



Scottish Information
Commissioner
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Decision Notice 148/2025

Environmental issues with radioactivity at His Majesty's Naval Base (HMNB) Clyde

Authority: Scottish Environment Protection Agency
Case Ref: 202401254

Summary

The Applicant asked the Authority for information relating to any environmental issues with radioactivity at HMNB Clyde at Faslane and Coulport near Helensburgh. The Authority considered the request under the EIRs and disclosed some information with redactions. It withheld the remainder on the basis that disclosure could jeopardise national security, public safety, or the Authority's ability to carry out investigations of a criminal or disciplinary nature.

The Commissioner investigated and found that, while the Authority had correctly withheld some of the information requested, it was not entitled to withhold the remainder which he required the Authority to make available to the Applicant. He also found that the Authority had wrongly considered some information to fall outwith scope, and that by failing to address the existence of some information, its review outcome was not fully compliant with the EIRs. He required the Authority to issue a revised review outcome for this information.

Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)¹ (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner).

¹ <https://www.legislation.gov.uk/asp/2002/13/contents>

The Environmental Information (Scotland) Regulations 2004² (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a), (b), (c) and (f) of “environmental information”) and (2) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (5)(a) and (b) (Exceptions from duty to make environmental information available); 16(3) Review by Scottish public authority; 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 10 October 2019, the Applicant made a request for information to the Authority. He asked it to provide correspondence, emails, memos, reports and any other unpublished information relating to any environmental issues with radioactivity at His Majesty’s Naval Base (HMNB) Clyde at Faslane and Coulport near Helensburgh since 1 January 2016. He stated he was not interested in personal information, duplicate information or purely administrative information.
2. The Authority responded on 26 June 2020 and apologised for the delay in responding. It applied section 39(2) of FOISA and considered the request under the EIRs. For information covering the period from 1 January 2016 to 20 November 2017, the Authority referred the Applicant to information published on its disclosure log for a previous information request, and applied regulation 6(1)(b) (Form and Format of information) of the EIRs to that information. The Authority partially disclosed some information with redactions, and fully withheld the remainder under (variously) regulations 10(4)(e) (Internal communications), 10(5)(a) (International relations, defence, national security or public safety) and 11(2) (Personal data) of the EIRs.
3. On 29 June 2020, the Applicant wrote to the Authority, requesting a review of its decision. The Authority responded on 24 July 2020, apologising for its failure to provide a response to the request for review within the statutory deadline, and provided the Applicant with details on how to contact the Scottish Information Commissioner.
4. On 15 October 2020, the Applicant again wrote to the Authority, seeking an update on when it would respond to his request for review. The Authority responded on 20 October 2020, apologising for the continued delay in responding which, it explained, had been exacerbated by ongoing COVID-19 service disruptions. It assured the Applicant it would respond as soon as possible.
5. On 21 July 2023, the Applicant wrote to the Authority asking about the status of his request dated 10 October 2019, for which he had submitted a request for review.
6. The Authority responded on 21 July 2023. It confirmed that the formal review had been closed as part of the process for dealing with its backlog. It explained that, following the disruption due to the cyber-attack [in December 2020] which had significantly affected its ability to respond to information requests, it had identified (from the case files recovered) a gap in the data held. As such, the Authority had been unable to review the decisions made, preventing it from undertaking a substantial review. The Authority acknowledged that this had not been made clear to the Applicant and that he should have been given the option to submit a new request. In light of this, the Authority opened a new request for the information

² <https://www.legislation.gov.uk/ssi/2004/520/contents>

requested, and apologised for the delays in advising the Applicant of the status of his request.

