EIRs Guidance

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

Exception Briefing

Scottish Information Commissioner

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Glossary and abbreviations

Term used	Explanation
The Commissioner	The Scottish Information Commissioner
EIRS	Environmental Information (Scotland) Regulations 2004
FOISA	Freedom of Information (Scotland) Act 2002
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
The Section 60 Code	The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002
The Directive	Directive 2003/4/EC on public access to environmental information
Implementation Guide	UNECE Aarhus Convention: An Implementation Guide (2nd edition)

The exception

The exception: the main points

1. Regulation 10(4)(b) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) allows a Scottish public authority to refuse to disclose environmental information if the request for information is manifestly unreasonable.

2. This is very similar, but not identical, to the vexatious provision in section 14 of the Freedom of Information (Scotland) Act 2002 (FOISA). The Commissioner has issued separate guidance on section 14 of FOISA. See **Appendix 1: Resources** for a link to that guidance.

3. The exception in regulation 10(4)(b) is subject to the public interest test in regulation 10(1) of the EIRs. This means that, even if the exception applies, the information should still be disclosed if the public interest in making the information available is outweighed by the public interest in maintaining the exception.

4. As with all of the exceptions in the EIRs, the exception can be relied on regardless of the age of the information.

5. This exception aims to protect the credibility and effectiveness of the EIRs. Most requesters exercise their rights to information responsibly, but there are rare occasions when this is not the case. This exception provides a way of dealing with the few cases that are unreasonable, would impose a significant burden on the financial and human resources of public authorities or are otherwise manifestly unreasonable because of their impact on the authority.

6. Public authorities should not use this exception lightly. They should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is manifestly unreasonable. Requesters must not be unjustly denied the opportunity to make a genuine information request. Requests may be inconvenient, and meeting them may at times stretch an authority's resources, but these factors are not on their own sufficient to deem a request manifestly unreasonable.

Steps in applying the exception

7. These are the steps an authority must take when thinking about whether a request is manifestly unreasonable:

   (i) Decide, does the exception apply? The exception must be interpreted in a restrictive way and the authority must apply a presumption in favour of disclosure (regulation 10(2) of the EIRs).

   (ii) If the exception does NOT apply, the information cannot be withheld under the exception.

   (iii) If the exception DOES apply, the public interest test must be applied.

   (iv) If the public interest in making the information available is not outweighed by that in maintaining the exception, the exception does not apply and the information cannot be withheld under the exception.

(v) If the public interest in making the information available is outweighed by that in maintaining the exception, the information can be withheld and notice served to that effect.

General points about the exception

8. The EIRs implement Directive 2003/4/EC on public access to environmental information. (See **Appendix 1: Resources** for a link to the Directive.)

9. The EIRs do not define the term "manifestly unreasonable", and neither does the Directive. However, the Aarhus Convention Implementation Guide, named after the Convention on which the Directive was based, makes it clear that volume and complexity alone do not make a request "manifestly unreasonable". (See **Appendix 1: Resources** for a link to the Implementation Guide.)

10. To an extent, the EIRs already make provision for a degree of complexity. Under regulation 7 a public authority is allowed to extend the maximum 20 working days for responding to a request for environmental information to 40 working days if the volume and complexity of the information requested makes it impracticable to comply with the request (or to decide to refuse the request) within 20 working days.

11. As with a "vexatious request" under FOISA, there may be circumstances where the burden of responding alone justifies deeming a request to be "manifestly unreasonable."

12. Unlike FOISA, there is no cost limit to the duty to comply with a request for environmental information, but there may be cases where:

    (i) the time and expense involved in complying with a request for environmental information means that any reasonable person would regard them as excessive; and

    (ii) an extension of an additional 20 working days (possible under regulation 7) is not sufficient to make dealing with the request manageable.

13. The Commissioner has published a number of decisions on whether a request for environmental information is "manifestly unreasonable". In applying this regulation, the Commissioner will take into account the same kinds of considerations as in reaching a decision as to whether a request is vexatious.

