

EIRS Guidance Series

An Overview of the Exceptions



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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)

EIRs Guidance Series

1. This is the sixth part of a series of guidance on the EIRs. The full series covers the following:
 - Introduction to the EIRs¹
 - What is environmental information?²
 - Which bodies are covered by the EIRs?³
 - What do the EIRs require Scottish public authorities to do?⁴
 - Handling requests for environmental information⁵
 - An overview of the exceptions⁶
 - Differences between the EIRs and FOISA.⁷
2. See **Appendix 1: Resources** for a link to all of the guidance.
3. Note that this document gives an overview of each of the exceptions. In depth guidance is being prepared for each of the exceptions and will be published on the Commissioner's website as and when it becomes available.

General

4. The EIRs allow Scottish public authorities to refuse to make environmental information available if one of the exceptions in regulation 10(4) or (5) applies. Regulation 10 is set out in full in

¹ http://www.itspublicknowledge.info/Law/EIRs/EIRs_Introduction.aspx

² <http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx>

³ <http://www.itspublicknowledge.info/Law/EIRs/EIRsCoverage.aspx>

⁴ <http://www.itspublicknowledge.info/Law/EIRs/EIRsObligations.aspx>

⁵ <http://www.itspublicknowledge.info/Law/EIRs/EIRsHandlingRequests.aspx>

⁶ <http://www.itspublicknowledge.info/Law/EIRs/EIRsExceptions.aspx>

⁷ <http://www.itspublicknowledge.info/Law/EIRs/EIRsDifferencesEIRSandFOISA.aspx>

5. **Appendix 2: Regulation 10.**
6. When applying the exceptions, remember:
 - the exceptions must be interpreted in a restrictive way
 - public authorities must apply a presumption in favour of disclosure and
 - even if an exception applies, the information must be disclosed unless the public interest in making the information available is outweighed by that in maintaining the exception
7. The Commissioner has issued guidance on applying the public interest test in the EIRs. See **Appendix 1: Resources** for a link to the guidance.
8. There are two types of exception in regulation 10:
 - “class” exceptions
 - “substantial prejudice” exceptions

Class exceptions

9. The class exceptions are in regulation 10(4). These exceptions are based on the type of information held or the nature of the request rather than on the content of the information (although content might be relevant when applying the public interest test).

Regulation 10(4)(a) - Information not held

10. This exception applies if the public authority does not hold the information. Remember that if another body holds information on your behalf (for example, if you use a local archive), you will still hold the information for the purposes of the EIRs.
11. If the authority does not hold the information, but believes that another authority holds it, the authority must either transfer the request to the other authority or give the requester the name and address of the other authority.
12. The Commissioner has issued detailed guidance on regulation 10(4)(a) – see **Appendix 1: Resources** for a link to the guidance.

Regulation 10(4)(b) - Manifestly unreasonable requests

13. There are no hard and fast rules as to when a request (which may be a one-off request, or the latest in a series of requests) will be manifestly unreasonable. However, the following factors – while not an exhaustive list – will help an authority decide if a request is manifestly unreasonable:
 - complying would impose a significant burden on the authority
 - the request does not have serious purpose or value
 - the request is designed to cause disruption or annoyance to the public authority
 - the request would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate
14. The Commissioner has issued detailed guidance on regulation 10(4)(b) – see **Appendix 1: Resources** for a link to the guidance.

Regulation 10(4)(c) - Formulated in too general a manner

15. A Scottish public authority may refuse a request for information if it is formulated in too general a manner and the authority has complied with its duty under regulation 9. This means a Scottish public authority must contact the requester to offer advice and assistance to see if the request can be clarified. The date on which further clarification is received should be treated as the date of the request for the purposes of calculating the time to respond (regulation 5).
16. The Commissioner has issued detailed guidance on regulation 10(4)(c) – see **Appendix 1: Resources** for a link to the guidance.

Regulation 10(4)(d) - Material in the course of completion, etc.

17. This exception covers material which is still in the course of completion, unfinished documents and incomplete data.

Material which is still in the course of completion

18. This suggests that a document will have more work done on it within some reasonable time-frame.

Unfinished documents

19. This wording suggests that unfinished documents are distinct from material in the course of completion. It appears unlikely that this category would include any document on which no further work was intended, even if the document is unfinished.

Incomplete data

20. Whether information can be categorised as incomplete data will depend on the circumstances. Data which is part of routine monitoring should not be regarded as part of an ongoing unfinished set, but should normally be disclosed as soon as practicable after collection.
21. A Scottish public authority relying on this exception must (under regulation 13(d)) tell the requester when it thinks the information will be finished or completed. This allows the requester to make a new request for the information once the information is finished or completed.