7. On 21 August 2023, the Authority wrote to the Applicant, asking him to confirm that his request related to the documents that were located for his initial request [of 10 October 2019] but were not released, and that the date range remained the same. The Applicant did so on 28 August 2023.
8. On 26 September 2023, the Authority wrote to the Applicant apologising for the delay in responding. On 5 April 2024, the Applicant asked the Authority for an update, which the Authority provided on 18 April 2024, again apologising for the delays.
9. The Authority responded to the Applicant's new request [of 21 July 2023] on 1 May 2024 and apologised for the delay in responding. It applied section 39(2) of FOISA and considered the request under the EIRs. The Authority fully disclosed some information, and partially disclosed some other information with redactions made under regulation 11(2) of the EIRs (on the basis that it was personal data relating to staff and private individuals) and under regulation 10(5)(a) (as it considered that disclosure would likely prejudice substantially public safety). It fully withheld the remainder of the information held and falling within scope of the request under regulation 10(5)(a). The Authority stated that, where it had issued additional information or advice, this had been provided under regulation 9 (Duty to provide advice and assistance) of the EIRs.
10. On 1 May 2024, the Applicant wrote to the Authority, requesting a review of its decision to fully withhold information under regulation 10(5)(a) of the EIRs. He referred to the Authority's claim that it would not be in the public interest to disclose this information on the basis that this would be likely to prejudice substantially public safety. He argued that, without having seen the information, he could not be certain that it was in the public interest to keep it all secret, as there was a great deal of public interest in understanding the environmental impact of operations at Faslane.
11. The Authority notified the Applicant of the outcome of its review on 13 September 2024. It apologised for the delay in responding and upheld its original decision with modification. The Authority explained that, for the purposes of searches, it had defined environmental issues with radioactivity as "any event or activity that might have caused an environment impact or that prompted concern or any kind of intervention by [the Authority]". In its review outcome:
 - The Authority disclosed some further information, explaining that it had redacted information which was considered to fall outwith scope of the request.
 - It provided a link to one document that was published online and applied regulation 6(1)(b) of the EIRs to that information.
 - It referred the Applicant to information relating to Faslane and Coulport published on its disclosure log for previous information requests during the timeframe covered by the Applicant's request. It explained that additional information or advice had been provided under regulation 9 of the EIRs.
 - It explained that, in the documents disclosed, personal data relating to staff and private individuals had been redacted under regulation 11(2) of the EIRs.

- It fully withheld some information under regulation 10(5)(a). Acknowledging the public interest in transparency, the Authority believed that disclosure of the information (which provided an insight into locations and workings at the naval bases) constituted a risk to national security and could be used by parties to plan attacks or disruption, the consequences of which would be likely to place the environment, the local community and possibly the wider public in danger.
 - It fully withheld some other information under regulation 10(5)(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). Acknowledging the public interest in openness and transparency, and in understanding its internal processes and decision-making, the Authority believed that disclosure of the information (which detailed how it investigates and reaches decisions on enforcement action) would be likely to significantly prejudice its other investigations, and there was a very strong public interest in it being able to carry these out successfully to protect Scotland's environment.
12. On 16 September 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that he was dissatisfied with the outcome of the Authority's decision, at review, to fully withhold information under (variously) the exceptions in regulations 10(5)(a) and 10(5)(b) because, without having seen the withheld information, it was difficult to judge whether the Authority's concerns about national security, and its ability to conduct inquiries, were realistic. He argued that there was a strong public interest in ensuring full transparency on any radioactive issues at the two sites. In relation to the information considered to be outwith scope, he stated he had no concerns about this provided it genuinely did not relate to environmental issues with radioactivity.

Investigation

13. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
14. On 4 November 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information together with some comments around its consideration of where the balance of the public interest lay in relation to the application of the exceptions in regulations 10(5)(a) and (b) of the EIRs. The case was subsequently allocated to an investigating officer.
15. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These focused on the Authority's justification for fully withholding certain information under (variously) regulations 10(5)(a) and 10(5)(b) of the EIRs, including the public interest. The Authority was also asked to explain why it believed other information was considered to fall outwith the scope of the Applicant's request.

16. As the Applicant had stated in his original information request that he was not seeking any personal data, the Commissioner will not consider further, in this Decision Notice, the Authority's decision to withhold third party personal data under regulation 11(2) of the EIRs.

