



Scottish Information
Commissioner
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Decision Notice 160/2025

Auchencarroch Landfill Site: Financial Provision Report

Applicant: The Applicant

Authority: Scottish Environment Protection Agency

Case Ref: 202400938

Summary

The Applicant asked the Authority for financial provision information relating to condition 1.6 of a specific Pollution Prevention and Control Permit for Auchencarroch Landfill Site. The Authority disclosed some information but withheld other information it considered to be commercially sensitive. The Commissioner investigated and found that the Authority had not been entitled to refuse to make the information available to the Applicant. He required the Authority to disclose the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 39(2) (health, safety and environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner”) (Interpretation); 5(1) and 2(b) (Duty to make environmental information available on request); 10(1) and (5)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 1 March 2024, the Applicant made a three-part request for information to the Authority, which included the following in respect of Pollution Prevention and Control (PPC) Permit PPC/W/20026 for Auchencarroch Landfill Site:

(i) *“All information held by the Authority relating to condition 1.6 (‘financial provision’)”*

2. The remaining parts of the request do not form part of the Applicant’s application to the Commissioner.
3. The Authority responded on 15 March 2024 under the EIRs. The Authority made some information available to the Applicant but relied on the exception in regulation 10(5)(e) for withholding information in the Financial Provision Report. The Authority considered making this information available would put operators at a competitive disadvantage and would lead to that operator (and others) being less cooperative when assisting the Authority with its investigations. The Authority concluded that the public interest lay in maintaining the exception.
4. On 15 April 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision to withhold the Financial Provision Report for two reasons. Firstly, he did not consider the regulation 10(5)(e) exception applied to the information requested. He stated that the Authority’s response had not explained that the confidentiality of the information requested was provided for by law (i.e. that there was a legally binding duty of confidence which applied to the information requested), and that he was not aware of any such duty of confidence that applied to the information requested. Secondly, he considered the Authority had misapplied the public interest test.
5. The Authority notified the Applicant of the outcome of its review on 29 May 2024. It upheld its initial response with modification. It stated that the financial provision report had been withheld in full. But as part of an updated response, it had issued the report with redactions of specific financial figures, for which it relied on regulation 10(5)(e) of the EIRs. Within its updated response, the Authority also provided revised reasoning as to why it considered regulation 10(5)(e) to apply, as well as further reasoning relating to its consideration of the public interest test.
6. On 10 July 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 he was dissatisfied with the outcome of the Authority’s review because it did not provide a redacted version of the Financial Provision Report in its updated response. Furthermore, it did not have grounds to use regulation 10(5)(e) to refuse to disclose the information requested because:
 - There was no applicable legal duty of confidence which applied to the information requested;
 - Disclosure was unlikely to cause substantial harm to a legitimate economic interest;
 - The Authority failed to apply the presumption in favour of disclosure, and
 - The Authority failed to correctly apply the public interest test.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 25 July 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 and the case was allocated to an investigating officer.
9. On 26 July 2024, the Authority notified the Commissioner that a redacted copy of the Auchencarroch Financial Provision Report had been provided to the Applicant, along with an apology that this had not been attached to the email with his formal review response of 29 May 2024, explaining that this had been a mistake.
10. 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 related to why it considered the information withheld from the Financial Provision Report to be commercial and confidential in nature and why it considered making that information available would cause specific harm. Questions were also asked around the Authority's consideration of the presumption in favour of disclosure and its application of the public interest test.
11. The Applicant was provided with the opportunity to make any further comments in relation to his application.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

13. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs and applied the exemption in section 39(2) of FOISA.
14. The Applicant has not disputed the Authority's decision to deal with the request under the EIRs.
15. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a) and (c) of the definition), as it relates to administrative measures in place to manage a landfill site. These administrative measures will affect or be likely to affect the elements referred to in paragraph (a) of the definition.
16. The Commissioner will, therefore, consider the handling of this part of the Applicant's request in what follows solely in terms of the EIRs.

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

17. 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 held by the authority when it receives a request.

18. 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 provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
19. Under the EIRs, a 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.

