the purposes of the EIRs.
64. If an authority has instructed external solicitors, guidance issued by the Law Society of Scotland (see **Appendix 1: Resources**) will help in determining what information in the solicitors' files are held by the authority and what is held by the solicitor.

### **Deletions or amendments following the receipt of a request**

65. Section 1(4) of FOISA specifically allows public authorities to delete or amend information, between the time a request is received and the time the authority provides the information, if that information would have been deleted or amended, regardless of the receipt of the request. Section 1(5) of FOISA also makes it clear that the information is not to be destroyed before it can be given, unless this is not reasonably practicable. An example of a case which considers this is found in **Appendix 1: Resources**.
66. There is no equivalent to section 1(4) or (5) under the EIRs, but the Commissioner expects public authorities to take all reasonable steps to ensure that environmental information is not destroyed or amended once a request has been received.
67. Public authorities must also remember that, after an information request has been made, altering, blocking, erasing, destroying or concealing information with the intention of preventing its disclosure is a criminal offence under regulation 19 of the EIRs.

# Appendices

## Appendix 1: Resources

### SIC Decisions

Paragraph	Decision number	Public authority	Summary
10	164/2015	South Ayrshire Council	The Council was asked about grant applications to the South Ayrshire Waste Environment Trust (SAWET). We accepted that SAWET was an independent organisation and did not hold information on behalf of the Council. The decision considers the tests which are specific to the EIRs: whether the information was “in [the Council’s] possession”, having been “produced or received by that authority”.
16	116/2010	Scottish Ministers	The Ministers were asked for statutory records kept by fish farms about the escape of farmed fish. The requester argued that the records were held by the fish farm on behalf of the Ministers. However, this wasn’t evident from the relevant statutory order, which made provision for the records to be accessed and copied by inspectors. There would have been no need for this if the records were held on behalf of the Ministers.
16	026/2016	Scottish Ministers	The Ministers were asked about Zero Waste Scotland (ZWS) funding. ZWS was an independent delivery programme for Scottish Government waste policy, funded by the Ministers, but operating independently in its day-to-day administration of projects and budgets. We agreed that information on ZWS’ funding of projected was not held on behalf of the Ministers. ZWS was a separate legal entity from the Ministers, even though it was a company wholly owned by the Ministers, and funding was a matter for ZWS alone.
16	208/2016	Glasgow City Council	Part of the request was for correspondence involving a named Councillor. This decision confirms that environmental information held by individual Councillors cannot be considered under the EIRs unless it is held on behalf of the Council. The correspondence concerned

Paragraph	Decision number	Public authority	Summary
			the Councillor acting on constituency business. In line with the views set out in Decision 132/2006 (FOISA), this information was not held by the Councillor on behalf of the Council, or by the Council on behalf of the Councillor.
16	039/2017	Scottish Ministers	This request was for transcripts of oral evidence to an independent panel appointed by the Ministers to review the Scottish planning system. We accepted that the panel was an independent body and that the Ministers were not required to ask Panel members to provide information covered by the request.
25	102/2020	Scottish Ministers	The Commissioner was satisfied that communications between the First Minister and Alex Salmond could simultaneously be held by the Scottish Ministers and by the First Minister for her own political or private purposes.
30	009/2008	Scottish Ministers	The request was for information about potential infraction proceedings against the Scottish Government in relation to an environmental issue. The Ministers explained that the information had been supplied by a department of the UK Government (DEFRA) in circumstances which created a clear obligation of confidence. The information was still confidential. After investigation we accepted this, and therefore accepted that the information was not covered by the EIRs.
36	094/2013	East Dunbartonshire Council	The Council was asked for risk assessments and other documents relating to grit and salt spreading in cold weather conditions. The Council said that it didn't hold the information as the work was contracted out. The school to which the request related was under a PPP contract and the contractor was liable for carrying out all risk assessments, and didn't provide documentation to the Council. We accepted this, but found that the Council was still under a duty to maintain safe premises for its employees and school pupils. This duty could not be contracted out, and therefore the risk documentation was held by the contractor on behalf of the Council.