Commissioner's analysis and findings

17. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

18. The Authority considered the Applicant's request in accordance with the EIRs, on the basis that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
19. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
20. The Authority submitted that, in its capacity as Environmental Regulator for Scotland, most of the information requests it received related to environmental information. The Authority considered that regulation 2(1)(b) applied as the information related to radiation and radioactive waste, as it related to a site on the River Clyde that had radioactive and national security implications. As such, the Authority also considered paragraphs (a), (c) and (f) of regulation 2(1) applied.
21. The Commissioner accepts that the request related to the factors (including radioactive waste) described in paragraph (b) likely to affect the state of the elements of the environment in paragraph (a) and any measures or activities in paragraph (c) likely to affect, or designed to protect, these. He also accepts that the information requested related to the state of human health and safety insofar as this may be affected by the elements in paragraph (a) or, through those, by any of the matters in paragraphs (b) and (c). As such, the Commissioner is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a), (b), (c) and (f) of that definition.

Section 39(2) of FOISA – Environmental information

22. The Authority confirmed that it wished to continue to rely upon section 39(2) of FOISA. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
23. The Authority submitted that, given the statutory right of access to environmental information, the public interest in maintaining the exemption in section 39(2) of FOISA outweighed that in considering the request under FOISA.

24. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
25. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.

Regulation 5(1) – Duty to make available environmental information on request

26. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any Applicant. This obligation relates to information that is held by the authority when it receives a request.
27. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
28. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies, but only if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

The information held by the Authority

29. The Authority explained that, as the Applicant had confirmed that he was seeking the information withheld from his original request of 10 October 2019, the files had already been collated to carry out the review for that original request, which Authority had been unable to complete due to the cyber-attack in December 2020. The Authority confirmed that the information had been recovered following the cyber-attack.
30. At the start of the investigation (when providing the withheld information to the Commissioner), the Authority explained that one further document, falling within the scope of the request, was considered to be not held under regulation 2(2) of the EIRs. This, the Authority explained, was due to the document being marked "Official Sensitive" and having been provided to the Authority by the Ministry of Defence (MoD), meaning that it was held in confidence.
31. During the investigation, the Authority confirmed that, having re-assessed the information that fell outwith the scope of the Applicant's request, it now considered that one further document fell within scope. The Authority submitted that it now wished to fully withhold this document under regulation 10(5)(a) of the EIRs.
32. For the information, redacted in the documents disclosed, which the Authority believed fell outwith scope, the Authority confirmed that this related to staff changes, site-specific issues at other locations, or standard operations and new arrangements for waste handling, and did not relate to "any environmental issues with radioactivity". It stated that the parts of those documents that satisfied the Applicant's request had been disclosed.

33. For the remaining information which the Authority considered fell outwith scope (i.e. those full documents which had not been disclosed), the Authority explained that these related to routine inspections and did not relate to issues, events or activities involving radioactivity which might have caused environmental impact.
34. The Authority submitted that it had considered the request in an unrestricted way and confirmed that its interpretation was based on “environmental issues with radioactivity”.