Provision of redacted copy of the Financial Provision Report

20. The Applicant raised in his application to the Commissioner that the Authority had failed to provide him with the redacted version of the Financial Provision Report with its review response.
21. Following receipt of the notification from the Commissioner that the Applicant had made an appeal and the details of his reasons of dissatisfaction with its response to his requirement for review, the Authority provided the Applicant with a redacted version of the Financial Provision Report. It apologised and explained to the Applicant that this had not been attached to his review response as the result of human error, and encouraged him, if anything like this were to occur again, to contact the Authority who would be happy to promptly remedy such an error.
22. The Commissioner accepts the Authority's explanation that the report was omitted from the review response provided to the Applicant in error. However, it is a fact that it was not provided with the Authority's review response and therefore the Commissioner must find that the Authority failed to comply with regulation 5(1) of the EIRs in this respect.

Presumption in favour of disclosure

23. A Scottish public authority applying any of the exceptions under regulation 10 of the EIRs is required to interpret them in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be made available 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)).
24. The Authority acknowledged that there was a presumption in favour of disclosure under regulation 10(2)(b) of the EIRs as a taxpayer funded public body with a duty to be open and transparent. It also appreciated the wider public interest in ensuring sufficient financial provision for landfill closure and remediation, the effective oversight of public funds and the Authority's effective regulation of landfill sites. It stated that it had reviewed its original response where it had withheld the whole report and had released the environmental information, only withholding the financial information.
25. The Applicant considered that the Authority had failed to apply the presumption in favour of disclosure of the requested information. He was of the view that a bald statement made by the Authority that the presumption was "considered" was not sufficient to discharge the requirement in regulation 10(2)(b). The Applicant commented that there was no evidence that the presumption in favour of disclosure had been applied.
26. The Commissioner has considered the submissions from both the Applicant and the Authority. The Commissioner notes the Authority's reconsideration of its position at the

review stage and provision of some of the information to the Applicant. The Applicant's view was that this was not sufficient to discharge the requirement in regulation 10(2)(b).

27. The Commissioner notes that neither the Aarhus Convention nor Directive 2003/4/EC refer specifically to such a presumption, both instruments, however, are drafted with a clear focus on facilitating access to environmental information and, in particular, recital 16 of the Directive states:

"The right to information means that the disclosure of information should be the general rule ..."

28. With that in mind, the Commissioner is satisfied that the Authority applied the presumption in favour of disclosure when applying the exception, at least at the point when it carried out its review. Whether it was entitled to withhold information under the exception in question, of course, requires further consideration of the tests specific to the exception in question and of the public interest (which the Commissioner will now go on to do).

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

29. Regulation 10(5)(e) 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 confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
30. [The Aarhus Convention: An Implementation Guide](#)¹, which offers guidance on the interpretation of the Convention from which the EIRs derived, notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is further considered below.
31. Having taken this guidance into consideration, the Commissioner's view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- (i) Is the information publicly available?
 - (ii) Is the information industrial or commercial in nature?
 - (iii) Does a legally binding duty of confidence exist in relation to the information – express or implied?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information publicly available?

32. The Authority submitted that the withheld information was not publicly available.
33. It stated that a redacted version of it was now available on its Disclosure Log and that prior to the cyber attack (which targeted the Authority's systems in 2020), a redacted copy of the report would have been published on its Public Register. It explained that the Public Register is gradually being rebuilt and the version of the report that would have been added

¹ [Aarhus Implementation Guide interactive eng.pdf](#)

to that Register is the same as the version supplied to the Applicant in response to his requirement for review.

34. The Commissioner is satisfied that the information within the Financial Report that continues to be withheld is not in the public domain.

Is the information commercial or industrial in nature?

35. The Authority explained that the withheld information consisted of financial information within an annual financial provisions report required by it as part of the conditions of compliance with a PPC permit issued under [The Pollution Prevention and Control \(Scotland\) Regulations 2012](#)² (the PPC Regulations). It argued that as the withheld information related directly to the management of a specific landfill site at Auchencarroch, which was a commercial venture within the recognised industry of waste management, the Authority had concluded that the information was commercial and industrial in nature.
36. Having considered the withheld information, together with the submissions from the Authority, the Commissioner accepts that the information is commercial in nature.

Does a legally binding duty of confidence exist?

