

# **Access to Environmental Information Guidance for Scottish Public Authorities and Interested Parties**

On the Implementation of the Environmental  
Information (Scotland) Regulations 2004

Latest Update  
September 2005  
Paper 2005/21



Scottish Executive Environment Group

**Access to Environmental Information**

**Guidance for Scottish Public Authorities and  
Interested Parties**

On the Implementation of the Environmental Information  
(Scotland) Regulations 2004

Latest Update  
September 2005  
Paper 2005/21

© Crown copyright 2005

ISBN: 0-7559-2714-1

Scottish Executive  
St Andrew's House  
Edinburgh  
EH1 3DG

Produced for the Scottish Executive by Astron B43114 09/05

Published by the Scottish Executive, September, 2005

Further copies are available from  
Blackwell's Bookshop  
53 South Bridge  
Edinburgh  
EH1 1YS

The text pages of this document are printed on recycled paper and are 100% recyclable.

<b>CONTENTS</b>	<b>Paragraphs</b>
<b>Introduction</b>	<b>1-11</b>
<b>Who must comply with the Regulations?</b>	<b>12-19</b>
<b>What do the Regulations cover?</b>	<b>20-32</b>
<b>What is required of public bodies?</b>	<b>33-40</b>
<b>Disseminating information actively</b>	<b>41-45</b>
<b>Handling requests for environmental information</b>	<b>46-61</b>
<b>Can a fee be charged for supplying information?</b>	<b>62-68</b>
<b>Refusal</b>	<b>69-73</b>
<b>What are the exceptions?</b>	<b>74-123</b>
<b>What are the procedures for review and appeals?</b>	<b>124-131</b>
<b>What arrangements should be put in place for long-term record keeping?</b>	<b>132-135</b>
<b>What will constitute an offence?</b>	<b>136-140</b>
<b>How will the regime be monitored and reported?</b>	<b>141-148</b>

This document has benefited from evidence of past experience, including inputs from consultees and stakeholders. It will be developed further with experience of the updated Regulations and their part in the wider freedom of information regime.

Comments, further evidence and good practice examples from readers would be welcome. Contact details are given at the end of the document.

## *Introduction*

1. The Scottish Executive is committed to freedom of information and to a greater sense of openness and transparency within the government itself. The Scottish Executive is also keen to give a greater sense and opportunity for empowerment to individuals and communities in matters which affect the quality of their lives. The Freedom of Information (Scotland) Act 2002 (FOISA) came into effect on 1 January 2005. The Act has introduced the appointment of an independent Scottish Information Commissioner to oversee compliance with the Act and his powers will be applied also to updated Regulations which develop access by individuals and interested groups to environmental information held by Scottish public authorities.

2. Access to environmental information has been regarded for many years as an important aspect of public participation and achieving sustainable development. A public that is well informed has a lot to offer the decision-making process by contributing a wide-range of opinions and views. This can help identify more immediate and evident consequences of policy as well as potentially unforeseen effects, particularly those whose impact may not have become apparent in the short-term and might easily have gone without being detected until too late.

3. Access to environmental information is not new. It has been practised in the UK for over 10 years. The Environmental Information Regulations (EIR) came into force in 1992 (SI 1992 No 3240) and were amended in 1998 (SI No 1447). The new Environmental Information (Scotland) Regulations 2004 (EISRs) give an opportunity to incorporate practices which have been good practice since 1992 and already in use by many authorities under the prior environmental information regime. Significantly, they also provide a means of meeting obligations under European and International commitments.

4. The UK signed the UNECE Convention on Access to Information, Public Participation and Access to Justice in environmental matters at Aarhus in Denmark in 1998 – the Aarhus Convention. The new Regulations enable Scotland to comply with the Convention and with the new Aarhus-based EU Directive 2003/4/EC of 28th January 2003 on public access to environmental information. Separate Regulations were made to ensure that England, Wales and Northern Ireland are also in compliance, assisting towards UK ratification of Aarhus and implementation of the EU Directive. The EU Directive seeks to bring the provisions of Community law in to line with the Convention. The objective of the Directive taken from Article 1 is:

- to develop the existing right of access to environmental information held by or for public authorities in Scotland and to set out the basic terms and conditions of the updated regime and
- to promote in as wide a structure as possible an information dissemination regime, which is easily accessible to the public on environmental information.

5. In general, the implementation of the new regulations is aligned with the Freedom of Information (Scotland) Act 2002.

## **EISRs AND FOISA**

6. Because our European and International obligations on environmental information go wider than is set out in the Freedom of Information (Scotland) Act 2002, the new Environmental Information (Scotland) Regulations 2004 differ in some respects from FOISA 2002.

- wider range of bodies covered
- requests can be in any form including spoken
- complex and voluminous requests can have up to 40 days to be answered
- exceptions are structured differently
- the basis of changing is expressed more generally
- transfer of request to another Scottish public authority required in certain circumstances

### **Main differences between new Regulations and the 1992 Regulations**

7. The principal differences between the new environmental information Regulations and the 1992 environmental information Regulations are:

- definitions of environmental information and the bodies that are associated with information on the environment are more fully/clearly illustrated in the EISRs 2004
- in most cases the time limit which a public body has to respond to a request for environmental information is reduced from 2 months to 20 working days
- a public interest test has been introduced, which means that information may be refused in terms of an exception only if the public interest in making the information available is outweighed by the public interest in maintaining the exception. This is in alignment with the comparable test in the Freedom of Information (Scotland) Act 2002
- also in line with the Freedom of Information (Scotland) Act 2002, an applicant may seek review by an authority of its decision and the Scottish Information Commissioner will provide a clearer process of appeal for applicants
- other changes clarify provisions from the 1992 regime, most of which are already practised by public authorities

8. This Guidance document replaces the existing Guidance on the environmental information Regulations 1992 as amended by the 1998 Regulations. A number of the detailed features of the new regulations featured in good practice Guidance of 1992. The Guidance will also assist Scottish public authorities to comply with their legal obligations under the new Regulations and help clarify the links between the Environmental Information Regulations and the Freedom of Information (Scotland) Act 2002 and other general information regimes. The Guidance is **not** legally

binding. Only the Scottish Information Commissioner and the courts can give an authoritative decision on the interpretation of the Regulations.

9. For Scottish public authorities this Guidance should be read along with the Code of Practice for the Regulations, describing the practices which, in the view of Scottish Ministers, it would be desirable for authorities to follow in the discharge of their functions under the Regulations.

10. Where parallel regimes are potentially applicable, the FOISA will apply unless information is environmental information, to which the EISRs regime will apply instead. If the information is personal data, the Data Protection Act 1998 will apply instead. There should be no overlap. Regulation 11 and paras 115-117 below deal with the DPA in more detail.

11. An authority should decide under which regime a request falls most appropriately. In general, it may be most practical and transparent to deal with the request entirely under the appropriate regime. If a larger request appears to fall into environmental information and other information it may be possible to deal with the parts under the EISRs and FOISA regimes. However, care should be taken to avoid confusion eg of the precise provisions of the regimes where the regimes differ in detail. Whichever information regime is used, the DPA requirements for personal data will need to be met.

## ***Who must comply with the Regulations?***

### **What is a Scottish Public Authority?**

12. In these Regulations a ‘Scottish public authority’ - means:
- a) all Scottish Public Authorities as listed in Schedule 1 of the Freedom of Information (Scotland) Act 2002 or designated by order as a ‘public authority’ under section 5 of the same Act.
  - b) a wholly government-owned company as defined by section 6 of the Act.
  - c) any other Scottish public authority within the meaning of the Scotland Act 1998.
  - d) any other person/body under the control of a public authority at (a), (b) or (c) and having public responsibilities, functions or providing services in relation to the environment.