The Commissioner's view on the information held by the Authority

35. For the information (held in one document) which the Authority had originally considered to fall outwith scope of the Applicant's request and which it now considers falls within scope, the Commissioner has no option but to find that the Authority failed to identify all of the in-scope information. In the Commissioner's view, this information ought to have been identified as falling within scope when the Authority issued its review outcome, at the latest. The Commissioner therefore finds that, in failing to identify this information as falling within scope, the Authority failed to comply with regulation 5(1) of the EIRs. As the Authority is now withholding this information under regulation 10(5)(a) of the EIRs, the Commissioner will include this information in his consideration of this exception below.
36. For the information (held in one document) which the Authority considers it does not hold in terms of regulation 2(2) of the EIRs, the Commissioner is concerned to note that the Authority made no reference to this information when it issued its review outcome – for example, by citing regulation 2(2). As such, the Applicant would have had no knowledge of this document's existence, and was therefore unable to challenge the Authority's decision in regard to the information contained therein. In light of this, the Commissioner considers that the Authority's review outcome was not fully-compliant with regulation 16(3) of the EIRs in that it did not cover this information. The Commissioner therefore requires the Authority to issue a revised review outcome to the Applicant in respect of this document.
37. In respect of the information which the Authority considered fell outwith scope of the Applicant's request, the Commissioner has fully considered this information against the terms of the Applicant's request.
38. For the redacted information in the documents partially disclosed at review, and for the full documents, all of which the Authority considered fell outwith scope at review stage, the Commissioner is satisfied that some of this information does not fall within scope.
39. However, the Commissioner is of the view that certain information in these documents does indeed satisfy the terms of the Applicant's request, in that he considers it relates to environmental issues with radioactivity.
40. The Commissioner therefore has no option but to find that the Authority failed to identify all of the in-scope information. In the Commissioner's view, this information ought to have been identified as falling within scope when the Authority issued its review outcome, at the latest. The Commissioner therefore finds that, in failing to identify this information as falling within scope, the Authority failed to comply with regulation 5(1) of the EIRs. The Commissioner therefore requires the Authority to issue the Applicant with a revised review outcome for this information. The information in question will be indicated on marked-up copies to be provided to the Authority along with this Decision Notice.

Regulation 10(5)(a) – Prejudice to international relations, defence, national security or public safety

41. Regulation 10(5)(a) 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, international relations, defence, national security or public safety.
42. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
43. There is no definition of “substantial prejudice” in the EIRs. However, the standard to be met in applying the test is high. The word “substantial” is important here: the harm caused, or likely to be caused, by disclosure must be of real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.

The Applicant’s submissions - regulation 10(5)(a)

44. In his application to the Commissioner, the Applicant stated that he was dissatisfied with the Authority’s claim, at review, that the information had been withheld “due to national security concerns”. Without having seen the information being withheld, it was difficult for him to judge whether there really were national security concerns about its release.

The Authority’s submissions - regulation 10(5)(a)

45. In its submissions to the Commissioner, the Authority stated that the exception in regulation 10(5)(a) applied to the withheld information as its disclosure would be likely to prejudice substantially defence, national security and public safety. The Authority noted that these factors were not defined in the EIRs; however:
 - Defence: The Authority referred to the Commissioner’s guidance on [regulation 10\(5\)\(a\)](https://www.foi.scot/sites/default/files/2022-04/EIRsGuidanceRegulation105aInternationalRelations.pdf)³ which indicated that the exception may apply to information relating to nuclear weapons. The Authority also referred to the definition of “defence” in the [Official Secrets Act 1989](https://www.legislation.gov.uk/ukpga/1989/6/contents)⁴ (OSA) which included “the weapons, stores or other equipment of those forces and the invention, development, production and operation of such equipment and research relating to it”, and the harm in section 2(2) of the OSA, which included actions that “damages the capability of the armed forces of the Crown to carry out their tasks”. The Authority considered this to be relevant as Faslane is a nuclear site and the information related to radiation and radioactive waste. It acknowledged the fact that the information related to these matters was not sufficient, in itself, to apply the exception.
 - National security: The Authority referred to [Decision 080/2019](https://www.foi.scot/decision-0802019)⁵ which considered the safety of the site in that case, and the risk of potentially endangering local residents and the wider environment. The Authority believed this was also relevant in this case as disclosure could impact the safety of the site.

³ <https://www.foi.scot/sites/default/files/2022-04/EIRsGuidanceRegulation105aInternationalRelations.pdf>

⁴ <https://www.legislation.gov.uk/ukpga/1989/6/contents>

⁵ <https://www.foi.scot/decision-0802019>

- Public safety: The Authority referred to [Decision 108/2008](#)⁶ which considered the safety of staff, emergency services and the local community.

46. Recognising that, individually, these factors may not always be sufficient to apply the exception, the Authority considered that combined, these factors would all be impacted by disclosure and so the exception was appropriately applied.