Regulation 10(4)(e) - Internal Communications

22. A Scottish public authority may refuse to disclose internal communications.
23. This exception is potentially very wide and includes any correspondence between officials in the same authority and its agencies.
24. In some limited cases, it is possible for communications between two or more separate public authorities be treated as “internal communications” for the purposes of regulation 10(4)(e). However, any public authority applying the exception must be able to demonstrate particular aspects of the administrative and legal relationship between the two bodies to show why communications between them should be considered to be internal.
25. The exception covers all internal communications, regardless of their content or the level of harm that disclosure would be likely to cause. However, internal communications cannot be

withheld under regulation 10(4)(e) unless there is a greater public interest in keeping the information secret than in disclosing it (regulation 10(1)(b)).

26. The Commissioner has issued detailed guidance on regulation 10(4)(e) – see **Appendix 1: Resources** for a link to the guidance.

Substantial prejudice exceptions

27. The exceptions in regulation 10(5) can only be applied where disclosure would, or would be likely to, cause substantial prejudice.
28. When applying this test, authorities should consider the following questions:
- Would disclosure of the information cause, or to be likely to cause, substantial harm to any of these matters (issues, processes, persons, etc.)?
 - Have circumstances changed since the information was created?
 - Is the information publicly available? If so, disclosure is less likely to cause substantial prejudice.

Regulation 10(5)(a) - International relations, defence, etc.

29. Regulation 10(5)(a) allows authorities to withhold information where disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety.

International relations

30. Information may be withheld if, for example, it contains confidential information obtained from (or which relates to) a foreign state, international organisation or overseas territory, where disclosure might compromise any future co-operation with the UK in areas of vital interests to the UK.

Defence

31. This may include information regarding military establishments, military exercises or the nature of military assets.

National security or public safety

32. The environmental information covered by this exception may include, for example, information on the protection of critical national infrastructures such as water supply.
33. A certificate by Scottish Ministers under regulation 12 stating that disclosure of the information would prejudice substantially national security would be sufficient to conclude that this exception applies. However, such a certificate is not conclusive in relation to the public interest test, so the requester can ask for a review of the application of the public interest test and could subsequently make an appeal to the Scottish Information Commissioner.

Neither confirm nor deny

34. Under regulation 10(8) of the EIRs, a public authority may refuse to reveal whether it holds information if doing so would involve making information available which would, or would be likely to, prejudice substantially international relations, defence, national security or public safety and if revealing whether the information is held would not be in the public interest.

35. The Commissioner has issued detailed guidance on regulation 10(5)(a) – see **Appendix 1: Resources** for a link to the guidance.

Regulation 10(5)(b) - The course of justice, etc.

36. A request for environmental information may be refused where the disclosure of the information would, or would be likely to, substantially prejudice:
- (i) the course of justice (including law enforcement);
 - (ii) the ability of a person to receive a fair trial;
 - (iii) the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
37. This exception applies to investigations or enquiries conducted by any public authority and may relate to current proceedings or to proceeding likely to take place in the future. It could include any information which, if disclosed, could prejudice the enforcement or appropriate administration of law, which includes the prevention, investigation or detection of a crime, or the apprehension or prosecution of offenders.
38. The Commissioner has issued detailed guidance on regulation 10(5)(b) – see **Appendix 1: Resources** for a link to the guidance.

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

39. Regulation 10(5)(c) allows authorities to withhold information where disclosure would, or would be likely to, prejudice substantially intellectual property (IP) rights.
40. There are lots of different types of IP rights, but the ones which are most likely to be relevant when considering requests under the EIRs are:
- Copyright
 - Database rights
 - Copyright in databases
41. As a general rule, IP rights belong to the author or creator of the asset. This means that a public authority will generally own the IP rights to any information created by its staff, but not to information they receive from third parties.
42. Before applying the exception, the authority must be satisfied that:
- The environmental information is protected by IP rights
 - The IP right holder would suffer harm.
 - The harm would result from the infringement of the IP right
 - The harm could not be prevented by enforcing the IP right.
43. The Commissioner has issued detailed guidance on regulation 10(5)(c) – see **Appendix 1: Resources** for a link to the guidance.