13. The definition of **function** above should be taken to include the provision of any services. **Control** should be taken to mean a relationship, which is constituted by statute, regulations, rights, licence, contracts or other means that either separately or jointly confer the possibility of directly or indirectly exercising a decisive influence on bodies/authorities or organisations. In line with this definition, any private company which is sufficiently associated with activities of a Scottish public authority will have responsibilities under EISRs. “Control” may relate to the body/authority itself and control of the services provided by it. It also includes financial control as well as regulatory or administrative control. Examples of such bodies would be private contractors or public private partnerships with environmental functions such as waste disposal, water, energy, transport and environmental consultancy. Following privatisation and liberalisation of marketing and competition such arrangements can be complex. For the EISRs to apply there needs to be a link to a body at (a), (b) or (c) above.

14. Public utilities carrying out functions involved with the supply of essential public services such as water, sewerage, gas and electricity may fall within the scope of the new Environmental Information (Scotland) Regulation 2004, depending upon the nature of the constitution of the company and the extent of their environmental responsibility. Some companies may be linked to UK public authorities and hence caught by the UK EIRs. A single contract between a Scottish public authority and a private organisation will not necessarily bring the private company within the scope of the environmental information regime although it may do so. Each case will need to be considered on its merits. No comprehensive list can be compiled of the companies and organisations under the control of a Scottish public authority. Such relationships are dynamic and subject to change.

15. If any individual/body or organisation is unclear of its status under the Regulations then it should seek legal advice. In any disputes it will be for the Scottish Information Commissioner, and ultimately the courts, to decide.

16. The Regulations apply to Scottish public authorities and therefore do not apply to

- UK government departments and associated agencies
- The House of Commons
- The House of Lords
- The Northern Ireland Assembly
- The National Assembly of Wales
- The armed forces of the Crown
- Any body or office holder listed in Parts II to VII of Schedule 1 of the Freedom of Information Act 2000 or designated by order as a “public authority” under section 5 of the same Act
- A publicly-owned company as defined by section 6 of the Freedom of Information Act 2000 and,

17. A person/body cannot be within the ambit of both UK and Scottish regulations. If the UK regulations apply as in paragraph 16 above, the EISRs do not apply.

18. Where a body is within the ambit of the EISRs 2004 by reason of a control link to a Scottish public authority and an environmental function, responsibility or service, it is caught by the Regulations only to the extent of that control and that function, responsibility or service.

19. The Regulations do not apply to any public authority when carrying out functions of a judicial or legislative capacity e.g. The Scottish Parliament, a Sheriff, courts or tribunals. These public authorities are, however, public authorities for the purpose of these Regulations when they carry out other functions, for instance, managing and operating their own premises.

## *What do the Regulations cover?*

### **Environmental Information – but what is that?**

20. The definition of environmental information includes information in written, visual, audio taped or database form on:

- the state of elements of the environment – such as air, water, soil, land, landscape and natural sites, flora and fauna, including GMOs, wildlife and biological diversity – and it includes any interaction between them.
- any factor such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment affecting or likely to affect the state of the elements of environment or any interaction between them
- measures and activities affecting or likely to affect, or intended to protect the state of the elements of the environment and the interaction between them. This includes administrative measures, policies, legislation, plans, programmes and environmental agreements
- reports on the implementation of environmental legislation
- cost benefit and other economic analysis used in environmental decision making
- the state of human health and safety, conditions of human life, the food chain, cultural sites and built structures, which are, or are likely to be affected by the state of the elements of the environment and the interaction between them

21. In more detail:-

**Air** includes the air contained by any building and any other natural or man-made structures either above or below the ground-level. It also include systems such as air-conditioning

**Water** includes underground as well as surface waters irrespective of whether they are natural or man-made in design. It also includes sewage and foul water, inland waters, rivers, canals, lakes, estuaries and seas.

**Soil** should also take in the upper layer of the mantle rock in which plants grow.

**Land and Landscape** includes all land surfaces, buildings, and underground layers or land covered by water.

**Natural Site** includes areas identified by reason of their flora, fauna, geographical or physiographical features, for example, sites of special scientific interest or areas of outstanding natural beauty.

**Biological diversity** includes both flora and fauna, living or dead

**Human health and safety and conditions of human life** includes human responses to physical, chemical and biological agents delivered through environmental media of water, air, land, and biodiversity etc

**Built structures** should include roads and other infrastructures

**State** includes physical, chemical and biological conditions

**Emissions** includes discharges and other releases into the environment whenever they occur including the direct or indirect release of substances, vibrations, or noise from individual or diffuse sources into or onto air, water or land

**Measures** includes administrative measures and environmental management programmes such as permit schemes, management contracts; and environmental information may be utilised in other measures such as land-use planning regimes and permits, regeneration and transport development plans and proposals.

**Effects** includes direct and indirect effects

**Economic analyses** includes financial analyses

22. For the purpose of these Regulations, information may relate to anywhere in the world.

23. Environmental information may be used or found in or extend beyond what is not specifically an environmental topic. Hence agriculture, industry or health sectors etc may use environmental information (which could be made available under these Regulations) as well as other information available under other regimes. Hence environmental information may relate to such issues as effects on the environment of GM crop trials, pesticide testing, run-off from agricultural land; impact of manufacturing processes; safe handling of clinical wastes, or environmental factors in public health, and land use planning. This may include reports on implementation of environmental measures and environmental legislation and any analysis resulting from appraisal of policy.

24. Environmental information includes information contained in documents, pictures and records, where records are taken to include registers, reports, returns, computer records and other non-documentary records. Maps will generally contain environmental information. Arrangements may have to be made over time with producers of maps to prevent restrictions that might otherwise arise over copyright and property rights. No types of information are excluded from the potential ambit of environmental information. It includes, for example, all types of decision letters, applications, inspection reports, concession agreements, contracts, tables, databases, spreadsheets, e-mails, photographs, sketches and handwritten notes or drawings and covers opinions and advice as well as facts.

25. Environmental information does not include non-existent information that could be created by manipulating existing information or data. Nor does it include information which does not exist until further research has taken place. Similarly it does not extend to information which has been destroyed in accordance with established procedures.

26. Scottish public authorities are advised to consider the accuracy of any information which they hold, particularly information received from a third party, or information which may have been based on opinion rather than fact.

27. If validation of certain information would be too expensive or difficult then it is advisable to issue a disclaimer with the information given to the public and to give the source of the information, especially in cases where perhaps only a small proportion of the data is available and therefore it may not be representative of the full data set.

28. There is no time limit on historical data or information, as information already in existence is covered by these Regulations, whether created or gathered.

29. Environmental information is held by a Scottish public authority if it is:-

- in its possession and it has been produced or received by that authority; or
- held by another person on that authority's behalf;

and in either case, it has not been supplied by a Minister of the Crown or department of the government of the UK and held in confidence.

30. These Regulations apply to any information held by or on behalf of a Scottish public authority whether or not it was obtained as a direct consequence of that body's environmental responsibilities. It includes information collected before the introduction of these environmental regulations. It thus includes information held within the body's buildings or elsewhere, held on its own behalf and it includes information held by others on behalf of the Scottish public authority (eg by consultants, private companies or in archives). Environmental information includes information transferred by a Scottish public authority to the Keeper of the Records of Scotland at the National Archives of Scotland [NAS] for preservation – the Keeper holds that information on behalf of the authority.

