



Scottish Information
Commissioner

**Decision 141/2007 Integra Compliance Limited
(trading as Compliance Link) and the Scottish
Environment Protection Agency**

*Request for information relating to SEPA's investigations into
producer responsibility obligations*

**Applicant: Integra Compliance Limited
Authority: Scottish Environment Protection Agency
Case No: 200502068
Decision Date: 20 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 141/2007 Integra Compliance Limited and the Scottish Environment Protection Agency

Request for information relating to SEPA's investigations into producer responsibility obligations made under the EIRs - withheld under various exceptions

Relevant Statutory Provisions and Other Sources

The Environmental Information (Scotland) Regulations 2004 (EIRs) regulation 5(1) (Duty to make available environmental information on request); regulation 10(1), (2), (4)(d) and (e), (5)(b), (d) and (e), (7), (8) and (9) (Exceptions from duty to make environmental information available); regulation 13 (Refusal to make information available) and regulation 16(1) and (4) (Review by Scottish public authority)

Environmental Protection Act 1990 section 22(1) (Exclusion from registers of certain confidential information)

The full text of each of these provisions is reproduced in Appendix 1 to this decision. Appendix 1 forms part of this decision.

Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Environmental Information (Scotland) Regulations

Access to Environmental Information: Guidance for Scottish Public Authorities and Interested Parties on the Implementation of the Environmental Information (Scotland) Regulations 2004.

The Aarhus Convention: An Implementation Guide

Facts

Integra Compliance Limited, trading as "Compliance Link" (Compliance Link) requested from the Scottish Environment Protection Agency (SEPA) information relating to SEPA's investigations into Compliance Link's and other organisations' producer responsibility obligations.

SEPA supplied Compliance Link with some information requested but withheld other information on the grounds that it was excepted from release under the EIRs.



SEPA upheld its original decision on review. During the course of the investigation SEPA revised its reliance on a number of exceptions and a number of the documents which had originally been withheld were released to Compliance Link.

Following an investigation, the Commissioner found that SEPA had been correct to deal with this request under the EIRs, but had failed to adequately specify how it had applied the public interest test and substantial prejudice tests in its response to Compliance Link.

The Commissioner also found that while SEPA acted correctly in withholding some information from Compliance Link, it had failed to comply with the EIRs in other aspects. The Commissioner has ordered SEPA to release certain information to Compliance Link. Appendix 2 sets out the information which is to be released.

Background

1. On 31 January 2005, Compliance Link wrote to SEPA requesting a variety of information relating to SEPA's investigations into producer responsibility obligations (the full request is set out in Appendix 3 of this decision).
2. SEPA confirmed on 11 February 2005 that it was dealing with this request under the terms of the EIRs and informed Compliance Link that a fee would be payable in this instance as per regulation 8(1) of the EIRs.
3. SEPA received payment of the fee requested on 1 March 2005.
4. On 15 March 2005 SEPA responded to the initial request and supplied Compliance Link with some of the information requested. However, other information was withheld on the basis that the information was excepted under regulations 10(4)(d), 10(4)(e), 10(5)(b), 10(5)(d) and 10(5)(e) of the EIRs.
5. On 30 March 2005 Compliance Link contacted SEPA detailing its dissatisfaction with the response supplied and requested a review under regulation 16 of the EIRs.
6. On 5 May 2005 SEPA responded to Compliance Link's request for review, upholding its original decision made on 15 March 2005.
7. On 14 June 2005 Compliance Link applied to me for a decision. Compliance Link was dissatisfied with the response supplied by SEPA on various grounds which are set out below.



8. The case was allocated to an investigating officer and validated by establishing that Compliance Link's request had been made to a Scottish public authority and that it had appealed to me only after asking the authority to review its response.

The Investigation

9. On 11 July 2005, a letter was sent to SEPA, in terms of section 49(3)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA) (which, as a result of regulation 17 of the EIRs, covers applications made to me under both the EIRs and FOISA), giving notice that an application had been received and that an investigation into the matter had begun. SEPA was invited to comment on matters raised by Compliance Link and on the application as a whole.
10. On 1 August 2005 SEPA replied, providing its comments on the case and supporting documentation.
11. SEPA provided this office with further information and released a number of documents to Compliance Link during the course of the investigation.

The Commissioner's Analysis and Findings

12. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Compliance Link and the SEPA and I am satisfied that no matter of relevance has been overlooked.

Background Information

13. Under the Producer Responsibility Obligations (Packaging Waste) Regulations 1997 (the Producer Regulations), if a business's assessment of its 'packaging handled' concludes that more than 50 tonnes of packaging is handled then, subject to the turnover threshold also being exceeded, the business must comply with producer responsibility obligations. As part of these obligations, the business must take reasonable steps to carry out the specified tonnages of recovery and recycling of packaging waste. The business may choose to discharge these obligations individually, or it may join a registered compliance scheme that will meet obligations on its behalf.



14. To enable producers to demonstrate compliance with their obligations, an instrument was developed called a Packaging Waste Recovery Note (PRN), which enables producers (or compliance schemes) to produce the necessary documentary evidence to show that they have had the specified tonnages of packaging waste recovered or recycled.
15. Only reprocessors who have been accredited can issue PRNs. Reprocessors are required only to issue PRNs to obligated businesses, but the PRN is a tradable note and can also be purchased, for example, on a trading floor.
16. Under this system, therefore, producers can meet their recovery and recycling obligations by buying or obtaining PRNs which provide evidence that the correct quantity and material of packaging waste has been recovered.
17. Regulation 25 of the Producer Regulations places a duty on SEPA to monitor compliance with these regulations in Scotland.
18. There are a number of producer responsibility offences under the Producer Regulations. For example it is an offence to fail to register, fail to take 'reasonable steps' to recycle or recover the required amount of packaging waste and to supply misleading data.
19. In this instance SEPA was carrying out investigations in relation to the Producer Regulations, as a result of allegations having been made that a company was illegally flooding the market with fraudulent PRNs.