Public interest test

14. The exception in regulation 10(4)(b) of the EIRs is subject to the public interest test (regulation 10(1)(b)). There may be cases where a request is manifestly unreasonable, but there is still a strong public interest in making the information available. (This is unlike the vexatious provision in section 14(1) of FOISA. On the other hand, the fact that there is some public interest in making the information available will not automatically mean that the request is not manifestly unreasonable. As ever, a balancing exercise needs to be carried out.

15. The Commissioner publishes separate guidance to assist with the consideration of the public interest test in the EIRs. This is available from the Commissioner's website. (See **Appendix 1: Resources** for a link to the guidance.)

Regulation 10(4)(b): interpretation

16. Essentially, regulation 10(4)(b) is concerned with the effect of a request on the authority and its staff. It should be interpreted in the context of the importance of the right of access to information provided by regulation 5(1) of the EIRs and must not be used to undermine that right. The fact that a request may be considered to be manifestly unreasonable acknowledges the damage which may be done to the right by disproportionate use of it.

17. There is no single formula or definitive set of criteria that support a formulaic approach to determining whether a request is manifestly unreasonable. Each request must be considered on the merits of the case, supported by evidence, clear evaluation and reasoning.

18. The following factors will be relevant to determining whether a request (which may be the latest in a series of requests or other related correspondence) is manifestly unreasonable. These are the same factors the Commissioner will consider when considering whether a request is vexatious under FOISA. The (English and Welsh) Court of Appeal concluded that, to all intents and purposes, the question of whether a request is vexatious under FOISA and of whether a request is manifestly unreasonable under the EIRs has the same meaning. (See **Appendix 1: Resources** for a link to that judgment.)

    (i) It would impose a significant burden on the public authority.

    (ii) It does not have a serious purpose or value.

    (iii) It is designed to cause disruption or annoyance to the public authority.

    (iv) It has the effect of harassing the public authority.

    (v) It would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

19. This is not an exhaustive list and must not be used as a checklist. It's important to remember that there is no one "test" for vexatiousness. "Vexatious" should be interpreted by reference to the ordinary, natural meaning of the word, read in its legislative context. See **Appendix 1: Resources** for a link to a 2018 Court of Session judgment on this point. Depending on the circumstances, and provided the impact on the authority can be supported by evidence, other factors may be relevant.

Applying regulation 10(4)(b)

20. This section looks at:

    (i) how to determine if a request is manifestly unreasonable

    (ii) what to take into account when determining whether a request is manifestly unreasonable, and

    (iii) how to respond to a manifestly unreasonable request.

How to determine if a request is manifestly unreasonable

21. These are the sorts of factors public authorities are likely to consider when determining if a request is manifestly unreasonable.

Significant burden

22. A request will impose a "significant burden" on a public authority where complying with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its resources, including financial and human, away from other statutory functions. The authority should be able to demonstrate why other statutory functions take priority over its statutory duties under FOISA. If the public authority does not perform statutory functions, it should demonstrate why its core functions are of a higher priority than the statutory requirement to respond to information requests.

23. Generally, the authority should consider the impact of the request on its whole resources, rather than simply the part of the organisation most immediately affected. It should also be able to quantify the impact of the request and identify the key functions and/or tasks from which resources would require to be diverted to deal with it and whether existing contingency or business continuity arrangements could be invoked.

The request lacks serious purpose or value

24. Public authorities should not reach this conclusion lightly. Even if a public authority thinks that a request lacks serious purpose or value, the requester might, from a subjective and reasonable point of view, have a genuine desire and/or need to obtain the information. The requester is not obliged to share his/her motives for seeking the information with the public authority. The inclusion of this criterion simply recognises that some requests may be so obviously lacking in serious purpose or value that they can only be seen as manifestly unreasonable.

The request is designed to cause disruption or annoyance

25. Again, this is not a conclusion an authority should reach lightly. Strictly speaking, a request is applicant blind (see "Request not requester" below) and the reasons for making the request are a matter for the requester. The EIRs do not require requesters to state why they want information.