31. There does not need to be any contract or formal agreement for receiving environmental information by a Scottish public authority. Information given voluntarily or obtained by a Scottish public authority, e.g. from the internet, is still held by that authority for the purpose of these Regulations and may need to be made available in response to a request to that authority. However, that voluntary giving of environmental information to a Scottish public authority does not extend any obligation of these Regulations to the party that volunteered the information.

32. There are other statutory provisions that provide legislative powers for public access to environmental information. Some may require less information to be made

available than these Regulations. In such circumstances the arrangements under these Regulations will be generally the ones which prevail. Exceptions to this rule are information in EU documents (once the relevant EU Regulation has been updated to reflect the Aarhus Convention) and personal information (where a decision to release must take account of the requirements of the Data Protection Directive 95/46/EC).

## ***What is Required of public bodies?***

### **Obligations under the Regulations**

33. The Environmental Information (Scotland) Regulations require Scottish public bodies to:

- make environmental information available proactively, especially by electronic means
- give advice and assistance to any person making a request for environmental information
- make environmental information available to any person who requests it as quickly as possible and within 20 working days of their request, or exceptionally within 40 working days if the request is complex and voluminous
- refuse only in accordance with the limited exceptions available under the Regulations; give reasons, and provide details of the procedures available to applicants for review of a refusal and the process for appeal
- ensure that internal procedures are in place to deal with representations for review

34. Scottish public authorities will be accustomed to the requirements of the EISRs as the previous Regulations and supporting Guidance were in place from 1992 to 2004. Most Scottish public authorities which already have good practices in openness and transparency should not find it difficult to provide an effective and efficient information service to the public. Public authorities may be able to put frequently-requested information on their websites, thus allowing customers to access information on the net, whilst saving staff resources on dealing with individual requests for information.

### **Training and Awareness Raising within public authorities – who needs to know?**

35. All staff working in a Scottish public authority will have to be aware that the Environmental Information (Scotland) Regulations 2004 apply now. Training/updating sessions might contain background on:

- the role of the Regulations and access to environmental information as a key stepping stone in the process towards public participation and sustainable development
- the international context of the Regulations, which predates the domestic legislation of FOISA and makes EISRs slightly different.
- what counts as environmental information

- the few key differences between EISRs and FOISA
- how EISRs fit in a global context from the 1991 Rio Conference on sustainable development, through the UNECE Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, and the EU Directive 2003/4/EC

36. It would also be helpful to make staff aware of the requirement that in most circumstances information about emissions and discharges into the environment will be made available. It will of course be up to each individual public authority to decide and put in place internal procedures to suit their own specific requirements.

37. Plans for training Scottish public authorities affected by the requirements of the Freedom of Information (Scotland) Act 2002 have been under way since 2004 and these training provisions also take into account the need for staff to familiarise themselves with the Environmental Information (Scotland) Regulations.

### **Records Management**

38. Scottish public authorities should already have reviewed their records management arrangements as part of the process of preparing for implementation of the Freedom of Information (Scotland) Act on 1<sup>st</sup> January 2005. In doing this, they should have taken account of the Code of Practice on Records Management published by the Scottish Ministers under section 61 of the Act. Supporting Guidance is set out in the generic 'Model Action Plan' for developing records management arrangements compliant with the Code of Practice on Records Management published by the Keeper of the Records of Scotland. Each authority will also have to consider to what extent it may need to identify information relating to the environment separately and whether it may need to train staff to specialise in responding to the requirements of the Environmental Information (Scotland) Regulations 2004.

Bodies such as contractors, partners and some public utilities which are public authorities for the purposes of the EISRs but not the FOISA will be able to draw upon their experience under the former UK EIR requirements. They may wish also to consider whether any more formal arrangements are required for training, records management and active dissemination.

### **Helpful hints on how to ensure that information is made easily available to the public**

39. Here are a few suggestions for Scottish public authorities on how information can be made more easily accessible:

*- ensure as much information as possible is available on the website and in other publications*

*- consider whether your publication scheme under FOISA (for those operating under the Act) contains enough environmental information or whether more information should be made available through your scheme*

***- make clear the information you are content to release on request and ensure that staff dealing with such requests are made fully aware of:***

- what information can be given out
- where to find the information

***- make sure staff dealing with request are familiar with any statutory requirements, such as:***

- 20 working day time limit
- providing help and assistance
- transferring requests to other Public Authorities
- accepting oral requests, but making a written record of them and
- confirming with the applicant when a request cannot be met immediately

***- give staff training on how to identify and deal with any potentially difficult cases or complaints:***

- refusal, partial refusal, or where information to be released must be separated from that which is to be withheld
- where a request may be particularly time consuming or costly to handle

### **Streamlining procedures for requests under EISRs and FOISA regimes**

40. What do they have in common?

Active dissemination – *covers all stakeholders*

Records Management – *the same approach should be followed for all information*

Public Interest Test – *the same for both regimes*

Fees for providing information – *can be the same for both regimes although EISRs have no lower or upper thresholds*

Enforcement procedures – *the same for both regimes*

## *Disseminating information actively*

41. This requirement can be met in part by a Scottish public authority's publication scheme. However, reference to 'active dissemination' means more than just listing already-available information: there is clearly an intention to promote and develop dissemination. Making information easily available can reduce the resources needed to deal with individual requests. The more proactive a public authority becomes in disseminating information and making it easily accessible to the public, then the less time and effort is needed by staff having to physically produce information themselves.

42. Scottish public authorities are encouraged to make information more easily available by means of websites, telecommunications and electronic technology. This includes electronic information on permits, applications for permits and monitoring data relating to those permits. However, where information has been collected prior to the Directive coming into effect then it will be up to each Scottish public authority to decide whether or not it is feasible to make this earlier information available in electronic format, taking into account the volume of information and the demand for it. The key question with historical information is whether it can be found when requested. The Regulations do not require electronic format for information dating prior to 14 February 2003.

43. Scottish public authorities under EISRs not subject to the requirements of the Freedom of Information (Scotland) Act 2002 will also need to judge what action their authority will need to take to proactively disseminate environmental information held by them, whether through the use of a website or some other means such as periodicals or ad hoc reports, publicity material or articles in trade and professional publications.

44. Wherever there is a requirement under any other legislation for a Scottish public authority to maintain an accessible register containing environmental information, these registers **must** be kept up to date and accurate and 'comparable'. Access to these registers should be free of charge. Registers which can be looked at "in situ" by the public as a rule are accessible only during normal working hours. Although access to the information should be free, a charge can be requested for providing photocopies.

## **Copyright**

45. The provision of information under the EISRs does not give the person who received the information the right to re-use that information in such a way that it infringes any copyright legislation. Scottish public authorities should be aware that environmental information disclosed under the Regulations may be subject to copyright protection. If an applicant wishes to use any information in a way that would infringe copyright, for example by making multiple copies, or issuing copies to the public, he or she would require a licence from the copyright holder. HMSO have issued Guidance on this subject in relation to Crown Copyright, which is available on HMSO's website <http://www.hmso.gov.uk> or by contacting HMSO at St Clements House, 2-16 Colegate, Norwich, NR3 1BQ tel (copyright) 01603 621000 tel (other) 01603 723011.

## ***Handling requests for environmental information***

46. Anyone or any organisation world-wide can ask for environmental information, without having to prove or give a reason for their interest in the information requested. All requests must receive a response within 20 working days of receipt of the initial request unless exceptionally the request is complex and voluminous and an extension up to the time limit of 40 working days is necessary.

47. The onus to comply with the requirements of the Regulations falls on the Scottish public authority holding the information, whether or not this public authority originally created the information. The obligation to respond to a request falls on the office that receives the request, if it holds the information. In some circumstances it may need to consult before making a decision.

