

EIRs Guidance

Regulation 10(5)(g): Protection of the environment

Exception Briefing



Scottish Information
Commissioner

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Glossary and abbreviations

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

The exception

The exception: main points

1. Regulation 10(5)(g) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) allows a Scottish public authority to withhold environmental information if its disclosure would, or would be likely to, cause substantial prejudice to the protection of the environment.
2. In common with other exceptions in the EIRs:
 - (i) the exception is subject to the public interest test in regulation 10(1). This means that, even if the exception applies, the information should still be disclosed unless the public interest in withholding the information outweighs the public interest in making it available.
 - (ii) the exception can be relied on regardless of the age of the information.
3. This exception cannot be used to withhold information on emissions.

Steps in applying the exception

4. These are the steps an authority must take once it has located and retrieved the requested information:
 - (i) Decide, does the exception apply? The exception must be interpreted in a restrictive way and the authority must apply a presumption in favour of disclosure (regulation 10(2) of the EIRs).
 - (ii) If the exception does NOT apply, the information cannot be withheld under the exception.
 - (iii) If the exception in regulation 10(5)(g) applies, the public interest test must be applied.
 - (iv) If the public interest in making the information available outweighs the public interest in maintaining the exception, the exception does not apply and the information cannot be withheld under the exception.
 - (v) If the public interest in maintaining the exception outweighs the public interest in making the information available, the information can be withheld.

General points about interpreting the exception

5. The EIRs implement Directive 2003/4/EC on public access to environmental information. The EIRs don't define any of the other terms used in the exception. However, the Aarhus Convention Implementation Guide, named after the Convention on which the Directive was based, contains useful guidance on interpreting the EIRs and references to the Implementation Guide are contained throughout this guidance. (See **Appendix 1: Resources** for a link to the Directive and Implementation Guide.)
6. The exception can only be applied where disclosure would, or would be *likely to*, cause *substantial prejudice*. Both of these phrases are considered in more detail below.

Applying the exception

7. A Scottish public authority may refuse to disclose environmental information in order to protect the environment the information relates to, e.g. the nesting location of rare birds. One of the aims of the EIRs is to increase the protection of the environment by ensuring greater access to environmental information. It would clearly be inconsistent with the purpose of the EIRs if disclosing information led to the environment being damaged.
8. “The environment” has a wide meaning. As can be seen from regulation 2(1) of the EIRs, the elements of the environment include:
 - (i) Air and atmosphere
 - (ii) Water
 - (iii) Soil
 - (iv) Land
 - (v) Landscape and natural sites including wetlands, coastal and marine areas
 - (vi) Biological diversity, including genetically modified organisms
 - (vii) The interaction of these elements.
9. See also **Appendix 1: Resources** for a link to more detailed guidance issued by the Commissioner on the definition of environmental information.
10. The exception cannot be applied to information on emissions. See paragraphs 20 to 23 below.
11. The harm must be to the protection of the environment to which the information relates. For example, if the exception is used to withhold information because disclosure would substantially prejudice the protection of the breeding site of a protected species, the information must itself relate to that breeding site.
12. See **Appendix 1: Resources** for a link to the Commissioner’s decisions on this exception.

“Likely”

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

“Substantial prejudice”

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

The public interest test

16. If the exception applies, the authority must go on to consider the public interest in relation to the information. In terms of regulation 10(1)(b), this means assessing whether – in all the circumstances – the public interest is better served by withholding the information or by making it available. The authority must identify the competing arguments for these two outcomes and must carry out a balancing exercise to determine where the public interest lies in that particular case.
17. In carrying out the balancing exercise, the authority must take account of the explicit presumption in favour of disclosure in regulation 10(2)(b).
18. The EIRs do not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public”. It has also been said that the public interest means what is in the interests of the public, rather than what is of interest to the public (although the two are not always mutually exclusive).
19. The Commissioner has published guidance on the public interest test. See **Appendix 1: Resources** for a link to the guidance.