Regulation 10(5)(d) - Confidentiality of proceedings

44. This exception applies where disclosure would harm the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
45. It may apply to information about the proceedings of a public authority where the proceedings are considered to be confidential.
46. The proceedings may be those of the public authority receiving the request, or those of any other public authority. "Proceedings" is not defined in the EIRs, but will include a range of investigative, regulatory and administrative/governance processes and other activities carried out according to a statute.
47. In most cases where this exception will apply, there will be a specific statutory provision prohibiting the disclosure of the information. However, there may also be cases where the common law of confidence will protect the confidentiality of the proceedings.

Regulation 10(5)(e) - Confidentiality of commercial or industrial information

48. Regulation 10(5)(e) allows authorities to withhold information where disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
49. Again, confidentiality may be provided either by explicit statutory restrictions on disclosure or by the common law of confidentiality. The information covered by the exception will include a range of commercially sensitive information such as trade secrets, information supplied by contractors, information supplied as part of a tendering or procurement process and information held by regulators.
50. Before regulation 10(5)(e) can be engaged authorities should consider the following questions:
 - (i) Is the information publicly available? If yes, regulation 10(5)(e) is unlikely to apply.
 - (ii) Is the information commercial or industrial in nature?
 - (iii) Does a legally-binding duty of confidence exist in relation to the information - express or implied?
 - (iv) Does this duty of confidence protect a "legitimate economic interest"?
 - (v) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?
51. Generally, the protection of information under this exception should be limited to the minimum time necessary to safeguard the commercial or industrial interest in question.

Regulation 10(5)(f) – Third party interests

52. Regulation 10(5)(f) allows authorities to withhold information where disclosure would, or would be likely to, prejudice substantially the interests of the person who supplied the information.
53. This exception only applies where:
 - (i) the environmental information was provided voluntarily, i.e. the supplier was not under, and could not have been under, any legal obligation to supply it to the Scottish public authority;

- (ii) there are no other circumstances that entitle the Scottish public authority to disclose it;
AND
 - (iii) the supplier has not consented to its disclosure.
54. Examples of the information potentially covered by this exception include information collected from members of the public in research or surveys, or privately owned information which has been deposited in a public record office or archive.
55. In that context, the purpose of this exception is to ensure the continuation of the flow information to regulators on a voluntary basis when collecting statistical data and conducting sample surveys. Making such information available to the public could possibly inhibit open and constructive discussions between environmental control authorities and industry.
56. Because the harm test also applies to this exception, it only applies where disclosure of the information would, or would be likely to, substantially prejudice the interests of the person who provided the information.
57. If a Scottish public authority is able to require the information to be provided under statutory obligation (whether used or not) then that information will not fall within this exception.
58. The Commissioner has issued detailed guidance on regulation 10(5)(f) – see **Appendix 1: Resources** for a link to the guidance.

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

59. A Scottish public authority may refuse to make information available in order to protect the environment to which it relates, e.g. the nesting location of rare birds. The ultimate aim 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 disclosure of information would lead to damage to the environment.
60. The Commissioner has issued detailed guidance on regulation 10(5)(g) – see **Appendix 1: Resources** for a link to the guidance.

Emissions

61. Information relating to emissions is given special status under the EIRs. Regulation 10(6) provides that, to the extent that environmental information relates to information on emissions, a Scottish public authority **cannot** rely on the following exceptions:
- (i) Regulation 10(5)(d) – the confidentiality of proceedings
 - (ii) Regulation 10(5)(e) – the confidentiality of commercial or industrial information
 - (iii) Regulation 10(5)(f) – the interests of the person who provided the information
 - (iv) Regulation 10(5)(g) – the protection of the environment
62. “Emissions” are not explicitly defined in the EIRs. However, a commonly cited definition is found within the European Directive on Integrated Pollution Prevention and Control. An emission is defined here as the ‘*direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources (...) into the air, water or land*’. This very broad definition captures a great deal of information.

63. Regulation 10(6) applies in relation to any information *on* emissions. Again, this is very broad. It suggests that information will not necessarily need to be directly concerning, but merely “relating to” emissions to fall within this provision.
64. See **Appendix 1: Resources** for a link to a decision where the Commissioner found that the information related to emissions and so the exception in regulation 10(5)(f) could not be applied.