48. There may be occasions where it could help to deal with a request to know the applicant's interest or reasons for the request, if the person making the request is willing to provide this information. For example, the request may be made in connection with a statutory application and the information may be needed very quickly to enable the applicant to take action on the information within the time frames set out under relevant legislation. However, if the person does not give a reason, the public authority should respond to the request as soon as possible in accordance with the Regulations. Scottish public authorities cannot insist that applicants state their interest or reasons for their requests, and must treat all requests equally, regardless of applicants' stated interest, or lack of it, or their reasons or non-disclosure of reasons for their request.

49. If a request is unclear it might make it easier to provide the information sought if the applicant is invited to discuss the request. A short telephone conversation may be all that is needed to clarify the request.

50. When a request for environmental information is received orally, there may be circumstances where the public authority would find it helpful to receive the request in writing. This could happen in the more complex requests or where lots of information has to be collated before a response can be issued. If asked, the person making the request may be willing to put the request in writing. However, public authorities cannot insist on this and if no written request is forthcoming the public authority that received the request is advised to make its own written note of the request and date it. The public authority could also ask the person making the request to confirm that the authority has made a correct record – but avoiding unduly bureaucratic procedures. In any event, it is imperative for the public authority to record the date of receipt of oral requests because the 20-day time limit begins the day after the oral request was made. Scottish public authorities will also need to be clear about the impact this has on the practice on using answer-phones or voicemail, especially where individual recipients are absent. A clear record of the date of a request will be important also in any subsequent proceedings before the Scottish Information Commissioner.

### **How should a request be responded to?**

51. The Regulations require access to be given at places made available for the purpose. Some callers may be answered on the spot but more complex requests may be better dealt with by correspondence. The facilities for providing access are clearly for decision locally e.g. inspection and copying; and should be publicised by the authorities. The Code of Practice sets out the expected practice.

52. Some Scottish public authorities have outstations, which may or may not be staffed, which could be recipients of requests for environmental information. Some such places may be able to respond directly or may be able forward the request to the authority's contact point for requests. Other such outstations may not be in a position to respond in this way and could refer an applicant to the authority's contact point. The latter situation could apply also to staff who could be approached in public places or workers who need to travel in the course of their duties and are supplied by their employers with a vehicle. Such employees could direct enquirers to the authority's contact point from memory, from some 'aide memoir' or, e.g. by reference to telephone number or electronic address displayed on the authority's road vehicle.

### **In what form or format should Environmental Information be made available?**

53. A Scottish public authority must make the information available in the form or format requested unless:

- it is reasonable for the Scottish public authority to make it available to the applicant in another form or format
- the information is already publicly available and easily accessible in another form or format

54. The Scottish public authority should be as helpful as possible with respect to form and format, taking into account the fact that e.g. some IT users may not be able to read attachments in certain formats, and that some members of the public may prefer paper to electronic copies.

55. Although there is no specific reference in the Regulations to the need to provide information in the form of a summary or digest, a request for environmental information may include a request for information in this format. In these cases a summary should generally be provided so long as it is reasonably practical to do so, taking into account the cost. But it is not intended that requesting information in a particular form or format should be used as a way of analysing or manipulating information that can be done by the enquirer or of avoiding payment for published information which normally carries a charge.

### **Is there an obligation to transfer a request for environmental information?**

56. The Regulations make provision for the transfer of a request from one body to another. This provision applies only if the body receiving the request does not hold the information nor makes use of the services of another body to hold this information on its behalf. In certain circumstances, however, the person who has made the initial

requests may not wish to have the request transferred to another authority/body. He/she may, for example, prefer to make a new request. For this reason, the applicant should always be asked before any transfer is made.

57. When a request is to be transferred to another authority/body the person should be provided with enough information and assistance so that the progression of their request can be tracked by the applicant without any difficulty. This can be done easily by providing a telephone number of the authority/body to which the request has been passed and by publicising a clear explanation of the procedures carried out by the authority when it is considered necessary to transfer a request.

58. If it is felt necessary to transfer a request the body transferring the request must complete the process by issuing a decision letter within 20 days of receipt of the request. This letter will be a formal letter of refusal. It should therefore contain;

- An explanation of the fact that the information requested is not held by that body, and
- Information about the review procedure and the applicant's right of appeal.

59. When a request has been transferred from another body it then becomes a new request and this means that a new start date is set for the request. This will be the date of receipt of transferred request and the 20 working days allowed under these Regulations for handling that request will start from the day following this new date.

### **What happens in the case of records which have been transferred to the Keeper of the Records of Scotland?**

60. The Regulations make special provisions in relation to environmental information contained in a record which a Scottish public authority has transferred to the Keeper of the Records of Scotland at the National Archives of Scotland [NAS]. Such information is held by the Keeper on behalf of the authority. Where a request is made to the Keeper for access to environmental information contained in such a record and that record has not been designated as open for public access, he must send a copy of the request to the authority as soon as possible after receiving it. It is then for the authority to decide whether the information is subject to an exception under the regulation 10(1)(a) and to apply the public interest test under regulation 10(1)(b), and to notify the Keeper whether he can make the information available. If the record has been designated as 'open' the Keeper may make it available without reference to the authority that transferred the record.

### **Extension of Time**

61. The Regulations recognise that it may be impractical due to the volume and complexity of the request to reply to an applicant within the specified 20 working days time limit for a response, eg where considerable staff time is required to identify and gather the information. In cases where it is not possible to give a complete response within 20 working days then the period may be extended up to a total of 40 working days. The applicant should be informed as soon as possible, and no later than 20 working days from the date of request, that an extension is considered necessary in order to give a comprehensive response to their request. The response

should explain that the provisions of regulation 7 require to be used and should give the authority's reasons for considering that the information is voluminous and complex. The response should also describe the provisions for review and for appeal to the Scottish Information Commissioner.

## *Can a fee be charged for supplying Information?*

62. The Regulations provide that no fee should be charged for:

- inspection of public registers, or examination in situ of information.
- examination of the information requested at a place that the authority makes available for that purpose

63. This means that where a legally-required register is provided, access to this should be free. Similarly, in some circumstances it may be more effective to provide facilities for applicants to visit the public authority offices or an information service centre to inspect information. Again there should be no fee. There should be no fee for advice on the availability of information, nor for the processes of deciding its response to a request, nor for review.

64. A Scottish public authority may charge a reasonable fee for the provision of environmental information but this should not exceed the actual cost of supplying the information, for example, the actual cost of location, retrieval and photocopies. The fee cannot seek recovery of the original cost of creating the information. When fees are being charged, these should be clearly set out in the authorities' advertising/dissemination of their information regime, including on the authority's website, and made available to the public.

65. It is often not cost effective to charge a fee for the supply of environmental information and some Scottish authorities adopt a policy of not charging for information if the fee falls below a certain cost level. In some cases the cost of administering and collecting the charge may outweigh the fee being charged. Some Scottish authorities may even wish to make concessions for certain groups such as community groups or charitable organisations.

66. A fee may be asked of an applicant in advance, in which case the applicant should be informed of the reason that the fee has been considered necessary. Such a case may be where priced publications are necessary to sustain production of the information. Where a fee is charged in advance, the authority is not obliged to provide the information until the fee has been paid.

67. Scottish public authorities should consider methods of providing information at as low a cost as possible e.g. reproduction wherever possible by using electronic communications in preference to paper. This will be especially significant where the information requested is lengthy. The preference of the applicant, if stated, will also need to be taken into consideration. However where historical records exist then the cost of eg. digitising material, must also be considered when deciding the most effective approach.