Emissions – an important point

20. Information relating to emissions is given special status under the EIRs. Regulation 10(6) says that, to the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority **cannot** rely on the following exceptions:
 - (i) Regulation 10(5)(d): substantial prejudice to the confidentiality of proceedings
 - (ii) Regulation 10(5)(e): substantial prejudice to the confidentiality of commercial or industrial information
 - (iii) Regulation 10(5)(f): substantial prejudice to the interests of the person who provided the information
 - (iv) Regulation 10(5)(g): substantial prejudice to the protection of the environment
21. There is no definition of “emissions” in the EIRs, or in the European Directive on which they are based. However, both the Aarhus Convention and Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) define emissions as:

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

See **Appendix 1: Resources** for a link to the Aarhus Convention and the 2010 Directive.
22. This is a broad definition. It’s also worth noting that regulation 10(6) applies to information *on* emissions. Again, this suggests that information will not necessarily need to be directly concerning, but merely “relating to” emissions to fall within this provision. See **Appendix 1: Resources** for decisions from the Commissioner on the definition of emission and for a link to a decision from the EU Court of Justice which concluded that information need only “relate in a sufficiently direct manner to emissions into the environment”.
23. Emissions will include information on past, current and projected future emissions.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision Number	Parties	Summary
12	044/2007	Mr G Crole and Transport Scotland	This case involved a request about a badger survey carried out on the A95 and A96. Transport Scotland refused to disclose information on the basis that disclosure would cause substantial prejudice to the badgers if information about the location of their setts was published. Transport Scotland was able to give the Commissioner evidence of harm that had been caused to badgers and badger setts. The Commissioner agreed that the exception applied and that the public interest lay in withholding the information.
12	071/2009	Fish Legal and the Scottish Ministers	Fish Legal asked about the escape of farmed trout in Loch Lochy. The Ministers withheld information on the basis that disclosure would harm its relationships with the aquaculture industry and, thereby, ultimately be harmful to the environment. The Commissioner was not satisfied that there was a sufficient connection between the disclosure of the information and the environment and ordered the Ministers to disclose the information.
12	073/2010	Dr A D Hawkins and Scottish Natural Heritage	This involved a request about freshwater pearl mussels. The Commissioner was satisfied that disclosing information about the <i>location</i> of the mussels would harm the protection of the species. However, information which was about the <i>state</i> of the species would not cause harm and should be disclosed.
12	193/2012	Global Alliance Against Industrial Aquaculture (GAAIA) and the Scottish Ministers	GAAIA wanted to know how many seals had been killed under licences issued by the Ministers. The Ministers argued that disclosing the information would cause harm to the environment: protesters might damage fish farm cages which would lead to farmed fish escaping and could impact on the wild fish population. The Ministers were unable to satisfy the Commissioner that there was any likelihood of this happening and the Commissioner ordered the Ministers to disclose the information.

12	128/2016	Mr and Mrs Mark Liddiard and Perth and Kinross Council	This case was about the planning permission granted by the Council for <i>T in the Park</i> . Part of the information covered by the request was about the ospreys in the area adjacent to where the festival was due to take place. The Commissioner agreed that disclosure would cause harm to the ospreys and that the information should be withheld.
12	242/2014	Friends of Loch Etive (FLE) and Argyll and Bute Council	This involved a planning application for a fish farm at Loch Etive and looked in some detail at the definition of emissions. FLE argued that the operation of marine-cage fish farms involves the discharge of waste food, faeces, chemical therapeutants, etc. into the wider environment and that the Council could not apply the exception in regulation 10(5)(e). The Commissioner concluded that the withheld information – a planning agreement – did not relate in a sufficiently direct manner to emissions into the environment and that regulation 10(6) did not apply.
22	191/2017	Salmon and Trout Conservation Scotland and the Scottish Ministers	The Commissioner was satisfied that information about anti-parasitic medicinal compounds used against sea-lice was information about emissions in line with regulation 10(6) of the EIRs. This meant that the exception in regulation 10(5)(f) could not apply.

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 032/2014).

If you do not have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

Other Resources

Paragraph	Resource	Link
5	Directive 2003/4/EC on public access to environmental information	http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF
5, 21	The Aarhus Convention: An Implementation Guide (2 nd edition)	https://www.unece.org/env/pp/implementation_guide.html
9	Commissioner's guidance: definition of environmental	http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx

	information	
19	The Commissioner's guidance on the public interest test in the EIRs	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx
21	Directive 2010/75 on industrial emissions (integrated pollution prevention and control)	http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0075
22	Stichting Greenpeace Nederland and PAN Europe v European Commission T-545/11	http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d50ffe3a3616264ce38aaba75a1a47300c.e34KaxiLc3eQc40LaxqMbN4PaxuPe0?text=&docid=142701&pageInd ex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=355040

Appendix 2: The exception

Regulation 10

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - ...
 - (g) the protection of the environment to which the information relates;
 - ...
- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).

...

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