26. However, there are occasions where the intention behind a request cannot, in the whole circumstances of the case, be disregarded. For that reason, this factor considers the requester's intention in making a request. If the intention is evidently to cause disruption or annoyance to the authority, rather than to access the information, the request may be manifestly unreasonable. It will be easiest to gauge a requester's intention where he/she has made it explicit. It may be possible for a public authority to gauge a requester's intention from prior knowledge of, and documented interactions with, the requester.

The request has the effect of harassing the public authority

27. This takes into account the effect a request has on a public authority regardless of the requester's intentions. Even where a requester does not intend to cause inconvenience or expense, if the request has the effect of harassing the public authority and/or its staff, it may be deemed manifestly unreasonable when considered from the perspective of a reasonable person. The language and tone of a request may be relevant in assessing this (for further guidance see discussion under **Abusive or inappropriate language** below).

28. See **Appendix 1: Resources** for a link to a 2018 Court of Session judgment, where the Court agreed with the Commissioner that a request which was "important" to the requester could still be vexatious on the basis that it had the effect of harassing the public authority.

The request is disproportionate

29. Regardless of the apparent purpose or value of a request, or the intention of the requester, a request may be deemed manifestly unreasonable if, in the opinion of a reasonable person, it would appear to be disproportionate.

30. The effect on a public authority of dealing with the request will be relevant in determining whether this is the case. Relevant factors to consider include the complexity of the request, the volume of information requested, the time and resources that would be required to process it, and the impact on the authority's statutory and/or core operations (see above on "significant burden"). Balanced against these factors should be the wider value and (where known) purpose of the request, bearing in mind that the EIRs are designed to give access to information and to promote transparency in public authorities.

What to take into account when determining whether a request is manifestly unreasonable

31. There are general principles that apply to all considerations about whether a request is manifestly unreasonable. While they do not make requests manifestly unreasonable in themselves, they may have a bearing on how authorities reach their conclusions about the factors set out above.

Request not requester

32. The term "manifestly unreasonable" must be applied to the request, NOT the requester.

33. It is not the identity of the requester that determines whether a request is manifestly unreasonable, but the nature and effect of the request made in light of the surrounding circumstances. A request cannot be judged manifestly unreasonable simply because a requester has been deemed manifestly unreasonable or vexatious in another context, for instance if they have made another complaint or because they may have submitted other requests that were manifestly unreasonable or vexatious.

34. However, a requester's identity and the history of their dealings with a public authority may be relevant. An authority could reasonably conclude that a particular request represents the continuation of a pattern of behaviour which it has deemed manifestly unreasonable or vexatious in another context. It might, in those circumstances, decide the request can be refused as the continuation of the pattern of behaviour makes the latest request manifestly unreasonable. This may arise, for example, where a requester has an on-going grievance against a public authority, or could reasonably be described as conducting an extended campaign to the point that their behaviour can be described as obsessive.

35. Campaigning to further legitimate concerns is acceptable practice in a democratic society, and public authorities should not deal with a campaign as potentially manifestly unreasonable simply on the grounds that it is a campaign. Considerations to take into account could include, for example, evidence (from the history of the matter) that:

    (i) the campaign is either not well founded or has no reasonable prospect of success;

    (ii) the requester has failed to take concerns up with the relevant authorities; or

    (iii) they refuse to consider any alternative point of view on the matter.

36. There may also be cases where it is reasonable, on the basis of the requester's previous dealings with the authority, to conclude that the requester's purpose is to pursue an argument or grievance and not actually to obtain information.

37. This doesn't mean that requests for information should be refused automatically; the requester should be given reasons to help them understand the conclusions reached by an authority, and to be assured that proper processes have been followed.

38. The request may also be manifestly unreasonable if:

    (i) there is no additional information that can be provided because all relevant information has already been disclosed; or

    (ii) it is unlikely that the additional information would shed light on, or alter, the requester's situation (because the subject in question has already been thoroughly addressed through the relevant complaints or appeals procedure).