The Commissioner's view on regulation 10(5)(a)

47. In determining whether the information would fall within the scope of this exception, the Commissioner has been mindful of the explanation given in [The Aarhus Convention: An Implementation Guide](#)⁷ where the principles behind the Convention provision on which the exception is based are set out in the following way (page 86):

“If release of the requested information would adversely affect international relations, national defence or public security, the public authority may consider whether to deny the request.”

The Guide goes on to explain that:

“The Convention does not define the terms “international relations”, “national defence” or “public security”, but it is implicit that the definition of such terms should be determined by the Parties in accordance with their generally accepted meaning in international law. Many national Governments already have similar exceptions in place and have interpreted them narrowly. Some countries have chosen to require information concerning the environment to be made publicly accessible, regardless of how it affects international relations, national defence or public security. ...”

48. The Commissioner notes that the Authority, in this case, is claiming that regulation 10(5)(a) applies to some of the withheld information, on the basis that its disclosure would, or would be likely to, prejudice substantially defence, national security or public safety.
49. In determining whether the exception in regulation 10(5)(a) applies, the Commissioner is required to consider the potential impact that disclosure of the information would likely have on these factors, and not solely the nature, content and/or sensitivity of the information being withheld under this exception.
50. Having considered the submissions made by both parties, along with the withheld information, the Commissioner does not accept that making the majority of the information available would, or would be likely to, lead to the kind of prejudice argued by the Authority.
51. The Commissioner is of this view as he is not convinced that disclosure of this information is a threat to anything other than reputations. The Commissioner notes that much of this information discloses routine inspections and actions recommended to rectify any issues identified, and amendments to procedures to improve the handling and disposal of waste which, in his view, appears to be generally routine and procedural. For other information, relating to incidents identified, given the low (or non-existent) level of harm caused (or the potential to cause harm) to the environment, again he is not convinced that disclosure of this information would have posed an ongoing risk at the time of the Authority's review outcome, as the Authority has claimed. He can see no harm in its disclosure, either at that time or now.

⁶ <https://www.foi.scot/decision-1082008>

⁷ https://unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

52. The Commissioner does not consider that the Authority has made sufficient arguments to evidence that disclosure of the particular information being considered here, which it has withheld under regulation 10(5)(a), would lead to the risk claimed by the Authority relating to the use of this information in an adverse way, by those intent on causing harm and disruption. As a consequence, and for the reasons already outlined above, in the Commissioner's view, making this information available would not, and would not be likely to, substantially prejudice defence, national security or public safety, as claimed by the Authority.
53. Notwithstanding the Authority's position on this information, the Commissioner does not accept that making available the majority of the information withheld under this exception commands the level of harm required to allow it to be excepted from disclosure under regulation 10(5)(a) of the EIRs.
54. As such, the Commissioner must find that the Authority was not entitled to withhold this information under regulation 10(5)(a) of the EIRs and he requires it to be made available to the Applicant (subject to the redaction of any personal data).
55. The Commissioner will now go on to consider whether the Authority was entitled to refuse to make the remainder of the withheld information available in line with regulation 10(5)(a).
56. The Commissioner notes that, in the main, the remaining withheld information relates to building names and specific locations as well as particular working practices. For this remaining information, which the Commissioner has fully considered, he accepts that it could be useful to those intent on causing harm and/or disruption.
57. As such, the Commissioner is satisfied that the exception in regulation 10(5)(a) is engaged for the remaining withheld information, in that its disclosure would, or would be likely to, assist those intent on causing harm or disruption, by providing information on activities in specific locations. This, the Commissioner believes, would in turn pose a threat to defence security and increase the risk to public safety, particularly to those in the near vicinity of the sites in question.
58. As the Commissioner has found that the exception in regulation 10(5)(a) applies to the remaining withheld information, he is now required (for this remaining information) to go on to consider the public interest test in regulation 10(1)(b) of the EIRs.