37. The Authority considered that a duty of confidence in law existed in relation to the withheld information under regulation 66 of the [PPC Regulations](#)³ and section 113 of the [Environment Act 1995](#)⁴. It stated that it had a duty to ensure that any information received as part of its regulatory role that it considered to be commercially confidential was processed appropriately and that the operator was given a reasonable opportunity to object to the information being made publicly available.
38. The Authority acknowledged that it did not hold a formal application from the operator under regulation 66(2), or a formal notice of determination under 66(3), in relation to the specific information withheld in this case.
39. Despite this, it was still of the view that the information remained sensitive, and that disclosure would cause real and significant harm if released.
40. Specifically, the Authority's position remained that the information:
- Contained details that, if released could unfairly disadvantage the operator in a competitive commercial environment.
 - Was provided to it with a reasonable expectation of confidentiality based on the nature of previous regulatory engagements and established regulatory practice.
 - If disclosed, would risk undermining the trust and cooperation essential to SEPA's regulatory function, including the future provision of sensitive data by operators.
40. The Authority believed the absence of formal documentation under regulation 66(2) and (3) did not negate the commercial sensitivity of the information in question, or its obligation to protect it under the relevant environmental information regulations.
41. The Authority explained that as part of this appeal it had sought the views of the operator of the site. In its response the operator commented that it considered the Authority to have a

² [The Pollution Prevention and Control \(Scotland\) Regulations 2012](#)

³ [The Pollution Prevention and Control \(Scotland\) Regulations 2012](#)

⁴ [Environment Act 1995](#)

duty of confidence to it not to disclose commercially sensitive information operators were required to submit in connection with the exercise of its statutory functions.

42. The Applicant stated that he was not aware of any duty of confidence which applied to the information requested.
43. He also referred to a recent decision of the Commissioner which focused on the exception in regulation 10(5)(e) ([Decision Notice 043/2024](#)⁵), which stated that a public authority applying this exception must do so in a restrictive way, and that the law must explicitly protect that type of information as commercial or industrial secrets.
44. The Applicant considered the Authority's review response had made no reference to legislation which explicitly protected the withheld information, nor did it provide any other supportive legal authority or any other explanation which demonstrated that the confidentiality of the information was provided for by law.
45. The Commissioner has considered regulation 66 of the PPC Regulations 2012, which in his view does create an express duty of confidence for information that has been deemed to be commercially confidential by the Authority, following an application to that end from the person supplying the information. He has also taken into account paragraph 6 of the Authority's National Security and Commercial Confidentiality Issues Procedure, which describes what may make information commercially confidential in this context. It describes information which has an intrinsic commercial value, where the value depends on the operator to whom the information relates maintaining its confidentiality, and information which might not have intrinsic commercial value but whose disclosure might unreasonably disadvantage the operator to whom it relates in the conduct of their lawful business, commercial, financial or professional affairs. It goes on to describe the type of information that may be included, such as financial information, cost-structures and plans. Along with this, the Commissioner has taken account of the content of the withheld information and the submissions from both the Applicant and the Authority.
46. The information in question would seem to be of a type that might qualify for a claim of commercial confidentiality, in line with the Authority's own guidance (as described above). There is, however, a statutory process for having information designated as commercially confidential for the purposes of the PPC Regulations, also as described above. The Authority has acknowledged that this process was not followed in respect of the information under consideration here.
47. The Commissioner must presume that the process in question is there for a reason and that, as a general rule, it will be the means by which confidentiality is maintained in respect of information supplied under the PPC Regulations. He does not believe he can accept a claim of confidentiality for such information lightly (in other words, imply such an obligation), where (as here) that process has not been followed. There would need to be some compelling argument for drawing such an implication and the Commissioner is not satisfied, from the Authority's submissions and the information itself, that such an argument can be said to be present here.
48. The Commissioner therefore does not accept that there was a legally binding duty of confidence in relation to the withheld information. He will, nevertheless, go on to consider the question of potential harm as a consequence of disclosure.