68. In order to simplify the management of fees for the supply of information which is not actively disseminated, bodies may decide to charge the same fee for information supplied in accordance with these Regulations as that charged under the FOISA. Fees arrangements under the FOISA in response to requests are fixed by Regulations and have a lower and an upper threshold. There is, however, no similar provision under EISRs. This means that when a request for environmental

information is received that is complex and voluminous, such that it may involve considerable staff time in identifying and gathering the information requested, the authority receiving the request has scope to consider not only whether a time extension may be needed under regulation 7 but also whether to seek to recover the costs involved by charging a fee. Fees for such information must also be reasonable.

## *Refusal*

69. These Regulations continue and extend the presumption that environmental information will be made available on request but refusal is possible in a limited number of circumstances. These are of two categories and they are discussed in more detail under “exceptions” below.

(i) Firstly, these relate to the extent that certain circumstances exist, namely where the information is not held by the Scottish authority; the request is manifestly unreasonable; the request has been made in too general a manner; it relates to information which is incomplete; or it relates to internal communications. In these cases the Scottish public body should provide as much advice and assistance as possible to the applicant.

(ii) Secondly, in circumstances, where making information available would, or would be likely to, prejudice substantially a number of interests.

The grounds for refusal must be interpreted in a restrictive way, taking into account the public interest served by disclosure. Information relating to emissions is given a special status and must be supplied in most cases.

70. In cases where a request for environmental information relates to a combination of information that can be released and information which it would not be in the public interest to release, the information should be separated out and the part that can be released made available to the applicant. The applicant must be informed of any refusal as soon as possible and within 20 working days in most cases.

71. Where the response to a request contains a refusal to make information available or available in a particular format then the refusal must:

- be in writing
- state clearly the reasons for refusal
- state the basis for applying any exception, if it would not otherwise be apparent
- where environmental information is incomplete and the exception in regulation 10(4)(d) is relied on, state the time by which the Scottish public authority considers that the information will be complete
- provide details of the mechanisms for review and appeals procedures available against the decision to refuse the request

72. The purpose of providing reasons to an applicant is to enable him/her to determine whether the refusal is well founded in fact and law, or whether he/she want to challenge the decision for the refusal.

73. No fee can be charged by a Scottish public authority for or on account of environmental information which is not made available and this includes any legal

fees incurred by the public authority, even if legal advice were sought on whether or not information should be provided. Nor should a fee be charged for explaining the reasons for withholding environmental information.

## ***What are the exceptions?***

74. The Regulations permit a Scottish public authority to refuse a request if there is an exception under regulation 10(4) or (5) or regulation 11 and the public interest in making information available is outweighed by that in maintaining the exception. Under the Regulations any potential substantial prejudice must be weighed against the public interest in disclosure of the information. This process of balancing public interest and exception from disclosing information is referred to as the **Public Interest Test**. This is dealt with later in the Guidance at paragraphs 118-123. In considering the application of the exceptions an authority must interpret those exceptions in a restrictive way and must apply a presumption in favour of disclosure.

### **(i) EXCEPTIONS – to the extent that certain circumstances exist**

#### **If the authority does not hold the information?**

75. The meaning of ***‘hold’*** is to be interpreted widely. Any information in the possession of the Scottish public authority or which is stored elsewhere and is held by a natural or legal person on behalf of, or solely in connection with, services provided to a public authority is ***‘held’*** by it.

76. It follows that this exception applies only if the public authority receiving the request does not hold the information nor make use of the services of another body or person to hold this information on its behalf. The Scottish public authority would therefore have to provide advice and assistance and, if the likely holder of the information is known, ask the applicant if he/she would like the request to be transferred. Whether or not the information is held by another public authority and whether or not the applicant decides that he/she would like the request to be transferred, the last step in the procedure for the Scottish public authority that does not hold the information is to refuse the request.

#### **What about unreasonable requests?**

77. A “manifestly unreasonable request” – the words of the Regulations - could include a request for information that places a substantial and arduous burden on a Scottish public authority. Examples might be when the amount of information sought is considerable, when extensive scans of historic files prove necessary, or when significant searching in large databases or files of information is required. Alternatively the exception might apply in response to a request very similar to one recently answered by a Scottish public authority. One of the factors to be taken into consideration here is whether the work involved would require an unreasonable diversion of resources from the provision of the public services by the Scottish public authority. In some cases it may be possible to provide the applicant with access to the database so that he/she can research the topic in person. In other circumstances obstacles may be overcome if the applicant is willing to pay a reasonable charge for the work involved. This may not always be the solution to the problem, particularly if it meant diverting a specialist from carrying out other work. Discussion with the applicant – under the duty of “advice and assistance” may assist.

### **If the request is too general?**

78. A public authority may refuse a request for information on the grounds that it has been presented in too general a manner to allow the information to be identified and then formulated into a sensible response. In these circumstances it will be essential to communicate with the applicant to offer assistance to find out if the request can be more defined before refusal is considered. It would not be appropriate to refuse because the applicant was unfamiliar with the correct terminology. A request for “... all the information you hold on...” might be too general for a broad subject or for a large operation. However, a broad question in a more specific field might be answerable. Where an applicant has been asked to clarify or define such a request, as an alternative to refusal, the period for response will commence after receipt of the applicant’s clarification.

### **What happens when data is incomplete?**

79. Whether or not a document can be categorised as complete data will depend on the circumstances and should be considered on a case by case basis. Data which is part of routine monitoring should not be regarded as part of an ongoing unfinished set but should normally be released as soon as practicable after collection, or according to a planned and published timescale. In the case of a longitudinal survey, each stage of the survey should be regarded as a separate piece of work and therefore information should be made available at the end of each stage of the survey.

80. In the case of a Scottish public authority concluding a study or writing a report, access to certain documents produced during the process – e.g. data received or acquired, other papers, etc may await the completion of the final report so that analysis and interpretation can proceed unhindered. However, if the study is abandoned any such working papers which are not otherwise confidential should be released in response to a request as soon as reasonable if not otherwise disseminated by the Scottish public authority.

81. Completed data sets should be released as soon as practicable after collection, or according to a planned and published timetable. This approach allows an authority to include planning for publicity, Ministerial announcements, decisions etc, in its steps towards the completion of the report. However, a report cannot be refused on the grounds that the Scottish public authority plans to publish an edited version some time in the future. On the other hand, if in compiling the report, time is being taken by a Scottish public authority to organise the report in such a way that the information which can be disclosed is separate from the parts which cannot, then the report will not be deemed as complete until it is in its final format.

### **Internal Communication**

82. Information contained in any internal communications of or between Scottish public authorities, including any correspondence between officials in the same authority and its agencies, may be excepted from the duty to release if it is of a confidential nature. This also extends to inter-agency correspondence or correspondence between government departments. An exception of this nature can apply to correspondence in whatever form it may take and this includes memos, notes

of meetings, e-mails. Authorities must be allowed to think in private. Papers, reports and background deliberation collected and accumulated during the making up of a report or policy statement may be considered confidential if, for example, their release might lead to speculation, confusion or be misleading and that it would not be in the public interest in all circumstances of the case to disclose this information; or if disclosure might jeopardise the outcome of any deliberations. This exception could include expressions of opinions and interpretation, especially if these opinions and interpretations have not been validated at the time. The concept is of some form of relationship, of consultation or of joint working; and it may be the relationship that decides the confidentiality. It is not just geographically 'internal'. This exception should not be taken to encompass routine or administrative business transactions, nor simply because they are labelled 'draft'. Environmental information that is not of a confidential nature that can be extracted from an internal communication should be made available on request. Data assembled in support of policy-development may be made available once the outcome has been decided and announced, if it has not been released already in a public consultation.