Public interest test – regulation 10(5)(a)

59. As noted above, the exception in regulation 10(5)(a) is subject to the public interest test required by regulation 10(1)(b) of the EIRs. The Commissioner is therefore required to consider whether, in all the circumstances, the public interest in making available the information, to which he has found the exception applicable, is outweighed by that in maintaining the exception.

The Applicant's submissions on the public interest - regulation 10(5)(a)

60. In his application to the Commissioner, the Applicant argued that there was a major public interest in ensuring full transparency on any radioactive issues at Faslane and Coulport, and questioned whether it was really in the public interest for these documents to be kept secret.

The Authority's submissions on the public interest - regulation 10(5)(a)

61. The Authority recognised the public interest in disclosure of the information in relation to it being a taxpayer-funded public body with a duty to be open and transparent, in its ability to regulate Scotland's environment (and in understanding how it does this), and in safety relating to radioactivity, the environment and nuclear facilities.
62. The Authority provided the following public interest arguments in support of maintaining the exception:
- The information, which referenced arrangements for the transfer, storage and handling of waste (including radioactive waste), shortfalls in maintenance and asset management, and internal investigations and outcomes, provided an insight into the workings at the naval base, and highlighted weaknesses and vulnerabilities in site systems and locations, all of which could be used to plan a targeted attack or disruption.
 - If disruption were planned or if a targeted attack were to take place, this would put members of the local community and possibly the wider public in danger, it would remove focus from other key duties at both locations, and would require resource from the emergency and naval services who would also be put in danger. Any targeted attacks or disruption would also require resource from the Authority as a category 1 responder.
 - There is a Memorandum of Understanding between the Authority and the MoD on matters relating to radioactive substances. This provides for the Authority to consult with the MoD on any information request concerning the release of information originating from or relating to the MoD. It also precludes the Authority from routinely disclosing, or placing on a publicly available register, any MoD material classified "Official-Sensitive" or above.
 - The current national threat level is "Substantial" (an attack is likely). Terrorists and activists are highly motivated and use seemingly innocuous information to identify weaknesses and targets.
 - There was no public interest in disclosing information that would jeopardise national security and public safety.
63. In conclusion, the Authority believed that the public interest in openness and transparency was outweighed by the risk to national defence security, and the use of the information to identify possible targets by those intent on planning attack or disruption. The Authority therefore considered that the public interest in maintaining the exception outweighed that in making the information available. In its view, the current threat level added weight to the balance of non-disclosure at the current time.

The Commissioner's view on the public interest – regulation 10(5)(a)

64. The Commissioner recognises the strong public interest in transparency and accountability, with particular regard to members of the public in the vicinity of the two sites (and indeed the wider public) knowing about any safety risk, and the steps taken to ensure that any rectification works or recommended improvements to arrangements were carried out. However, in his view, this is catered for largely by making available the information which, as rehearsed above, he has found to have been wrongly withheld under the exception in regulation 10(5)(a) of the EIRs.

65. The Commissioner has also considered the public interest arguments for non-disclosure of the remaining withheld information. While he is less convinced by the Authority's arguments relating to defence and national security, he finds those relating to public safety to be compelling. The Commissioner concurs with the Authority's view that there is no public interest in disclosing detailed information which could be used by those with malicious intent to cause harm or disruption. The Commissioner recognises the heightened risk such a disclosure would pose to the nearby communities, particularly at this time when the current national threat level is "substantial". When pieced together with the information he has found to have been wrongly withheld, the Commissioner considers the level of detail this discloses to be valuable in the wrong hands.
66. The Commissioner is therefore satisfied that, for the remaining withheld information, the public interest in maintaining the exception outweighs that in making it available, and he finds that the Authority correctly withheld that information under the exception in regulation 10(5)(a) of the EIRs.
67. For the information which the Commissioner has found to have been wrongly withheld and which he requires the Authority to make available to the Applicant, this will be indicated on a marked-up copy of the withheld information, to be provided to the Authority along with this Decision Notice.