⁵ [Decision 043/2024 | Scottish Information Commissioner](#)

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

49. The Authority explained that the exception was being applied to ensure competitors did not gain access to commercially valuable information, protecting the operator's commercial bargaining position in negotiations and avoiding reputational damage with their suppliers.
50. The Authority considered that the legitimate economic interests of the operator of the site would be substantially harmed by disclosure of the withheld information. It added that the views of the operator formed part of the regulatory process.
51. The Authority explained that there was a designated process for dealing with commercially confidential information and as part of this appeal the operator was contacted to ascertain if they considered this information to remain commercially confidential.
52. The Authority was of the view that disclosure of the withheld information would cause, or be likely to cause, substantial harm to the operator as releasing the financial details into the public domain would compromise their ability to take part in a competitive tendering process with suppliers and partners. It also believed that as this information was not publicly available for other companies in the sector, it would put the operator at a competitive disadvantage.
53. As part of its submissions, the Authority provided the Commissioner with the views of the operator on the requisite harm.
54. The operator's view was that disclosure would cause real harm to it and place it at a commercial disadvantage when procuring goods and services during the entire duration of the aftercare phase of site operations by undermining its negotiating position with those potential suppliers. It believed that disclosure of its expected costs and provision for costs would lead to suppliers' tenders "clustering" around that cost point rather than offering the best price.
55. The operator further considered that disclosure had the potential to cause significant harm to the business as the report contained commercial sensitive information specific to the waste industry. It believed the information was liable to be misinterpreted or misunderstood by individuals who lacked the relevant experience or knowledge of the waste industry and that it might be misrepresented by third parties in order to undermine the reputation of the operator, with significant consequences for its economic interests. It stated that local suppliers might opt not to service the operator due to adverse reputational impact that would result from the publication of the data, resulting in difficulty procuring local suppliers and/or facing higher costs associated with sourcing suppliers from outside the local area. The operator suggested that as the site was closed and no longer generating income, those costs could be prohibitive.
56. The operator also considered disclosure of the information would undermine its position in relation to potential future disposal or alternative use for the site, by undermining its position in negotiations with third parties.
57. The Applicant believed that disclosure of the information requested was unlikely to cause harm to a legitimate economic interest.
58. The Applicant again referred to [Decision Notice 043/2024](#) of the Commissioner, which concerned the non-disclosure of financial information in respect of quarry operations, and the argument put forward by the Authority in that case that the operator of the quarry would be at

a disadvantage with their competitors (who would gain information that was not publicly available at that point). He stated that the Commissioner in that case had concluded that "more factors" would need to come into play before competitors could ascertain sufficient information about the enterprise to have that impact and effect.

59. The Applicant considered the Authority's claim that disclosure of figures around financial provision for a landfill could cause prejudice to be unsupported by any evidence and did not bear scrutiny. He argued that there were many more factors which would need to be considered by potential competitors before they would be in a position to have sufficient information to obtain an "advantageous insight" into how the operator in this case worked and their financial obligations regarding the landfill.
60. The Applicant suggested these additional factors might include:
 - The number of staff employed at the landfill and their salaries
 - The type and quantity of waste deposited at the landfill
 - Payments received by the operator for all the waste deposited at the landfill
 - Any tax liabilities relating to the landfill
 - Construction, operation and maintenance costs of the landfill
61. He believed it was not clear whether it would be possible to obtain this information from the withheld information. He considered that in the absence of these additional factors, disclosure of the withheld information was unlikely to cause substantial economic harm.
62. The Commissioner has carefully considered the arguments advanced, along with the withheld information.
63. The Commissioner accepts that the operator of the site does have a legitimate economic interest in relation to the withheld information.
64. The Commissioner has also referred to the Authority's [Technical Guidance Note – Estimate of Amount of Financial Provision for Landfill Sites](#)⁶. The purpose of this is to provide guidance for the Authority's Officers on the assessment of the proposed estimated financial provision to be provided for landfill sites.
65. The Guidance Note makes it clear, at para 1.2, that "demonstration of adequacy of Financial Provision is required as part of the determination of the fit and proper status of a person (this may be a legal person such as a company or a local authority) to operate a landfill site. This is prescribed in regulation 18(4)(b) of The Pollution Prevention and Control (Scotland) Regulations 2012 'the 2012 Regs'."
66. The Guidance Note also explains that "Regulation 10(2)(b) of the Landfill (Scotland) Regulations 2003 'the 2003 Regs' requires that a landfill permit includes conditions ensuring that the financial provision or its equivalent required by regulation 18(4)(b) of the 2012 Regs is maintained until the permit is surrendered in accordance with those regulations. This places a duty on the operator to maintain the necessary financial provision for the whole life of the site. Regulation 13 of the 2003 Regs requires the landfill operator to ensure that disposal charges will cover setting up and operating the landfill, the costs of maintaining

⁶ [technical-guidance-note-estimate-of-amount-of-financial-provision-for-landfill.pdf](#)

financial provision and the costs for closure and aftercare. All of these requirements will be imposed at landfill sites through conditions of a PPC permit.”