FOISA or EIRs?

20. Compliance Link submitted its request for information under both the EIRs and FOISA. SEPA responded to its request under the EIRs.
21. The Producer Regulations were made under Part V of the Environment Act 1995 with the aim of securing a more sustainable approach to dealing with packaging waste and of reducing the amount of such waste going to landfill. I am therefore satisfied that the information requested by Compliance Link falls within the definition of environmental information and that SEPA was correct, therefore to deal with the request under the EIRs.

Scope of Investigation

22. I would like to take this opportunity to make it clear that it does not fall within my remit to question the actions of SEPA with regard to its regulatory function. My investigation extends only to whether SEPA acted correctly with regard to its obligations under the EIRs.



The Basis of the Appeal

23. Compliance Link applied to me for a decision based on its dissatisfaction with the response from SEPA to its wide-ranging information request. Compliance Link's areas of dissatisfaction were wide ranging but can be categorised as follows:
- (a) SEPA had not relied upon the terms of regulations 10(8) and 10(9) of the EIRs in responding to Compliance Link's information request. (Regulations 10(8) and (9) permit public authorities to refuse to confirm or deny whether information is held by them in certain limited circumstances.) As a result, Compliance Link took the view that SEPA did not regard the nature of the information withheld (and the format in which it is held) as being information which SEPA should withhold. Compliance Link felt that SEPA should have disclosed the nature of the information withheld and the format in which it is held even if the information itself was validly withheld.
 - (b) Compliance Link felt that SEPA failed to adequately specify how it had applied the substantial prejudice and public interest tests contained in the exceptions it had relied on to withhold information.
 - (c) Compliance Link was dissatisfied that SEPA had withheld relied on exceptions in the EIRs to withhold information. They raised specific concerns about the use of regulations 10(5)(b) and 10(4)(d) and I will consider these, together with SEPA's use of the exceptions more generally under this heading.
 - (d) Compliance Link was not satisfied that SEPA had fully complied with the requirements of regulation 10(7) with regard to the redaction of the documents supplied.
 - (e) Finally, Compliance Link further asserted that SEPA failed to provide a response to the request for review within the timescales set down in regulation 16(4).
24. The investigation therefore focussed on these specific issues highlighted by Compliance Link.

Submissions from SEPA

25. In its submissions to my Office, SEPA highlighted that it had sought legal advice supporting all of the decisions it had made, and that advice was also provided to SEPA from the Scottish Executive Environment Group, which concurred and fully supported SEPA's stance and its legal advice. However SEPA did not provide me with a copy of any such legal advice.



Ground of dissatisfaction (a): Use of generic terms

26. With regard to the first ground of dissatisfaction raised by Compliance Link (paragraph 23(a)), SEPA submitted that it considered its stance of referring to documentation or using generic titles in its response as being correct both in general terms and the specific instance of this case.
27. SEPA further submitted that, with regard to this particular case, to have designated any documentation further - e.g., "Letter from X [a named company] to SEPA re possible wrongdoings of Y [another named company], dated Z [a specific date]" - could have been sufficient information in itself to have substantially prejudiced SEPA activities or compromised the other parties involved.
28. Regulation 10(8) provides that a public authority may refuse to reveal whether 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) (international relations, defence, national security or public safety) and if to reveal whether the information exists or is held by it would not be in the public interest.
29. Having reviewed the response supplied to Compliance Link, it is clear that there was no suggestion that SEPA was seeking to rely on the terms of regulation 10(8) of the EIRs. However, SEPA appears to have used a system for identifying documents relevant to Compliance Link's request based upon convenience and ease of identification. The information withheld is referred to by SEPA generically as "documents" but discussed under the various paragraphs correlating to the elements of Compliance Link's request.
30. Under regulation 13(b) of the EIRs, a public authority is required only to specify the reasons for the refusal to provide requested information including how the Scottish public authority has reached its decision with respect to the public interest.
31. As such, while it may be good practice to do so, this regulation does not appear to require a public authority to provide what would be, effectively, an inventory detailing the nature of each of the documents withheld and the format in which they are held. That SEPA provided only a generic description of the documents it was withholding in its response to Compliance Link does not breach the requirement of regulation 13(b) of the EIRs.
32. I am therefore satisfied that the provision of a generic term in describing the documents withheld was sufficient in this instance.



Ground of dissatisfaction (b): Application of the Public Interest Test

33. All of the exceptions contained in regulation 10(4) and 10(5) are subject to the public interest test required by regulation 10(1)(b). Regulation 10(1)(b) provides that an authority may refuse a request for environmental information where an exception applies *and* the public interest in making the information available is outweighed by that in maintaining the exception.
34. This regulation builds in a presumption (regulation 10(2)(b)) in favour of disclosure which means that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed.
35. Compliance Link's dissatisfaction with SEPA's response arose from its apparent failure to specify how it had applied the public interest test in determining that the information should be withheld.
36. Regulation 13(b) stipulates that where a Scottish public authority refuses a request for environmental information and that refusal is based on any of the exceptions contained within regulations 10(4) or 10(5), the authority shall specify in writing how it has reached its decision. This includes its reasoning behind the public interest considerations.
37. SEPA, in its response to Compliance Link's request for review, stated that its consideration of the public interest is evident in the response given, i.e. the fact that it has relied on exceptions is sufficient to indicate that SEPA were of the view that the public interest in making the information available was outweighed by that in maintaining the exception.
38. Having reviewed SEPA's responses to Compliance Link, I am not satisfied that SEPA fulfilled the requirements of regulation 13(b). I do not consider it sufficient to provide a response which is deemed to inherently imply that the public interest test was applied appropriately. A two stage test is required: firstly to consider whether information is exempt in terms of any of the exceptions in the regulation 10(4) or (5) and, secondly, to consider whether, in line with the public interest test, that the exception should be maintained. The purpose of providing detailed reasoning is to enable the applicant to determine whether the decision made by the authority is well-founded and to provide the applicant with the information required to challenge or accept that decision.
39. The duty to give reasons in relation to the public interest is set out in the Code of Practice on the Discharge of Functions by Scottish Public Authorities under the EIRs (the Section 62 Code), which states that:



“The [EIRs] also require Scottish public authorities, when withholding information, to state the reasons for claiming that the public interest in maintaining the exception outweighs the public interest in disclosure. Scottish public authorities should specify the public interest factors – for and against disclosure – that they have taken into account before reaching the decision, unless the statement would involve the disclosure of information which would itself be withheld in accordance with the [EIRs].” (paragraph 65)

40. I therefore find that SEPA breached its obligations under regulation 13(b) in failing to specify how it had applied the public interest test to the exceptions it was relying on to withhold information from Compliance Link.
41. However, SEPA has advised me that it has since amended its procedures to explicitly refer to how the application of the public interest test is applied in requests for information. (I also note that SEPA dealt with this particular information request shortly after the EIRs came into force.)

Ground of dissatisfaction (b), continued: Requirements of regulation 10(5) – the harm test

42. Compliance Link also expressed dissatisfaction with SEPA’s apparent failure to demonstrate how the considerations detailed in the exceptions contained in regulations 10(5)(b), 10(5)(d) and 10(5)(e) would, or would be likely to, be prejudiced substantially should the information withheld under these exceptions be disclosed.
43. Regulation 10(5) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially any of the considerations detailed in regulations 10(5)(a)-(g).
44. Regulation 13(c) of the EIRs provides that where an authority refuses to make environmental information available it shall state the basis on which any exception relied on under regulation 10(4) or (5) applies if it would not otherwise be apparent.
45. Paragraph 65 of the Section 62 Code states:

“Where a request for information is refused or partially refused in accordance with an exception, the [EIRs] require that the Scottish public authority notifies the applicant in writing which exception has been claimed, and the reason that exception applies. Scottish public authorities should not merely paraphrase the wording of the exception unless the statement would involve the disclosure of information which would itself be withheld in accordance with the [EIRs]. The Scottish public authority should state clearly in the decision letter why they have decided to apply that exception in the case in question.”



46. In its response to Compliance Link's request for review, SEPA indicated that the fact that it had exempted information under an exception inherently implied that SEPA considered that disclosure would prejudice substantially the considerations in the exceptions relied upon. Furthermore, SEPA state that the notes from its group dealing with the request put it beyond doubt that the correct tests were *de facto* applied.
47. However, I do not agree with this approach, but instead agree with the approach taken in the Section 62 Code.
48. Having reviewed the responses supplied to Compliance Link, I conclude that SEPA failed to adequately specify the substantial prejudice which would, or would be likely, to occur should the information in question be disclosed. I therefore find that it failed to comply with its obligations under regulation 13(b) of the EIRs.
49. In combination with my findings at paragraph 40 above this is a highly unsatisfactory outcome. In summary I have found that SEPA have failed to identify what harm would be caused by release of the documents it has withheld and what if any public interest matters it considered when deciding to withhold the information. It is not surprising that the applicant was dissatisfied.
50. However in submissions to my office, SEPA expanded on its application of both the public interest and the harm tests. I will therefore consider each exception applied by SEPA under regulation 10(4) and 10(5) below.

Ground of dissatisfaction (c): SEPA's reliance on the exceptions

51. I will now turn to consider SEPA's reliance on exceptions in the EIRs to withhold information from Compliance Link. To start with, Compliance Link questioned whether it was appropriate for SEPA to maintain the exception under regulation 10(5)(b), once it had decided whether or not to take any criminal/regulatory action.
52. Regulation 10(5)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the 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.
53. I am of the view that this exception applies to information relating to present proceedings or proceedings likely to take place in the future. It could include any information which, if disclosed, could prejudice the enforcement or appropriate administration of the law, which includes the prevention, investigation or detection of a crime, or the apprehension or prosecution of offenders. However every effort should be made to make information available once the proceedings have been completed.



54. Five documents (11,12,13,14 and 15) were initially withheld in their entirety by SEPA on the grounds that the information contained within them was exempt by virtue of the exception contained in regulation 10(5)(b). (During the course of the investigation, and after releasing a number of additional documents to Compliance Link, SEPA relied on the exception in regulation 10(5)(e) to withhold document 13 instead). SEPA stated that, if released at the time of the request, the information could have prejudiced substantially the course of justice or the ability of SEPA to conduct an inquiry of a criminal nature. Information was also redacted from documents 16, 17 and 18, on the same grounds.
55. SEPA stated that the documents withheld contained data and/or communications with other parties, possibly involved or being investigated. The documents also contained information relating to the fraudulent PRNs which, if released at that time, could have substantially (if not totally) prejudiced its ability to take the necessary enforcement / criminal actions against those concerned.
56. SEPA submitted that to prejudice its ability as the relevant legal authority to carry out such investigations would have been fundamentally against the public interest. This would apply not merely in respect of any potential wrongdoing in this particular case - but also in respect of the larger matter of the fraudulent PRNs and in SEPA's ability to investigate allegations of criminality and take relevant regulatory action.
57. In submissions to my Office, Compliance Link provided a letter dated 3 June 2005 which drew to a conclusion the investigations carried out by SEPA. I am therefore satisfied that SEPA was in the course of active proceedings at the time of the initial request (made on 31 January 2005) and request for review (responded to on 5 May 2005).
58. During the course of this investigation SEPA acknowledged that the exception applied at the formal review stage was time bound and that the exception had now lapsed with regard to a number of documents. SEPA therefore released documents 11, 12, 14, 15 and the elements of document 18 falling within the scope of Compliance Link's request. As noted above, the Guidance makes it clear that public authorities should make every effort to make information available once the proceedings have been completed and it was therefore good practice for SEPA to have released this information during the investigation.
59. As documents 11, 12, 14, 15 and the remainder of document 18 falling within the scope of Compliance Link's request were released by SEPA during the investigation, I do not intend to consider them further in this decision.