83. An exception could include any correspondence between a Scottish Minister and a local authority council member, information passed between officials in the course of their normal duties, internal minutes and submissions to senior officers or Members. It could also include any reports submitted by an inspector to a Department, or to a local authority committee as part of the normal internal process for considering a report to maintain confidentiality pending a final decision on the outcome.

**(ii) EXCEPTIONS – which may cause substantial prejudice**

84. This second category of exception applies to the extent that disclosure would, or would be likely to, substantially prejudice certain processes or persons. The Freedom of Information (Scotland) Act 2002 provides for similar but not identical reasons for exceptions. The Freedom of Information (Scotland) Act 2002 provides for exemptions from disclosing information if the release of information would, or would be likely to, substantially prejudice the interests listed under the Act. Despite the differences in the exceptions between the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 both pieces of legislation require bodies to make a judgement in advance about the likely consequences of releasing the information, and whether it would result in any substantial prejudice.

**International relations**

85. Information relating to international relations, may be excepted if it contains confidential information obtained from (or which relates to) a foreign state, an international organisation, or overseas territories where the release of information might compromise any future co-operation with the UK in areas of vital interests to the UK.

### **In the case of defence?**

86. Defence information may include information that makes it possible to calculate military capacity, for example, levels of discharge from a naval submarine or other forms of information that would jeopardise the ability of the armed forces to carry out their defence functions. It may also include information which if disclosed would damage national security. Defence technology as well as plans and strategy change over time. In the longer term this exemption will become less relevant as, for example, information relating to the dumping of munitions from World War II could not be considered as being capable of affecting any military defence today.

### **National Security and Public Safety**

87. Environmental information may be refused by a Scottish public body if the release of such information would, or would be likely to substantially prejudice national security or public safety. This exception, together with those for 'international relations' and 'defence' (above), are similar to the exemptions under Section 31 of the Freedom of Information (Scotland) Act 2002. Such interests are likely to be narrow, considering the limited extent of Scottish public authorities' roles in those topics and the essential environmental focus. Likely topics could include environmental information on the protection of critical national infrastructures such as water supply. A Scottish public authority will also have exercised a presumption in favour of release and the public interest test must have been applied.

88. A certificate by Scottish Ministers of the fact that the exception applied at any time under Regulation 12 could require the 'national security' exemption to apply and would be 'conclusive'. However, appeal may be available on application to the courts for judicial review. In the absence of a certificate under Regulation 12, a refusal given under the exception and reviewed by the Scottish Administration could be appealed to the Scottish Information Commissioner for a decision. A decision notice or enforcement notice served upon the Scottish Administration by the Commissioner could cease to have effect if the First Minister issued a certificate under section 52 of the Freedom of Information (Scotland) Act 2002 by virtue of regulation 17(2)(c), stating that there had been no failure to comply with regulation 5 (duty to make information available) and that the information requested is of exceptional sensitivity. Given the presumption in favour of disclosure and the narrow interest of Scottish Ministers in matters affecting national security (see above), this power is expected to be rarely used by them.

### **What if it affects the course of justice?**

89. A request may be refused where the disclosure of the information would, or would be likely to, substantially prejudice

- the course of justice – this includes law enforcement (specific cases or compilation of a body of evidence)
- the ability of a person to receive a fair trial

- the ability of a Scottish public authority to conduct an inquiry of a criminal or disciplinary nature

90. The above exemption applies to any level of government, and to any institution or public authority, local, regional, national or international, and may relate to present proceedings or proceeding 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. Every effort should however be made to make information available once the proceedings have been completed.

### **Intellectual property rights**

91. A request may be refused where release of information would, or would be likely to, substantially prejudice intellectual property rights. All intellectual property rights, which includes copyright, a patented design or the constituents of a chemical which has yet to be marketed, or other trade secret may be protected by this exception where it can be reasonably anticipated that making information available would, or would be likely to, cause substantial prejudice and where the public interest in disclosure does not outweigh that prejudice.

### **Confidentiality of proceedings of any Scottish public authority**

92. An exception may also apply to certain proceedings of a Scottish public authority if they are considered to be confidential. The proceedings of a Scottish public authority will include meetings of its formal board members and council meetings including in some cases the formal or statutory communications with another public body or with other external organisations. Authorities must be allowed to think in private. Scottish public authorities must be allowed to function and deliberate on communications in any form leading up to a decision i.e. policy statements may be confidential and therefore may not be released until after decisions have been concluded. Confidential information need not be released, but this exemption should not cover transactions or business activities of an administrative or routine nature.

93. Increasingly Scottish public authorities are choosing to release and disseminate through their publication schemes either summaries or full minutes of board meetings within a specified time after the meeting has taken place. Wherever possible any environmental information contained in these should be released as soon as possible. In these circumstances, it may be appropriate to respond to a request for environmental information by providing advice on when this information will be available.

94. If the information requested relates to emissions into the environment then, in accordance with the Regulations, this exception is not available and the information should be released unless some other exception also applies which is not caught by the 'emissions' provision of regulation 10(6).

## **What about commercial or industrial confidentiality?**

95. This provision in the EISRs 2004 is similar but not identical to the provisions set out separately in sections 33 and 36 of the Freedom of Information (Scotland) Act 2002 for ‘commercial interests and the economy’ and ‘confidentiality’.

96. Statutory provisions can sometimes help a Scottish public authority to identify what might be protected under this exception. However, the effect of regulation 5(3) is that any decision to supply or refuse a request for environmental information that is also commercially sensitive must be determined in accordance with the EISRs. Under s22 of the Environment Protection Act 1990, if information has been kept off a public register, that will be a relevant factor, along with the public interest test, for consideration when determining whether the EISRs exception is relevant and should be applied.

97. Commercial confidentiality may be acknowledged in the terms of a contract but merely stating in a contract that certain information is confidential does not necessarily make it so. Scottish public authorities are encouraged to minimise the use of confidentiality clauses in any agreements they enter into. Where letting contracts for products or services some authorities are advising that information about the competition may have to be made available and indeed experience of the wider FOI regime may encourage such openness.

98. Confidentiality of commercial or industrial information must safeguard a legitimate economic interest. Economic interest in activities that are unlawful cannot be protected under the provisions. A legitimate economic interest could however cover compensation entitlements or details of prices or payment on a company’s accounts. It may also cover information that could give an insight into a company’s general method of business or approach to certain types of contracts. It would be important to demonstrate that significant damage would occur to the interests, not just notional or transient damage. ‘Legitimate economic interest’ also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its 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.

99. When a supplier of information believes that its release would, or would be likely to, substantially prejudice his economic interest he/she should be asked to write:

- Identifying the information to be protected
- Giving cogent evidence of the need for the protection of such information on grounds of commercial or industrial confidentiality, and
- Justifying a period of time for which protection is sought.

100. This approach can also be used if environmental information has been supplied by a third party whenever the attention of a Scottish public authority is drawn to a commercial or industrial confidentiality concern about its release under the Regulations.

101. It can be difficult to draw a line between what is or is not commercially confidential and it is likely that the commercial sector itself will often argue for a liberal interpretation of this exception. However, this is not a reason to adopt an ‘all or nothing’ approach. The public authority will need, in each case, to take a view, and to distinguish between those claims in relation to information which is so closely related to prices, and costs, that they are commercially confidential from those which are of a more general nature whose disclosure would not on any reasonable view cause any substantial prejudice to the commercial undertaking.

102. It will not normally be appropriate to withhold information in response to a general claim that disclosure might damage the reputation of the supplier and hence his commercial competitiveness. Neither will it be reasonable to withhold information which could be obtained or inferred from other publicly accessible sources.