Regulation 10(5)(b) – Prejudice to the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an enquiry of a criminal or disciplinary nature

68. Regulation 10(5)(b) 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, 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.
69. Again, as with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
70. There is no definition of "substantial prejudice" in the EIRs. However, the standard to be met in applying the test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.

The Applicant's submissions - regulation 10(5)(b)

71. In his application to the Commissioner, the Applicant stated that he was dissatisfied with the Authority's claim, at review, that the information had been withheld because it "would be likely to cause substantial prejudice to the ability of [the Authority] to conduct inquiries of a criminal or disciplinary nature if released". Without having seen the information being withheld, it was difficult for him to judge if this was really true.

The Authority's submissions - regulation 10(5)(b)

72. In its submissions to the Commissioner, the Authority stated that the exception in regulation 10(5)(b) applied to the withheld information as its disclosure would be likely to prejudice substantially its ability to conduct an inquiry of a criminal or disciplinary nature.

73. The Authority explained that the information related to the decision on whether to take enforcement action and therefore met the condition as it related to how the Authority conducted its investigations. Referring to paragraph 7 of the Commissioner's [guidance on regulation 10\(5\)\(b\)](#)⁸, the Authority stated that the information did not relate to a mere civil or administrative investigation which was relevant, as disclosure on how it conducted its investigations would be likely to negatively impact any potential criminal or disciplinary action.

The Commissioner's view on regulation 10(5)(b)

74. In determining whether the information would fall within the scope of this exception, the Commissioner has been mindful of the explanation given in The Aarhus Convention: An Implementation Guide, where the principles behind the Convention provision on which the exception is based are set out in the following way (page 87):

"If the release of information would adversely affect the "course of justice", public authorities may have a legal basis to refuse to release it. The course of justice refers to active proceedings within the courts. The term "in the course of" implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused."

The Guide goes on to explain that:

"Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation. In some countries, public prosecutors are not allowed to reveal information to the public pertaining to their cases. The Convention clearly does not include all investigations in this exception, but limits it to criminal or disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered."

75. The Commissioner has also fully considered the submissions made by both parties, and the content of the withheld information itself (which he must take care not to disclose here).
76. The Commissioner has considered the Authority's claim in its review outcome, that disclosure of the information (which, it stated, detailed how it investigates and reaches decisions on enforcement action) would be likely to significantly prejudice its other investigations. He has also considered its arguments provided during the investigation, i.e. that the information did not relate to a mere civil or administrative investigation, and that disclosure of information on how it conducted its investigations would be likely to negatively impact any potential criminal or disciplinary action.
77. In the Aarhus Convention: An Implementation Guide, the exception in regulation 10(5)(b) clearly limits information relating to investigations to criminal or disciplinary ones only. In his own guidance on regulation 10(5)(b), the Commissioner recognises that the investigation may relate directly to the detection of crime or the apprehension or prosecution of offenders, or relate to another form of law enforcement process where there is still a reasonable prospect of criminal proceedings in the event of a failure to comply.

⁸ <https://www.foi.scot/sites/default/files/2022-04/EIRsGuidanceRegulation105bCourseofJustice.pdf>