60. Although the proceedings in question have since concluded, SEPA also applied regulation 10(5)(b) to the redactions made to documents 16 and 17. Having reviewed the redactions made to these documents I am satisfied that the release of this information, at the time of the request would, or would be likely to have, prejudiced substantially SEPA's ability to conduct an inquiry of a criminal or disciplinary nature. I am also satisfied that SEPA acted in accordance with regulation 10(7) in only redacting the information excepted from release by virtue of regulation 10(5)(b).
61. I am satisfied that the public interest in SEPA's ability to carry out its regulatory function outweighs that of disclosure in this specific instance and therefore find that, at the time the request was made, the public interest in maintaining the exception outweighed the public interest in disclosing the information.
62. Compliance Link are of course entitled to request the information redacted from these documents now. However, as I am satisfied that SEPA acted in accordance with the requirements of the EIRs in withholding this information at the time of the request, I shall not consider documents 16 and 17 further in this decision.
63. Document 13 remained withheld by SEPA on the basis that the exception contained within regulation 10(5)(e) applies. The application of this exception will be considered below.

Regulation 10(5)(e)

64. Regulation 10(5)(e) provides that an authority may refuse to make environmental information available to the extent that its 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.
65. 'Legitimate economic interest' implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist a company's competitors. It can also cover requests for information such as cost benefit or other financial analysis, if disclosure would, or would be likely to, substantially prejudice the confidentiality of matters to which any commercial or industrial confidentiality attaches.
66. In applying this exception an authority may have regard to section 22 of the Environment Protection Act 1990 (EPA) which relates to information recorded on a public register. Where information is kept off the public register this may provide an indication as to whether the information is commercially sensitive and whether the exception in regulation 10(5)(e) is applicable.



67. Commercial confidentiality may also be based on the common law of confidence. This may be acknowledged in a contract, although merely stating that certain information is confidential within a contract does not necessarily make it so.
68. Even where the exception in regulation 10(5)(e) is found to apply, the public interest must still be considered (regulation 10(1)(b)) and the information released if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
69. 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.
70. SEPA applied the exception contained within regulation 10(5)(e) to documents 13, 22, 23, 24, 25 and 33. SEPA submitted that it had applied the exception and the public interest test on the basis that to “disclose the commercial/industrial information concerned, which was confidential in respect of the regimes provided but also at common law, would be against the public interest.”
71. SEPA also redacted information from documents 26, 27, 28 and 29 on the same grounds.
72. SEPA submitted that disclosure of this information could have led to legal action being taken against them and ultimately distrust between themselves as regulator and registered parties. SEPA explained that the information was of such a nature that disclosure was likely to be substantially prejudicial to those companies whose competitors / fellow scheme-operators obtained the data concerned, thereby obtaining a commercial advantage. The third parties were under a legal obligation to provide the information to SEPA (as regulator) in accordance with environmental legislation, but the information was exempt from listing on the public registers on the grounds of its commercial sensitivity.
73. SEPA highlighted that before deciding to rely on this exception, it had sought consent from the third parties referred for the information to be released. As a result of this, SEPA had been in a position to release most of the information which would otherwise have been subject to this exception to Compliance Link.



74. As noted above, document 13 was originally withheld under regulation 10(5)(b). However, SEPA subsequently applied regulation 10(5)(e) to this document instead during communications with this Office. I am satisfied that this document is a collection of information provided to SEPA from a variety of organisations. Given the competitive nature of the industry in question, I am satisfied that in withholding this document SEPA would be protecting the legitimate economic interests of a number of different organisations.
75. However, given that this extract was incomplete and historical at the time of the request, I am not satisfied that it retained any commercial sensitivity and that the disclosure of the information would not, or would not be likely to, have prejudiced substantially the confidentiality of commercial or industrial information. I therefore conclude that SEPA was incorrect in applying the exception contained within regulation 10(5)(e) to this document.
76. Document 22 was released by SEPA to Compliance Link during the investigation and I therefore do not intend to consider it further in this decision.
77. Document 23 provides SEPA with unaudited financial information from an external organisation. I am satisfied that in withholding this document SEPA was safeguarding a legitimate economic interest in that disclosure could provide an insight into this organisation's long-term strategy and thus would, or would be likely to, prejudice substantially the organisation's legitimate economic interest.
78. Document 24 is a copy of a compliance scheme's operational plan which shows how it intends to meet members' tonnage obligations; this submission to SEPA is a requirement under the Producer Responsibility Obligations 1997. I am satisfied that this document was supplied to SEPA in confidence. However, I note that SEPA have extracted data from this document which does not fall within the scope of the exception and have supplied this information to Compliance Link. I am satisfied that SEPA acted correctly in withholding the remaining sections of this document under regulation 10(5)(e).
79. Document 25 is a submission to SEPA from an organisation which was previously under investigation. Although this document was compiled in February 2002, I am satisfied, given the content of this document, the manner in which it was furnished to SEPA and the long-term strategic objectives set out in this document that it retains commercial sensitivity and that the disclosure of the document would, or would be likely to, prejudice substantially the interest protected by regulation 10(5)(e).