39. A useful test is for the public authority to consider whether the information would be supplied if it were requested by another person, unknown to the authority. If it would, this might suggest that the request should not be treated as manifestly unreasonable.

The public authority's actions

40. Where an authority intends to take account of prior dealings with a requester, it should consider whether its own actions may have contributed to the situation. For instance, if an authority has provided partial, ambiguous, or inconsistent responses to previous requests, this might have led to the requester making further requests in order to clarify the response.

41. The Commissioner is unlikely to conclude that a request is manifestly unreasonable if the public authority's actions helped protract dealings between authority and requester, especially if there is no evidence that the authority has met its duties under regulation 9 (see below, **The duty to provide reasonable advice and assistance)**. There would need to be a link, however, between the authority's actions and continued dealing on the requester's part: this should not be seen as a mechanism for sanctioning the public authority from a departure from good practice or some other failing.

Series of requests or large numbers of requests

42. Where a request is the latest in a series, or where a large number of requests are submitted at once, they can be considered collectively when assessing the burden they impose on the public authority. However, a large number of requests will not necessarily mean any or all of those requests are manifestly unreasonable. Some kinds of requester might reasonably be expected to make numerous requests to the authority.

43. If the number of requests made by one requester, at the same time or in close succession, is so great that no public authority could reasonably be expected to handle them in accordance with the requirements of the EIRs, the requests may be manifestly unreasonable.

Abusive or inappropriate language

44. The use of abusive or inappropriate language will not, in itself, make a request for information manifestly unreasonable. However, language a reasonable person would consider abusive or inappropriate in the circumstances may be a factor in deciding whether a request meets the criteria specified above.

The duty to provide reasonable advice and assistance

45. Under regulation 9 of the EIRs, authorities must provide reasonable advice and assistance to requesters. If processing a request is likely to impose a significant burden on an authority, a requester should be consulted to help them refine their request in order to make it more manageable. How this is done will depend on the circumstances of each case, but the

Commissioner would expect to see evidence of the authority's actions. If an authority has taken reasonable steps to explain the difficulties involved in processing a request and offered assistance with refining the request, and the requester (without good cause) refuses to refine their request, it may be manifestly unreasonable.

46. There is a separate exception in regulation 10(4)(c) of the EIRs which covers requests which are formulated in too general a manner. The exception can only be relied on if the authority has asked the applicant to clarify the request and has assisted the requester to do so. In some cases, it will be more appropriate to rely on this exception rather than the "manifestly unreasonable" exception in regulation 10(4)(b).

Decision-making and record-keeping

47. A decision to deem a request manifestly unreasonable will often be contentious, and it is quite likely that the requester will exercise their right to request a review, and ultimately to make an application to the Commissioner. Such decisions should be taken at an appropriately senior level, and after careful thought.

48. It is important to keep records documenting the decision-making process, i.e. why the request was judged to be manifestly unreasonable, and how the public authority came to this decision. The Commissioner will expect these decisions to be backed by detailed evidence and sound reasoning. If the authority is arguing that complying with the request would be a significant burden, it should be able to quantify the effect of compliance.

Good practice

49. If a public authority receives a high proportion of manifestly unreasonable requests, it may be helpful to publish the criteria which are used to determine if a request is manifestly unreasonable and to provide a link to this briefing. This will help staff members faced with making the decisions and also show requesters that an objective method of assessment is used.