67. This guidance states that the issuing of a permit following the demonstration of adequacy of financial provision by an operator does not mean that the Authority has agreed that subsequent overrun costs will equate to the estimates made by the operator. The suggestion is rather that there is a duty to maintain sufficient financial provision, so an operator must adjust and maintain appropriate funds as time passes, and that ultimately the financial provision estimates made by an operator will be heavily affected by aspects that are difficult to quantify over the decades-long period envisaged in the aftercare period of a landfill site.
68. The report under consideration here explains that the financial provision would come into effect if the licence holder became unable to operate the site through financial constraints or if it was deemed an unsuitable operator, and that the financial provision discussed within the report would be used by the Authority to maintain the site for 30 years.
69. The Authority and operator have raised concerns that disclosure could affect future competitive tendering exercises with suppliers. The Commissioner has taken cognisance of the fact that although the report was prepared in 2024, the costs contained within it date from 2021. A note in the report recommends that these costs should be adjusted for inflation. So already, given the volatile nature of the UK and world economies over the past few years, these figures are likely to need adjustment for the current market. Additionally, taking into consideration the span of time to be covered in post-closure management and maintenance, it is difficult to see the actual figures in the report as more than an estimate, rather than an indication of exactly what any operator would be prepared to pay for the work required. It is difficult, therefore, for the Commissioner to accept that disclosure of these would cause the harm that is envisaged by the Authority and operator, particularly as the Authority’s own guidance to staff reviewing such reports refers to estimates and the need for adjustment.
70. The Commissioner accepts that the Applicant has raised some valid points about other factors that would have to come into play to allow competitors to gain an advantage over the operator, rather than from the content of the withheld information alone.
71. The operator has raised potential misunderstanding or misinterpretation as a reason for withholding the information. The Commissioner does not accept this a valid reason to withhold information, as there is nothing to prevent context and explanation from being provided with any disclosure of information (in line with the terms of section 9.9 of the [Scottish Ministers’ Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information \(Scotland\) Act 2002 and the Environmental Information \(Scotland\) Regulations 2004 \(the Section 60 Code\)](#).⁷)
72. The issue of reputational damage that has been raised by the Authority and the operator as a result of this misunderstanding or misinterpretation of the information is difficult to accept. If the report has been completed in good faith, and the Authority has competently assessed and accepted it, then it is difficult to see how this reputational damage would arise. How this would directly lead to such substantial reputational damage, as suggested by the Authority and operator, is difficult to see (the damage claimed in this regard would appear, in any case, to be very largely speculative and unsupported by evidence).
73. For these reasons, the Commissioner cannot agree with the Authority that the substantial harm it considers would occur to the operator’s interests would result, or would be likely to,

⁷ [Code of Practice under section 60 of FOISA](#)

result as a consequence of the disclosure of the withheld information in response to this request.

74. The Commissioner is not satisfied that disclosure of the information would, or would be likely to, cause the substantial prejudice required by regulation 10(5)(e) of the EIRs. Consequently, given also that he has not accepted the confidentiality claimed for the information by the Authority, he cannot accept that the Authority can justify the application of the exception in regulation 10(5)(e) to the withheld information.
75. Given that the Commissioner has found that the exemption in regulation 10(5)(e) was incorrectly applied to the information withheld by the Authority, he is not obliged to, and has not gone on to, consider the application of the public interest test required by regulation 10(1)(b) of the EIRs.
76. The Commissioner finds that, by not making the information available, the Authority failed to comply with regulation 5(1) of the EIRs. He therefore requires the Authority to make the information available to the Applicant.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

By failing to make available a redacted copy of the Financial Provision Report along with the review outcome, the Authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that the Authority was not entitled to rely on the exception in regulation 10(5)(e) of the EIRs for refusing to make information available that fell within scope of the Applicant's request (and, in that respect, too, failed to comply with regulation 5(1)).

The Commissioner therefore requires the Authority to make available to the Applicant the parts of the Financial Provision Report that were previously withheld, by **11 August 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.

Euan McCulloch
Head of Enforcement

26 June 2025