80. Document 33 is an internal e-mail exchange with documentary evidence from a third party organisation submitted to a House of Lords Select Committee Inquiry attached. Having reviewed the covering e-mails, I am satisfied that the e-mail of 9 May 2002 11:33 summarises and addresses the comments made within the attached document. The attached document is marked 'Confidential' by the originating author. The introductory paragraph of this document explains that the information is commercially sensitive in nature, but is being supplied to the Committee to assist with its inquiry. I am satisfied that this document provides details of the long-term strategic objectives of the commercial organisation and address allegations which have been made about this organisation. As such I am satisfied that SEPA acted correctly in withholding this document along with the covering e-mail of 9 May 2002 11:33 as disclosure would or would be likely to prejudice substantially the interests protected by regulation 10(5)(e).
81. However, I am not satisfied that regulation 10(5)(e) applies to the remainder of document 33. The remainder of this document is also duplicated within document 46, which was withheld under regulation 10(5)(d) and will be considered below.
82. A redacted version of document 26 has been supplied to Compliance Link. Having reviewed the redactions made, I am satisfied that SEPA acted correctly in redacting the first line of paragraph 2 of this document (which reflects specific monetary values) and that disclosure of the information would, or would be likely to, prejudice substantially the interest protected by regulation 10(5)(e).
83. However, I am not satisfied that the release of information in the latter half of this document which details the differences in interpretation between management accounts and statutory accounts would, or would be likely to, prejudice substantially the commercial interests of this organisation. I am not satisfied that this information reflects any commercial information which is specific to that organisation. I therefore find that the exception in regulation 10(5)(e) does not apply to paragraph 5 of this document.
84. Document 27 was similarly subjected to redaction. I am satisfied that the redactions made to this document were made in order to protect the economic interests of the organisation and that disclosure of the information in question would, or would be likely to, have prejudiced the interest protected by regulation 10(5)(e).



85. Although document 28 is marked confidential, SEPA supplied this document to Compliance Link subject to minor redaction. I am not satisfied, given the historical nature of the information redacted, that it remains commercially sensitive or that release of the information would, or would be likely to have, prejudiced substantially the interest protected by regulation 10(5)(e). I therefore conclude that SEPA was incorrect in its application of regulation 10(5)(e) in withholding this information.
86. Document 29 is an internal e-mail, two paragraphs of which were redacted by SEPA before the email was released to Compliance Link. However, having reviewed these redactions, I am satisfied that these redactions fall outwith the scope of the request. Consequently, I will not consider this document further.

Consideration of the public interest test and regulation 10(5)(e)

87. Having upheld the use of the exception contained within regulation 10(5)(e) in relation to documents 23, 24, 25, 26 (in part), 27 and 33 (in part), I am required to carry out the public interest test required by regulation 10(1)(b).
88. Although I recognise the public interest in transparency and accountability, having reviewed the information withheld I can see no public interest in the release of this specific commercial information. In addition, having considered the circumstances under which the majority of this information was furnished to SEPA I can see no countervailing public interest in release which would outweigh that in safeguarding the public interest in retaining a co-operative and trusting relationship between the industry and regulator. Accordingly, I find that the exception in regulation 10(5)(e) should be maintained.

Regulation 10(4)(d)

89. SEPA withheld 7 documents (35 - 41) on the basis that regulation 10(4)(d) of the EIRS applied. As SEPA subsequently released documents 40 and 41 during the investigation, I do not intend to consider them further. During the investigation, SEPA also advised me that it wished to rely on the exception in regulation 10(4)(e) to withhold this information and I do that below. Given the time limited aspects of the exception in regulation 10(4)(d) and that I have found the information in these documents to be exempt under regulation 10(4)(e), I will not consider the substantive issues relating to regulation 10(4)(d) here (i.e. whether the request relates to material which is still in the course of completion etc.). However, I will consider the ground of dissatisfaction specifically raised by Compliance Link in relation to SEPA's use of this particular exception.
90. Regulation 10(4)(d) provides that a Scottish public authority may refuse to make environmental information available to the extent that it relates to material which is still in the course of completion, to unfinished documents or incomplete data.



91. Regulation 13(d) provides that where a Scottish public authority excepts information on the basis of regulation 10(4)(d), the authority shall state the time by which the authority considers that the information will be finished or completed.
92. Compliance Link was dissatisfied that SEPA had failed to state the time by which it considered that the information withheld in draft form would be finished or complete.
93. In failing to advise Compliance Link of the time by which it considered that the information withheld under regulation 10(4)(d) would be finished or complete, I find that SEPA failed to comply with regulation 13(d).

Regulation 10(4)(e)-Internal communications

94. As stated above, SEPA applied this exception during the course of my investigation to documents 35, 36, 37, 38 and 39. SEPA had already applied this exception to documents 42, 43 and 44 in its initial responses to Compliance Link.
95. Regulation 10(4)(e) provides that an authority may refuse to make environmental information available to the extent that the request involves making available internal communications. As with all of the exceptions under regulation 10, a public authority applying this exception must do so in a restrictive manner and apply a presumption in favour of disclosure. Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception.
96. The exception does not expand upon what is meant by “internal communications”. The wording of the regulation directly reflects Article 4.1(e) of the relevant European directive (Directive 2003/4/EC on public access to environmental information), as well as Article 4.3(c) of the Aarhus Convention.
97. SEPA submitted that it may need to entertain certain discussions as part of the deliberation process and that these discussions may not reflect the actual outcome of the decision making process. It also submitted that disclosure of such drafts and the thought processes would have been likely to be misinterpreted and used to undermine SEPA’s actual decision. SEPA asserted that to inhibit such thought processes not just in the present case, but on the whole, was considered to prejudice substantially its ability to carry out its required functions in future, which was not considered in the greater public interest.