Paragraph	Decision number	Public authority	Summary
36	221/2013	Scottish Natural Heritage	SNH said it had delegated permission to carry out bird ringing to the British Trust for Ornithology (BTO) and did not hold any information. We accepted that SNH was empowered to delegate the licencing of bird ringing to BTO under the Wildlife and Countryside Act 1981 (the WCA). We decided that the information was held by BTO independently, and not on behalf of SNH.
45	043/2013	Scottish Ministers	The Ministers were asked about the deletion of sea lice data. The Ministers told the requester they didn't hold the information. We found that the Ministers held some information which inferred that certain data had been deleted. However, this did not mean that they "held" information which was not recorded and could only be inferred.
47	210/2013	Scottish Ministers	<p>The requester asked for the number of reports held about the independence referendum. The Ministers said they did not hold this information.</p> <p>In line with the (UK) Information Tribunal decision <i>Michael Leo Johnson v the Information Commissioner and the Ministry of Justice</i> (details below), we considered whether the Ministers held the building blocks required to generate this information and found that they did. However, we accepted that a significant level of skill and judgement would be required to identify the documents falling within the scope of the request, and therefore agreed that the Ministers didn't hold the information.</p> <p>(This was a request under FOISA, so there was no public interest test to consider.)</p>
57	123/2009	Glasgow City Council	This decision sets out the line taken by the Commissioner in all other cases where the public interest test required by regulation 10(1)(b) is considered in relation to regulation 10(4)(a). Given that the information was not held, there was no conceivable public interest in requiring it to be made available.
60	016/2015	Aberdeen City Council	During our investigation, the Council identified

Paragraph	Decision number	Public authority	Summary
			information in an email archive which had not been permanently deleted after the owner had left the Council.
63	014/2015	Scottish Prison Service	Newspapers are delivered daily to the prison with a list of the recipients. The request was for the list received that day. The information had been destroyed before the request was acted upon. No breach of section 1(5) of FOISA was identified.

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) in the "Search" bar.

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
6	Commissioner's briefing on section 17 of FOISA (Information not held)	<a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Informationnoheld/InformationnoheldFOISA.aspx">http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Informationnoheld/InformationnoheldFOISA.aspx</a>
8	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>
8	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>
22	<i>Department of Health v Information Commissioner &amp; Lewis</i> [2017] EWCA Civ 374	<a href="https://1woyw921roz71aldxk2unpkv-wpengine.netdna-ssl.com/wp-content/uploads/sites/2/2017/05/Approved-Judgment-rhd-Department-of-Health-v-Information-Commissioner.pdf">https://1woyw921roz71aldxk2unpkv-wpengine.netdna-ssl.com/wp-content/uploads/sites/2/2017/05/Approved-Judgment-rhd-Department-of-Health-v-Information-Commissioner.pdf</a>
23-24	<i>Dr Ian Graham v The Scottish Information Commissioner</i> [2019] CSIH 57	<a href="https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih57.pdf?sfvrsn=0">https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih57.pdf?sfvrsn=0</a>

31	More information about the (UK) Environmental Information (Scotland) Regulations 2004 can be found on the (UK) Information Commissioner's website.	<a href="https://ico.org.uk/">https://ico.org.uk/</a>
33	Commissioner's guidance on regulation 10(5)(f) (Third party interests)	<a href="http://www.itspublicknowledge.info/Law/FOISA-EOIRsGuidance/EOIRsexceptionbriefings/Regulation10(5)(f)/Regulation10(5)(f)Thirdpartyinterests.aspx">http://www.itspublicknowledge.info/Law/FOISA-EOIRsGuidance/EOIRsexceptionbriefings/Regulation10(5)(f)/Regulation10(5)(f)Thirdpartyinterests.aspx</a>
54	Commissioner's guidance on charging a fee or refusing to comply with a request on excessive costs grounds	<a href="http://www.itspublicknowledge.info/Law/FOISA-EOIRsGuidance/Fees_and_charging/ChargingFOISA.aspx">http://www.itspublicknowledge.info/Law/FOISA-EOIRsGuidance/Fees_and_charging/ChargingFOISA.aspx</a>
60	Commissioner's guidance on regulation 10(4)(b) of the EIRs: manifestly unreasonable requests	<a href="http://www.itspublicknowledge.info/Law/FOISA-EOIRsGuidance/Manifestly_unreasonable_requests.aspx">http://www.itspublicknowledge.info/Law/FOISA-EOIRsGuidance/Manifestly_unreasonable_requests.aspx</a>
62	Law Society of Scotland guidance: The Ownership and Destruction of Files (updated May 2018)	<a href="https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-e/division-b/guidance/the-ownership-and-destruction-of-files/">https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-e/division-b/guidance/the-ownership-and-destruction-of-files/</a>

## Appendix 2: The provisions

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### Regulation 2: Interpretation

...

- (2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is –
- (a) in its possession and it has been produced or received by that authority; or
  - (b) held by another person on that authority's behalf,
- and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...

### Regulation 10: Exceptions from duty to make environmental information available on request

- (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 -

...

- (a) it does not hold that information when an applicant's request is received;

...



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