103. Where it is decided that information should be withheld, this decision may need to be reviewed at a later date. Generally the protection of information under this exception should be limited to the minimum time necessary to safeguard the commercial or industrial interest. When circumstances change, the information may cease to be sensitive.

104. Where a Scottish public authority believes that the information should not be withheld, the supplier or other concerned party should be notified in writing and the reasoning given.

105. When information is commercially confidential, it could be clearly marked together with a release date to avoid unintended disclosure. If part of the information being supplied is restricted, an edited version containing any non-sensitive information could be prepared and marked as a public access copy. A statement indicating the existence of the restricted information without disclosing the content of the information plus its release date should be attached to the public access copy. Public bodies will need to exercise extreme caution when handling commercial information for businesses in which they have or had a controlling influence or are a member of a partnership with the business concerned.

106. If the information requested relates to emissions into the environment then this exception is not available and the information should be released unless some other exception also applies which is not caught by the ‘emissions’ provision of regulation 10(6).

### **What about the interests of the individual providing information?**

107. The purpose of this exception is to ensure the continuation of the flow of voluntary information between members of the public and regulators e.g. 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. The supply of volunteered information could diminish if information is supplied in response to requests. Concerns have been expressed at the potential breadth of this exception, but the exception is still available in the context of a presumption of release.

108. This exception may also be relevant when members of the public or companies are applying for grants, permits or licences. It could be used to protect whistle blowers.

109. The exception only applies where:

- the environmental information was provided voluntarily, ie the supplier was not under, and could not have been put under, any legal obligation to supply it to the Scottish public authority
- there are no other circumstances that entitle the public authority to disclose it, and
- the supplier has not consented to its disclosure.

110. It is available only where it is clear that disclosure of the information would, or would be likely to, substantially prejudice the interests of the person who provided the information and where the public interest in disclosure does not outweigh that substantial prejudice. There may be circumstances where withholding may be necessary to obtain information that might not otherwise be made available, but the public authority should not provide reassurance that the information, once supplied, will never be made available to any third party on request. This is because what is judged to be in the public interest may change according to circumstances and over time. Instead suppliers of volunteered information should be encouraged to consent to release. Such consent can be sought in advance, when the information is collected; but can be sought later in response to a particular request or in order to actively disseminate the information.

111. If a Scottish public authority requires the information for the purposes of a statutory obligation then that information will not fall within this exception. Where environmental information has been supplied to a Scottish public authority in pursuit or support of an application for a regulatory benefit, including any consent or licence, or a grant and whether such a benefit would have been forthcoming if the information had not been supplied, the public authority may also take this factor into consideration when considering the public interest. This too may change over time, as the now-obligatory presumption of disclosure and restrictive interpretation of exceptions gain in confidence.

112. If there are access rights under another piece of legislation, or other circumstances that entitle the Scottish public authority to disclose it then it will not fall within this exemption.

113. If the information relates to release of emissions into the environment then the information should be made available unless some other exception also applies which is not caught by the 'emissions' provision of regulation 10(6).

### **What if the release of information can actually harm the environment?**

114. A Scottish public authority may refuse to supply environmental information in order to protect the environment to which it relates. In some cases the availability of environmental information could lead to harm or pollution of the environment. For example, information about the location of nesting sites, rare habitats or

endangered/protected species may need to be withheld to avoid the risk of damage. Equally, information about possible sites of Special Scientific Interest should not normally be made available until a formal notice is served; especially if there is any risk that making information available prematurely could result in pre-emptive damage being caused to a site before it was protected.

### **What about personal information?**

115. Firstly, regulation 11 disapplies the duty upon a Scottish public authority in regulation 5 (1) regarding information which is information about the applicant i.e. where the applicant is the 'data subject'. In effect, that may require the principles and provisions of the Data Protection Act 1998 to be applied to such data. Secondly, the regulation requires the protection of personal data of which the applicant is not the data subject and in respect of which either of 2 conditions (again from the DPA) are met. In effect, that imposes an obligation not to disclose such personal data otherwise than in accordance with that regulation. Note that a public interest test is included in consideration of whether either of the conditions apply.

116. The fact that environmental information requested contains personal data will not automatically mean that the request must be refused. It may be possible to separate the personal data from the other information requested, or to provide a summary excluding any personal data, where these must not be disclosed.

117. In certain circumstances there may be a correlation between a piece of environmental information and personal information. It is therefore particularly important that Data Protection Officers understand the public interest and human rights implications of environmental information, so that they can identify and seek advice in appropriate circumstances.

### **How does the public interest test work?**

118. Before a Scottish public authority can refuse a request to provide environmental information it will need to carry out a public interest test. This is a similar public interest test to that in section 2 (1)(b) of the Freedom of Information (Scotland) Act 2002. Where the Scottish public authority considers that one of the exceptions in the Regulations applies, it will be necessary to consider the **public interest** in making the material available. The public interest has been described as something that is "of serious concern or benefit to the public not merely of individual interest". It has also been stated that public interest does not mean "of interest to the public" but "in the interest of the public". The term is not defined in the Freedom of Information (Scotland) Act 2002 and its meaning may change over time and according to the circumstances of each situation. Scottish public authorities will therefore need to make a subjective judgment based on the circumstances of each case and in the light of any emerging Guidance or good practice.

119. It is difficult to set out a definite list, but amongst the factors which may inform a decision about the public interest are:

- the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation
- whether disclosure would contribute to the administration of justice and enforcement of the law or would prejudice the prevention or detection of crime or the apprehension or prosecution of offenders
- whether disclosure would affect the economic interests of the whole or part of the UK
- whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment
- whether disclosure would impact substantially on safeguarding national security or international relations
- whether disclosure would contribute to ensuring that any Scottish public authority with regulatory responsibilities is adequately discharging its functions
- whether disclosure would contribute to a debate on a matter of public interest
- whether disclosure would prejudice the protection of an individual's right to privacy

120. In deciding whether a disclosure is in the public interest, authorities should **not** take into account.

- possible embarrassment of Scottish public authority officials
- possible loss of confidence in government or other public authority
- the seniority of persons involved in the subject matter
- the risk of the applicant misinterpreting the information

121. Refusal to provide environmental information is permissible only in circumstances where the public interest in refusing the information outweighs the public interest in disclosing it. This means that where the information requested is clearly covered by a specific exception once all the circumstances of the case have been considered, the public interest may dictate that the information is still released.

122. It may be appropriate to balance the public interest factor and the time period which has lapsed since the event. A Scottish public authority will need to consider the

substantial prejudice that may be accorded to any specified interest under the exception, and weigh this against the potential impacts of refusing the information. Relevant question to consider may include whether the information could reveal environmental impacts, or potential impacts that the public need to know about because they may be affected by them – whether access to the information is likely to support effectiveness, public participation or decision-making.

123. While a Scottish public authority may put in place its own guidelines or policies for dealing with the public interest test, certain types of harm and public interests may be more relevant than others depending on the scope of responsibilities of the public authority. However, the circumstances of each and every case have to be considered before a final decision is made.

### ***What are the procedures for review and appeals?***

124. All Scottish public authorities must provide an internal review procedure for handling representations by applicants dissatisfied with an authority's act or omission in relation to these Regulations. Wherever possible the person handling the review should not be the individual who dealt with the original request. The applicant should make representations within 40 working days of receiving the decision. The authority must respond to the applicant indicating the outcome of the internal review within 20 working days of receiving the representation.