98. Document 35 is a very early draft note summarising part of a meeting held between SEPA and an external body. It is evident from the nature of this document that the author is seeking to confirm what should be recorded in respect of that meeting. In this case, I am willing to accept that it is an internal communication and that it is therefore excepted in terms of regulation 10(4)(e). However, this exception is subject to the public interest test.
99. Document 36 consists of an internal email exchange enclosing a draft submission to the House of Lords inquiry described in paragraph 121 of this decision. This document is in draft form and includes opinions and advice from SEPA's internal legal adviser. I am satisfied that this document meets the requirements of regulation 10(4)(e).
100. Document 37 consists of four separate drafts of the same letter to an external organisation. Given that these are drafts which were not issued, I am satisfied that these documents fall within the wide definition of "internal communications" and thus within the exception contained within regulation 10(4)(e).
101. Document 38 is a draft document with a covering summary draft public statement. Having considered the content of this document as a whole, including annotations, I am satisfied that this document falls within the definition of an "internal communication" and thus that the exception contained with 10(4)(e) is engaged.
102. Document 39 is an undated and unsigned draft of a letter, SEPA states that the final version of this document has not been released to Compliance Link. This version appears to be comprised of draft elements contributed by more than one individual. I am satisfied that this document meets the requirements of regulation 10(4)(e).
103. Document 42 reflects an internal e-mail exchange providing general comments and legal advice, as such I am satisfied that this document qualifies as an internal communication and that the document is excepted in terms of regulation 10(4)(e).
104. Document 43 is an unmarked file note. Having reviewed the content of this note and the comments expressed therein, I am satisfied that this note was for internal use and excepted in terms of regulation 10(4)(e).
105. Document 44 is an internal e-mail exchange with a preparation note for a meeting attached. I am satisfied that this document meets the requirements of regulation 10(4)(e).



Consideration of the public interest and regulation 10(4)(e)

106. As I have determined that exception within regulation 10(4)(e) is engaged in relation to documents 35, 36, 37, 38, 39, 42, 43 and 44. I must now go on to consider the application of the public interest test.
107. In favour of disclosure are the general principles of accountability and transparency to ensure that SEPA are carrying out their regulatory function effectively.
108. However, consideration need also be given as to the extent to which it is in the public interest to afford some measure of space in which public authorities can discuss options and decisions.
109. Having considered the content of documents 35, 36, 37 and 38, I am of the opinion that they provide no further substantive information and merely reflect an internal process of deliberation on stylistic issues.
110. Having considered the nature of documents 39, 42, 43 and 44 and the comments and opinions expressed therein, which includes in some instances the provision of legal advice; I am satisfied that the release of such information would or would be likely to inhibit substantially the candour of SEPA's decision-making process, which would not be in the general public interest.
111. I am of the view that the balance of public interest lies in maintaining the exception. The information contained within these documents would not provide any additional information to further public understanding of the issues at hand.

Regulation 10(5)(d)-Confidentiality

112. In its response to Compliance Link, SEPA initially withheld documents 45, 46 and 47 on the basis that the information contained within them was excepted from disclosure by virtue of regulation 10(5)(d) of the EIRs. As document 45 was subsequently released by SEPA during the investigation, I do not intend to consider it further.
113. Regulation 10(5)(d) provides that a Scottish public authority may refuse to make environmental information available if its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law. In most cases where this exception will apply, there will be a specific statutory provision prohibiting the release of the information. However, I consider that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings.



114. Documents 46 and 47 relate to the provision of evidence before a House of Lords Select Committee Inquiry into the costs to industry associated with the European Directive on packaging and packaging waste (94/62/EC). I am satisfied that the documents fall within the scope of Compliance Link's request and that the Select Committee Inquiry falls within the definition of "proceedings" contained in regulation 10(5)(d).
115. SEPA argued that to release the information would substantially prejudice and inhibit the decisions, thought processes and full and frank discussions that are often required within an organisation (here, the House of Lords) as part of the decision making process, due to the specific nature and content of the documents concerned.
116. Document 46 is a series of e-mails between a Clerk from the Select Committee Inquiry and SEPA. These exchanges comment on the submission made to the Select Committee Inquiry (document 47). I am not satisfied that the entirety of this exchange engages the exception contained within regulation 10(5)(d). I am satisfied that the comments made in sentences 2, 3, 4 and 7 of e-mail 10 May 2002 15:25 reflect views expressed in confidence by SEPA and summarise the points made by SEPA in document 47. I shall therefore consider the application of regulation 10(5)(d) to these comments when considering document 47.
117. However, with regard to the remainder of document 46, I am of the opinion that it reflects innocuous and administrative statements which do not convey any other information than that which the applicant is party to. As such, I am not satisfied that the confidentiality of the proceedings in question would, or would be likely to, be prejudiced substantially by the release of the remainder of this document.
118. Document 47 is a copy of a submission to the House of Lords Select Committee Inquiry to which SEPA has made some annotations. This document is marked "Confidential" by the originating author. The introductory paragraph of this document explains that the information is commercially sensitive in nature, but is being supplied to the Select Committee to assist with its inquiry. Although the House of Lords normally publishes evidence which has been provided to it, I am satisfied that it did not publish the submission in question or, indeed, the annotations made to the submission by SEPA.