The Commissioner's decisions

50. See **Appendix 1: Resources** for links to some of the Commissioner's decisions on section 14(1).

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision Number	Parties	Summary
50	020/2011	Garry Calder and East Lothian Council	This decision acknowledged that there was often a thin line between requests showing persistence on the part of the requester and being manifestly unreasonable. This could be a difficult judgment to make, especially where requests were linked to a background issue which was difficult to resolve. The Commissioner accepted that there must be a limit to the number of times a public authority could be expected to revisit issues relating to a particular grievance, but did not believe this authority had reached that point here.
50	153/2011	Tommy Kane and the Scottish Ministers	The Commissioner did not accept that Mr Kane's requests were so wide ranging as to make them manifestly unreasonable. The Commissioner noted that the Ministers could have sought more particulars (under regulation 9(2)) if they had considered any of the requests to have been formulated in too general a manner. The Commissioner acknowledged the relevance of other requests from Mr Kane, still under consideration by the Ministers. Some of these were voluminous and complex, although there were specific provisions in the EIRs designed to deal with requests of that nature. The Commissioner accepted that volume and complexity might be relevant factors in demonstrating a significant burden, but was not satisfied that such a burden existed here.
50	012/2012	Tommy Kane and Scottish Water	The Commissioner found that that Scottish Water had focused too much on the disruptive nature of past requests when arguing that Mr Kane's current requests were disruptive and caused harassment. The current requests were specific and well formulated, and Scottish Water had been able to apply exemptions when dealing with them initially. Scottish Water had also referred to the concern and annoyance expressed by its staff at the effect of the requests on their other duties. The Commissioner could not accept that these amounted to evidence of harassment. The Commissioner did not agree that an authority and its

			employees could be said to have been harassed simply because the requester had been provided with a substantial amount of information, but continued to seek more. Scottish Water appeared to have indicated to the requester that it would refuse to respond to any future requests from him regardless of subject matter or how readily they could be responded to or their actual impact. The Commissioner could not support this approach, which would be to regard the requester (and not the request) as manifestly unreasonable.
50	020/2013	Daniel Henderson and Falkirk Council	The Commissioner did not accept that it would be manifestly unreasonable to provide the information in the form requested, even if it might be more meaningful (as the Council believed) to provide information in another form of the authority's choosing. From the arguments provided and the information available, the Commissioner did not agree with the Council that compliance would require such an input of skill and judgment that the request was manifestly unreasonable.
50	126/2015	Royal Society for the Protection of Birds and the Scottish Ministers	The RSPB asked the Ministers for information relating to east coast windfarm projects. The Ministers refused to make the information available on the basis that the request was manifestly unreasonable because of the burden it would place on them to respond. The Commissioner accepted, given the breadth of the request, that the request was manifestly unreasonable.

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 032/2014).

If you do not have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

Other Resources

Paragraph	Resource	Link
2	Commissioner's guidance on vexatious or repeated requests under FOISA	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx

Paragraph	Resource	Link
8	Directive 2003/4/EC on public access to environmental information	http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF
9	The Aarhus Convention: An Implementation Guide (2nd edition)	http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf
15	The Commissioner's guidance on the public interest test in the EIRs	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx
19, 28	Beggs v Scottish Information Commissioner [2018] CSIH 80	https://www.scotcourts.gov.uk/docs/default-source/default-document-library/2018csih80.pdf?sfvrsn=0

Appendix 2: The exception

Regulation 10

(1) A Scottish public authority may refuse a request to make environmental information available if –

(a) there is an exception to disclosure under paragraph (4) or (5); and

(b) in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall –

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

…

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

…

(b) the request for information is manifestly unreasonable

…

Document control sheet

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30/08/16	SH	01.02	01.03	Published on website and updated DCS
30/08/16	SH	01.03	01.04	Amended website file library name and updated DCS
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23/05/17	KB	01.08	01.09	DCS updated, published on website
28/07/17	MK	01.09	01.10	• More text on public interest test added • Cross-reference table deleted • Reference to OGL added to backing
31/07/17	KB	01.10	01.11	DCS updated, published on website
06/02/19	MK	01.11	01.12	• Updated to reflect Beggs Court of Session judgment (paras.14 and 22) • Reference to Commissioner as “she” changed • OGL reference updated
13/02/19	KB	01.12	01.13	DCS updated, published on website
22/02/19	MK	01.13	01.14	Paras 40/41 amended to reflect further the Beggs judgment
06/03/19	BOW	01.14	01.15	DCS updated, published on website
11/07/23	MK	01.15	01.16	Reference to case on page 11 removed
11/07/23	BOW	01.16	01.17	DCS updated, published on website

Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610
f 01334 464611
enquiries@itspublicknowledge.info

www.itspublicknowledge.info