Personal Data

65. Regulation 11(1) provides that, to the extent that the environmental information requested includes personal data about the applicant, then the duty under regulation 5(1) to make that environmental information available will not apply. However, in line with the duty to advise and assist under regulation 9, the applicant should be advised how to make a subject access request for their personal data under Article 15 of the UK General Data Protection Regulation (UK GDPR) or, as appropriate, section 45 of the Data Protection Act 2018.
66. To the extent that the environmental information requested includes personal data about an individual other than the applicant (third party personal data), the data does not have to be made available if any of the following circumstances apply:
 - (i) Disclosure would breach any of the data protection principles contained in Article 5(1) of the UK GDPR (this is an absolute exemption);
 - (ii) Disclosure would contravene Article 21 of the UK GDPR (right to object to processing) and the public interest favours withholding the information;
 - (iii) The data subject would not be entitled to be given the personal data if they made a subject access request for it and the public interest favours withholding the information.

Neither confirm nor deny

67. Under regulation 11(6), a public authority may refuse to reveal whether it holds personal data if doing so would in itself be contrary to regulation 11.
68. The Commissioner has issued detailed guidance on regulation 11 – see **Appendix 1: Resources** for a link to the guidance.

Conflicts between the EIRs and other laws

69. Regulation 5(3) says that any enactment or rule of law which would prevent information being made available in accordance with the EIRs shall not apply. This means that, even if other legislation says environmental information should not be disclosed, the information can still be disclosed under the EIRs. (It might be subject to an exception, of course.)
70. This regulation can be contrasted with section 26(a) of FOISA, which provides that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment.

Appendices

Appendix 1: Resources

Para	Resource	Link
2	Introduction to the EIRs	http://www.itspublicknowledge.info/Law/EIRs/EIRs_Introduction.aspx
2	What is environmental information?	http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx
2	Which bodies are covered by the EIRs?	http://www.itspublicknowledge.info/Law/EIRs/EIRsCoverage.aspx
2	What do the EIRs require Scottish public authorities to do?	http://www.itspublicknowledge.info/Law/EIRs/EIRsObligations.aspx
2	Handling requests for environmental information	http://www.itspublicknowledge.info/Law/EIRs/EIRsHandlingRequests.aspx
2	Differences between the EIRs and FOISA	http://www.itspublicknowledge.info/Law/EIRs/EIRsDifferencesEIRSandFOISA.aspx
7	Commissioner's guidance on the public interest test and the EIRs	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx
14	Commissioner's guidance on regulation 10(4)(a)	Regulation 10(4)(a) Information not held (itspublicknowledge.info)
14	Commissioner's guidance on regulation 10(4)(b)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ManifestlyUnreasonableRequests.aspx
16	Commissioner's guidance on regulation 10(4)(c)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(4)(c)/Regulation10(4)(c)Requestswhicharetoogeneral.aspx
26	Commissioner's guidance on regulation 10(4)(e)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(4)(e)/Regulation10(4)(e)Internalcommunications.aspx
34	Commissioner's guidance on regulation 10(5)(a)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(5)(a)/Regulation10(5)(a)InternationalRelationsNationalSecurity.aspx
38	Commissioner's guidance on regulation 10(5)(b)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(5)(b)/Regulation10(5)(b)JusticeandFairTrial.aspx
43	Commissioner's guidance on regulation	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(5)(c)/Regulation10(5)(c)Requestswhicharetoogeneral.aspx

	10(5)(c)	ulation10(5)(c)Intellectualpropertyrights.aspx
58	Commissioner's guidance on regulation 10(5)(f)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(5)(f)/Regulation10(5)(f)Thirdpartyinterests.aspx
60	Commissioner's guidance on regulation 10(5)(g)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(5)(g)/Regulation10(5)(g)Protectionoftheenvironment.aspx
67	Commissioner's guidance on regulation 11	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation11/Regulation11PersonallInformation.aspx
64	Decision 191/2017 Salmon and Trout Conservation Scotland and the Scottish Ministers	https://www.itspublicknowledge.info/uploadedFiles/Decision191-2017.pdf

Appendix 2: Regulation 10

10 Exceptions from duty to make environmental information available–

- (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.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- (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;
 - (b) the request for information is manifestly unreasonable;
 - (c) the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9;
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves making available internal communications.
- (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-
 - (a) international relations, defence, national security or public safety;
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
 - (c) intellectual property rights;
 - (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
 - (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or

- (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).
- (7) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is not made available by virtue of these Regulations unless it is not reasonably capable of being separated from that other information.
- (8) For the purposes of this regulation, a Scottish public authority may respond to a request by not revealing whether such information exists or is held by it, whether or not it holds such information, if to do so would involve making information available which would, or would be likely to, prejudice substantially any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).
- (9) For the purposes of a response under paragraph (8), whether information exists and is held by the public authority is itself making information available.

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