119. I am satisfied that this information was provided to the House of Lords in confidence and has not been disseminated wider than to parties who were invited to comment on its contents. I am also satisfied that the contents of this document were not published along with other evidence provided in the course of the Select Committee Inquiry and that third party consent was refused in releasing this information. I am therefore satisfied that it has retained the necessary quality of confidence and that it was obtained under an obligation of confidentiality.
120. I am satisfied that, even in 2005, the disclosure of this information would result in harm to the commercial organisation which supplied this information in providing direct competitors with details of its long term strategic goals.
121. As sentences 2, 3 and 4 of the e-mail dated 10 May 2002 of document 46 summarises the substance of the comments made in document 47, I am satisfied that these excerpts also meet the requirements of regulation 10(5)(d).
122. I am therefore satisfied that the confidentiality of proceedings would, or would be likely to, be prejudiced substantially by the release of sentences 2, 3 and 4 of document 46 and the whole of document 47.

Consideration of the public interest test and regulation 10(5)(d)

123. Given that I have found that parts of document 46 and all of document 47 are exempt under regulation 10(5)(d), I am now required to go on to consider the public interest test in respect of this information.
124. In this case, I am satisfied that the public interest in allowing external private organisations to make such submissions in confidence and allowing public authorities to deliberate and comment on such submissions in confidence in the process of formal proceedings outweighs that in disclosure. I am therefore satisfied that SEPA acted correctly in maintaining the exception contained within regulation 10(5)(d) to sentences 2, 3 4 and 7 of the e-mail dated 10 May 2002 15:25 of document 46 and the entirety of document 47.

Ground of dissatisfaction (d) – Regulation 10(7)

125. A further area of dissatisfaction raised by Compliance Link related to SEPA's application of regulation 10(7). Compliance Link was not satisfied that SEPA had fully complied with the requirements of this regulation in the way it had redacted the documents supplied to them.
126. Regulation 10(7) of the EIRs provides that nothing in the EIRs 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 the EIRs unless it is not reasonably capable of being separated from that other information.



127. This means that, wherever possible, information which is subject to an exception must be separated out or redacted and the remaining part of any environmental information requested should be made available. Whether information can be separated out is a practical test, but in many cases it will be possible for excepted information to be separated from other information
128. Throughout my consideration of the documents withheld by SEPA I have considered whether any further information could have been made available by virtue of regulation 10(7).
129. Although I have found that SEPA was wrong to rely on exceptions in certain cases to withhold information from Compliance Link, I am generally satisfied that SEPA complied with regulation 10(7) in the manner in which it redacted information which it provided to Compliance Link in response to its request.

Ground of dissatisfaction (e) – Timescales

130. Regulation 16(1) of the EIRs allows an applicant to make representations to a Scottish public authority if it appears to the applicant that the authority had not complied with any requirement of the EIRs in responding to the applicant's request. Regulation 16(4) provides that where an applicant has made representations to a Scottish public authority, the public authority must notify the applicant of its decision on the representations as soon as possible and not later than 20 working days after the date of receipt of the representations.
131. Compliance Link faxed representations to SEPA on 31 March 2005. The response from SEPA is both dated and date stamped 28 April 2005 (i.e. the twentieth working day). However, according to Compliance Link, they did not receive the response until 5 May 2005 due to insufficient postage.
132. I consider that the use of the term “notify” in regulation 16(4) does not mean that the applicant must be notified within the 20 working day period, but rather that the notification must have been issued to the applicant within that timescale. Consequently, I cannot find that SEPA failed to comply with regulation 16(4), although SEPA clearly erred in not ensuring that sufficient postage had been paid.
133. If it became known to me that a public authority had frequently failed to ensure that there was sufficient postage on its responses under the EIRs – or, indeed, under FOISA – then I would have the option of issuing a practice recommendation. I do not consider that to be appropriate here.



Decision

I find that the Scottish Environment Protection Agency (SEPA) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Compliance Link.

In failing to release certain documents to Compliance Link (as detailed above and as summarised in Appendix 2 to this decision), I find that SEPA failed to comply with regulation 5(1). I now require SEPA to release the information specified in Appendix 2 to Compliance Link within 45 days of receipt of this decision notice.

In failing to specify adequately how it had applied the public interest test and substantial prejudice tests in respect of the exceptions it had relied on, I find that SEPA failed to comply with its obligations under regulations 13(b) and 13(c) of the EIRs.

In failing to specify the time by which it considered that information which it had withheld under the exception in regulation 10(4)(d) would be finished or complete, I find that SEPA failed to comply with regulation 13(d).

However, in considering these failures, I note SEPA's comment that it has amended its procedures to explicitly refer to how the application of the public interest test was applied in future requests for information. I have also taken account of the fact that the information request was made to SEPA shortly after the EIRs came into force. As such I am satisfied that no further action is required on that point.

I also find that SEPA complied with regulations 10(4) and (5) and 13(c) of the EIRs in the manner in which it described the information excepted from release; complied with its obligations under regulation 10(7) in supplying all the information possible at the time of the request and, finally, complied with the timescales set out in regulation 16(4) of the EIRs.



Appeal

Should either the SEPA or Compliance Link wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
20 August 2007



APPENDIX 1

Relevant Statutory Provisions

The Environmental Information (Scotland) Regulations 2004

Duty to make available environmental information on request

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

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.

[...]

- (4) A Scottish public authority may refuse to make environmental information available to the extent that-

[...]

- (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-



[...]

- (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;

[...]

- (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;

[...]

- (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.

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-



- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;
- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and
- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

[...]

- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

[...]