78. The Commissioner notes that, in Scotland, the disposal of radioactive wastes was subject to the provisions of the [Radioactive Substances Act 1993](https://www.legislation.gov.uk/ukpga/1993/12/contents)⁹ (RSA93) until 1 September 2018, which was largely replaced from that date by the [Environmental Authorisations \(Scotland\) Regulations 2018](https://www.legislation.gov.uk/sdsi/2018/9780111039014/contents)¹⁰ (EASRs). Section 42 of the RSA93 provided an exemption for the MoD and this exemption is replicated in Regulation 78 of the EASRs. As set out in a [consultation paper](https://consultation.sepa.org.uk/radioactive-substances-unit/hmnb-clyde-application-consultation/supporting_documents/HMNB%20Clyde%20Consultation%20Document.pdf)¹¹ published by the Authority in January 2020, at site level, the arrangements for the disposal of radioactive waste take the form of Letters of Agreement (LoAs), which contain conditions and limitations on the disposal of waste. This paper also described MoD policy as:
- “Where Defence has exemptions, derogations or dis-applications from HS&EP legislation, we maintain Departmental arrangements that produce outcomes that are, so far as reasonably practicable, at least as good as those required by UK legislation.”
79. The Commissioner notes that the above is also reflected in an [Addendum to the Letters of Agreement Covering the Disposal of Radioactive Liquid and Gaseous Waste from HMNB Clyde, Faslane](https://theferret.scot/storage/2024/10/14.0r-RR.pdf)¹² (dated June 2019) in place between the Authority and the MoD.
80. It is therefore clear to the Commissioner that, given the MoD is exempt from the EASRs, and so there would exist no possibility of any criminal or disciplinary proceedings being taken against that body by the Authority, none of the information being withheld satisfies the tests for the exception in regulation 10(5)(b) of the EIRs to be engaged.
81. As such, the Commissioner must find that the Authority was not entitled to withhold this information under regulation 10(5)(b) of the EIRs.
82. Given that the Commissioner does not accept the application of regulation 10(5)(b) to withhold any information under that exception, he is not required to consider the public interest test required by regulation 10(1)(b) of the EIRs for that information.
83. The Commissioner notes that a small amount of the information being withheld under regulation 10(5)(b) is also present in the information withheld by the Authority under regulation 10(5)(a). For that particular information, which the Commissioner has already found to have been properly withheld under regulation 10(5)(a), the Commissioner does not require the Authority to make it available to the Applicant.
84. With this exception, the Commissioner requires the Authority to disclose to the Applicant the information he has found to have been wrongly withheld under regulation 10(5)(b) (subject to the redaction of any personal data). This will be indicated on a marked-up copy of the withheld information, to be provided to the Authority along with this Decision Notice.

⁹ <https://www.legislation.gov.uk/ukpga/1993/12/contents>

¹⁰ <https://www.legislation.gov.uk/sdsi/2018/9780111039014/contents>

¹¹ https://consultation.sepa.org.uk/radioactive-substances-unit/hmnb-clyde-application-consultation/supporting_documents/HMNB%20Clyde%20Consultation%20Document.pdf

¹² <https://theferret.scot/storage/2024/10/14.0r-RR.pdf>

Decision

The Commissioner finds that the Authority fully complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) but failed to fully comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that, by relying on section 39(2) of FOISA and considering the Applicant's request under the EIRs, the Authority complied with Part 1 of FOISA.

He also finds that, by withholding some of the information under regulation 10(5)(a) of the EIRs, the Authority complied with the EIRs in that respect.

However, the Commissioner finds that the Authority was not entitled to withhold the remainder of the information requested under (variously) regulations 10(5)(a) and 10(5)(b) and, in that respect, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that, by failing to identify all of the in-scope information by the time it issued its review outcome, the Authority failed to comply with regulation 5(1) of the EIRs.

In addition, by failing to consider certain information, falling within the scope of the request, in its review outcome, the Commissioner finds that the Authority failed to issue a review outcome that was fully-compliant with regulation 16(3) of the EIRs.

The Commissioner therefore requires the Authority to:

- make available to the Applicant the information that he has found to have been wrongly withheld under (variously) regulations 10(5)(a) and 10(5)(b) (as indicated on a marked-up copy of the withheld information, to be provided to the Authority along with this Decision Notice); and
- issue a revised review outcome to the Applicant in respect of the in-scope information which it considers to be not held in terms of regulation 2(2) of the EIRs (and which was not covered by its review outcome of 13 September 2024), and also in respect of the information which, the Commissioner has found, was wrongly considered to fall outwith scope of the Applicant's request (as indicated on marked-up copies to be provided to the Authority along with this Decision Notice).

The Commissioner requires the Authority to take these steps by **28 July 2025**.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

12 June 2025