125. A Scottish public authority may not charge a fee for handling any representations for review.

### **What does the Scottish Information Commissioner Do?**

126. An applicant may appeal to the Scottish Information Commissioner if he/she is dissatisfied with the outcome of an internal review of a response to a request for information and the Scottish public authority has decided it is not in breach of the Regulations. An appeal must be made in writing or otherwise in recorded format as soon as possible after receiving notification of the decision of the internal review and within 6 months of receiving the decision. The regulations apply the enforcement and appeal procedures of the FOISA 2002 to environmental information request cases.

127. The Scottish Information Commissioner must take into consideration whether the applicant has exhausted all of the review and appeal procedures provided by a Scottish public authority. The Scottish Information Commissioner will also consider whether there has been undue delay in making the application. It is the duty of the Scottish Information Commissioner to review the facts of the case and provide a decision. The appeal will be dealt with as quickly as possible and the Commissioner may:

- uphold the decision made by the Scottish public authority
- uphold the appeal and instruct the Scottish public authority to make available all, or in certain cases part, of the environmental information requested

128. The Commissioner should reach a decision generally within 4 months of receiving the appeal, if no settlement has been reached in the meantime.

129. The Scottish public authority must comply with the decision of the Scottish Information Commissioner. There is no statutory time limit for this. It will depend on the circumstances of the case but the Commissioner will specify a particular time limit for compliance in the decision in question. The Commissioner has powers under section 53 of the Freedom of Information (Scotland) Act 2002 to enforce any decision notice issued.

130. Special provisions may apply with relation to decisions to refuse a request to supply environmental information on grounds of national security. Where the Commissioner has given the Scottish Administration a decision notice or enforcement

notice in relation to perceived failures to comply with the EISRs the First Minister may certify that there was no such failure and that the information requested is of exceptional sensitivity.

131. A further route of appeal is via the Scottish courts and ultimately the European Court of Justice. In such circumstances it would be for each body to defend its reasons for refusing access.

***What arrangements should be put in place for long-term record keeping?***

132. The Freedom of Information (Scotland) Act 2002, Code of Practice on Records Management provides Guidance to all Scottish public authorities as to the practices which it would, in the opinion of the Scottish Ministers, be desirable for them to follow in connection with the keeping, management and destruction of their records. This Code is required under section 61 of the Freedom of Information (Scotland) Act and so it is a supplement to the provisions of that Act. Its adoption will help authorities to comply with their duties under the Act but it is not a substitute for legislation, nor do its provisions have the force of law. However, part of the role of the Scottish Information Commissioner is to promote observance of the Code. If an authority fails to have regard to the Code, it may be failing in its duty under the Act and under the Regulations.

133. In addition, a generic Model Action Plan for developing records management arrangements compliant with the Code of Practice on Records Management has been published by the Keeper of the Records of Scotland. The aim of the Model Action Plan is to provide detailed operational Guidance to assist Scottish public authorities to develop records management arrangements which comply with the Code. It is intended to be used as the basis of sectoral action plans which are tailored to suit the needs of particular sectors, eg health, local government etc. Some sectors may, of course, be too small to merit their own action plan, and some authorities may not readily fit into a particular sector – in such cases the generic action plan should be used.

134. One of the key aims of successful record keeping is to be able to quickly and easily access the information requested, whether for internal or external use in order to respond to a request for environmental information.

135. As long as information is retained by a Scottish public authority, even when it is stored off-site or in space organised and controlled by another public authority, it remains the responsibility of the first authority. If a request for information contained in such records is received by the Scottish public authority, it has a duty to respond to that request and, although it may arrange with the holding authority for it to act on its behalf, it remains liable for compliance. Paragraph 60 of this Guidance explains the special arrangements which apply to information contained in records which have been transferred to the Keeper of the Records of Scotland.

### ***What will constitute an offence?***

136. Any person found destroying or otherwise disposing of records in order to avoid supplying information in response to a request under these Regulations will be guilty of an offence.

137. It is good practice not to destroy records other than in accordance with the records selection policy and disposal schedules. Disposal schedules also provide a record of which records have been destroyed. So, if disposal schedules are published, applicants will be able to find out in advance whether the information they are looking for may or may not have been destroyed. As well as making easier the work of the Scottish public authority dealing with requests, this helps to avoid the suspicion of information being destroyed just to avoid a request.

138. The offences set out in the Regulations apply to both the Scottish public authority and to any individual person who destroys, alters, defaces or erases information and fines are available to the courts for these offences.

139. Where the Scottish Executive is the public authority, it cannot be prosecuted but a crown servant can be. The Scottish Parliament cannot be prosecuted.

140. In addition, under FOISA 2002 Schedule 3 any person who obstructs the execution of a warrant will be guilty of an offence.

### *How will the regime be monitored and reported?*

141. Scottish public authorities should put in place appropriate systems to monitor their performance under the new Regulations. It will be the responsibility of each authority to determine what type of information should be recorded under its own administrative procedures, ensuring that it is working and demonstrating that it is complying with the Regulations. All requests for environmental information could be classified as a request under the EISRs but monitoring all requests may be difficult or unrealistic. However monitoring procedures should generally include available information on the following:

- the number of requests which an authority receives but has refused, along with the reason for the refusal;
- the number of fees charged by the authority for information required under EISRs;
- the number of reviews carried out by the authority and the outcomes of the reviews;
- the number of requests not responded to by the time limit for reply and the reasons.

142. Scottish public authorities are advised to keep the operation of the Regulations under review as part of their operations, monitoring and reporting procedures. They may need to revise training and awareness raising processes in response to the outcomes.

143. The collection of this monitoring information need not be onerous and some Scottish authorities may already have adequate measures in place or may only need to update their existing procedures. The monitoring recommended above matches that recommended for requests made for information under the Freedom of Information (Scotland) Act 2002. It may be possible to include both FOISA and EISRs regimes within one process.

144. With experience, and after discussion with the Scottish Information Commissioner, authorities may come to an agreement on a standard set of data which would indicate more appropriately an authority's compliance with the Regulations.

### **Reporting**

145. EU Directive 2003/4/EC requires member states to report on the experience gained in operating the Directive. The UK government will need to make a report to the European Commission in 2008. It can only do this with the assistance of those bodies subject to the requirements of the Regulations. The Scottish Executive will ask bodies for information relating to the practical implementation of the Directive.

146. The reports to be given by member states to the Commission will be made with a view to enabling the latter to report to the European Parliament and the Council and to make any proposal that it may consider appropriate for the revision of

legislation. Bodies should bear this in mind, and in particular be ready to note any shortcomings in the Community legislation that should be reported to the institutions of the EC and/or remedied by proposals for further legislation.

147. Now that the UK has ratified the Aarhus Convention, there is also a responsibility to report once every 2 years to the Meeting of Parties to the Convention. Again, a qualitative report, rather than a quantitative report will be most helpful since it will allow Parties to consider the effectiveness or otherwise of the first (information) pillar of the Convention.

148. The Scottish Information Commissioner is expected to include the EISRs in reports on the operation of his Office. Scottish public authorities are also invited to inform the Environment Group of the Scottish Executive of any cases of particular interest or concern, especially where these may point to flaws or gaps in the legislation, Code of Practice or this Guidance. Contact details are set out at the end (see below).

## **Contact**

Sustainable Development Directorate: International Team  
Environment Group  
Scottish Executive  
Victoria Quay  
EDINBURGH  
EH6 6QQ

Telephone 0131 244 7034  
Fax 0131 244 0195  
E-mail [environmental.information@scotland.gsi.gov.uk](mailto:environmental.information@scotland.gsi.gov.uk)







100% of this document is printed on recycled paper and is 100% recyclable.

This document is also available on the Scottish Executive website: [www.scotland.gov.uk](http://www.scotland.gov.uk)  
Astron B43114 09/05

ISBN 0-7559-2714-1



9 780755 927142