The Environmental Protection Act 1990

22 Exclusion from registers of certain confidential information

- (1) No information relating to the affairs of any individual or business shall be included in a register maintained under section 20 above, without the consent of that individual or the person for the time being carrying on that business, if and so long as the information—
 - (a) is, in relation to him, commercially confidential; and



(b) is not required to be included in the register in pursuance of directions under subsection (7) below;

but information is not commercially confidential for the purposes of this section unless it is determined under this section to be so by the enforcing authority or, on appeal, by the Secretary of State.



APPENDIX 2

Document Number	Exception cited	Exception upheld (Y/N)	Public interest lies in disclosure?(Y/N) N/A = not applicable	Release/Withhold
11	N/A	N/A	N/A	Released by SEPA during course of investigation
12	N/A	N/A	N/A	Released by SEPA during course of investigation
13	10(5)(e)	N	N/A	Release
14	N/A	N/A	N/A	Released by SEPA during course of investigation
15	N/A	N/A	N/A	Released by SEPA during course of investigation
16	10(5)(b)	Y	N	Withhold
17	10(5)(b)	Y	N	Withhold
18	N/A	N/A	N/A	Section 4 which falls within the scope of the request released by SEPA during course of investigation.
22	N/A	N/A	N/A	Released by SEPA during course of investigation
23	10(5)(e)	Y	N	Withhold
24	10(5)(e)	Y	N	Withhold
25	10(5)(e)	Y	N	Withhold
26	10(5)(e)	Y-Monetary values only (Part I) N-Interpretation of figures (Part II)	N-Part I N/A	Withhold (Part I) Release (Part II)
27	10(5)(e)	Y	N	Withhold
28	10(5)(e)	N	N/A	Release



Document Number	Exception cited	Exception upheld (Y/N)	Public interest lies in disclosure?(Y/N)	Release/Withhold
29	N/A	N/A	N/A	Information outwith the scope of the request
33	10(5)(e)	Y-attachment and e-mail of 9 May 2002 11:33 N-remainder of document	N	Withhold-attachment and e-mail of 9 May 2002 11:33. Release-remainder of document.
35	10(4)(d) 10(4)(e)	Not considered Y	N	Withhold
36	10(4)(d) 10(4)(e)	Not considered Y	N	Withhold
37	10(4)(d) 10(4)(e)	Not considered Y	N	Withhold
38	10(4)(d) 10(4)(e)	Not considered Y	N	Withhold
39	10(4)(d) 10(4)(e)	Not considered Y	N	Withhold
40	N/A	N/A	N/A	Released by SEPA during course of investigation
41	N/A	N/A	N/A	Released during course of investigation
42	10(4)(e)	Y	N	Withhold
43	10(4)(e)	Y	N	Withhold
44	10(4)(e)	Y	N	Withhold
45	N/A	N/A	N/A	Released by SEPA during course of investigation
46	10(5)(d)	Y-sentences 2, 3, 4 and 7 of email 15:25 only N-remainder	N N/A	Withhold sentences but release remainder of document.
47	10(5)(d)	Y	N	Withhold



APPENDIX 3

INFORMATION REQUEST MADE BY COMPLIANCE LINK

- a. All external correspondence and minutes of telephone conversations, meetings, advice notes, memoranda and/or consultations between SEPA and Compliance Link, the Environment Agency and other third parties in connection with the 8,000 tonnes of Peniston Plastics PRNs held by Compliance Link, the circumstances relating to their acquisition, their validity or otherwise, their audit trail from issue to acquisition by Compliance Link and whether their submission by Compliance Link would satisfy their “reasonable steps” obligations in terms of the 1997 Regulations.
- b. All internal notes and minutes of telephone conversations, meetings, advice notes, memoranda and/or consultations with SEPA and/or Environment Agency staff in connection with the 8,000 tonnes of Peniston Plastic PRNs held by Compliance Link, the circumstances relating to their acquisition, their validity or otherwise, their audit trail from issue to acquisition by Compliance link and whether their submission by Compliance link would satisfy their “reasonable steps” obligations in terms of the 1997 Regulations.
- c. All external and internal correspondence and minutes of telephone conversations, meetings, advice notes, memoranda and/or consultations between SEPA and Compliance Link, the Environment Agency and other third parties relating to the “areas of concern” or reasons for refusal referred to in SEPA’s letters of 31 August and 27 September 2004, being essentially that (a) Compliance Link had not exercised sufficient due diligence prior to their acquisition of the PRNs in question, (b) the capacity of plastics reprocessing plant in the UK at the time suggests 8,000 tonnes of plastic could not have been reprocessed in December 2003, and (c) the PRNs were issued out of sequence.
- d. All other notes and correspondence held on file by SEPA in connection with the 8,000 tonnes of Peniston Plastics PRNs held by Compliance Link.
- e. All external and internal correspondence and minutes of telephone conversations, meetings, advice notes, memoranda and/or consultations between SEPA and Compliance Link, the Environment Agency and other third parties relating to SEPA’s audit report on Compliance Link on 22 June 2004.
- f. All external and internal correspondence and minutes of telephone conversations, meetings, advice notes, memoranda and/or consultations between SEPA and the Environment Agency and other third parties relating



to Peniston Plastics' removal from SEPA and the Environment Agency's websites as an accredited reprocessor.

- g. All external and internal correspondence and minutes of telephone conversations, meetings, advice notes, memoranda and /or consultations between SEPA, and the Environment Agency and other third parties (including the Scottish Executive and DEFRA) held by SEPA in relation to Wastepack's failure to meet its recovery and recycling obligation in 2001.
- h. All other external and internal correspondence and minutes of telephone conversations, meetings, advice notes, memoranda and/or consultations between SEPA, the Environment Agency and other third parties relating to Peniston Plastics.
- i. All information confirming SEPAs' employee's qualifications and experience in regulating a tradable permit system.