Decision Notice 024/2022

Landfill and waste disposal sites

Applicant: the Applicant

Public authority: Scottish Environment Protection Agency

Case Ref: 201901130

Scottish Information Commissioner

Summary

SEPA was asked for environmental information relating to waste ash and landfill disposal.

SEPA disclosed some information but refused to disclose some information on the basis that it was excepted from disclosure. During the investigation, SEPA disclosed further information to the Applicant and amended the exceptions it was relying on to withhold the remainder of the information.

The Commissioner investigated and found that SEPA had partially breached the EIRs in responding to the request. This was because it withheld information which it later discovered it did not hold. However, he was otherwise satisfied that the information withheld was excepted from disclosure.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information") and (2)(a) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 7 (Extension of time); 10(1), (2), (4)(a) and (b), (5)(b),(d) and (e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 9 October 2018, the Applicant made a request for information to the Scottish Environmental Protection Agency (SEPA). The information requested was:

    a) All correspondence between the William Tracey Group and SEPA.

    b) All waste input and output data from the William Tracey Group between 2007 – 2017 including the details of all the original producers of waste ash.

    c) All correspondence between the William Tracey Group and SEPA between 2011 and 2017 which mention the Tarbolton Landfill site.

    d) All audits, test results and correspondence SEPA have in their possession in relation to the liquids and solids both hazardous and non-hazardous that entered the Dunniflats facility and where said liquids and solids were eventually disposed of.

    e) All correspondence between SEPA and Barr Environmental at both Garlaff and Auchencara Landfill sites from 2007 to 2017, relating to the Ash Waste Stream.

    f) All correspondence between SEPA Ayr Office and SEPA head office, relating [to] the Ash Waste Stream from 2007-2017.

    g) All correspondence between SEPA and Tarbolton Landfill Ltd from 2008-2016.

2. SEPA contacted the Applicant on 23 October 2018, and sought clarification of parts a) and d) of the request. In particular, SEPA asked the Applicant to confirm the timescales for these parts of the request.

3. The Applicant responded the same day and confirmed that the timescales for requests a) and d) were 2007 to 2017 inclusive.

4. On 6 November 2018, SEPA wrote to the Applicant and explained that regulation 7(1) of the EIRs permits an authority to extend the time to comply with a request by up to 20 working days, if the volume and complexity of the information covered by the request makes it impracticable to comply with the request within the original 20 working days or to make a decision to refuse to do so. SEPA notified the Applicant that it was relying on regulation 7(1) of the EIRs and that a response would now be provided by 19 December 2018.

5. SEPA responded on 19 December 2018, and notified the Applicant that it considered the information to be exempt under section 39(2) of FOISA as it comprised environmental information, which should be handled under the EIRs. SEPA:

    - applied the exception contained in regulation 10(4)(b) of the EIRs to information covered by requests a), c), d) and g)
    - withheld some of the information asked for in request b) under regulation 10(5)(e) of the EIRs
    - disclosed information covered by request e) with personal data redacted under regulation 11(2) of the EIRs and
    - notified the Applicant that it did not hold any information covered by request f), citing exception 10(4)(a) of the EIRs.

6. On 15 January 2019, the Applicant wrote to SEPA requesting a review of its decision on the basis that it did not agree with the exceptions being relied on to withhold information. In particular, the Applicant questioned SEPA's reliance on regulation 10(4)(b) and 10(5)(e) of the EIRs.

7. SEPA notified the Applicant of the outcome of its review on 14 February 2019. It:

    - upheld the application of regulation 10(4)(b) to request a)
    - withdrew its reliance on regulation 10(4)(b) for requests c), d) and g) and indicated it would carry out further searches and provide the Applicant with a full response and
    - maintained its reliance on regulation 10(5)(e) to request b).

8. On 29 March 2019, SEPA contacted the Applicant with an updated review outcome, as a result of the further searches it had undertaken. It:

    - provided the Applicant with 125 documents that fell within the scope of request g) with personal data redacted under regulation 11(2) of the EIRs
    - notified the Applicant that it was withholding information in requests c) and d) under regulation 10(5)(b) of the EIRs.

9. On 3 July 2019, 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 it was dissatisfied with the outcome of SEPA's review because it did not accept that all of the information they had requested had been provided. In particular, the Applicant:

- disagreed with SEPA's reliance on regulation 10(4)(b) to request a)
- rejected the application of regulation 10(5)(e) to request b)
- in relation to request c), questioned why it had not been provided with any correspondence between 2011 and 2013
- challenged SEPA's reliance on regulation 10(5)(b) to withhold information falling within the scope of requests c) and d)
- did not accept SEPA's argument that it did not hold any information falling within the scope of request f).

Investigation

10. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.

11. On 14 August 2019, SEPA was notified in writing that the Applicant had made a valid application. SEPA was asked to send the Commissioner the information withheld from the Applicant. SEPA provided the information and the case was allocated to an investigating officer.

12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and to answer specific questions. These related to its decision to withhold information under regulations 10(4)(a), 10(4)(b) and 10(5)(e) of the EIRs.

13. On 25 October 2019, SEPA contacted the Commissioner and provided its comments on the application. In this letter, SEPA answered questions about requests a), b) and f), but noted that it would provide comments on requests c) and d) in a later response.

Request f)

All correspondence between SEPA Ayr Office and SEPA head office, relating [to] the Ash Waste Stream from 2007-2017.

14. SEPA upheld its previous application of regulation 10(4)(a) of the EIRs to information falling within the scope of request f), arguing that the information requested by the Applicant was not held. SEPA provided details of the searches it had carried out, including the names of staff who had carried out the searches as well as the information resources that had been interrogated. SEPA submitted that none of the searches had located any relevant information.

Request a)

All correspondence between the William Tracey Group and SEPA [from 2007 to 2017].

15. SEPA upheld its previous application of regulation 10(4)(b) of the EIRs to information falling within the scope of request a), arguing that compliance with the request would require a disproportionate amount of time, and the diversion of an unreasonable proportion of

resources, including financial and human, away from other statutory functions. SEPA contended that it had never intimated to the Applicant that all of the correspondence between the William Tracey Group and SEPA was held in "one room". SEPA provided the Commissioner with the estimated costs of compliance with the request which exceeded £8,000.

Request b)

All waste input and output data from the William Tracey Group between 2007 – 2017 including the details of all the original producers of waste ash.

16. SEPA upheld its previous application of regulation 10(5)(e) of the EIRs to information falling within the scope of request b). SEPA argued that the third parties who have commercial interests in relation to request b) include the operator and their customers and suppliers. SEPA provided the Commissioner with an email from the operator, explaining why the information sought in request b) is confidential and why it should be withheld.

17. In addition, SEPA argued that disclosing the information would risk undermining the existing trust between itself and operators in general, as its guidance for site operators[1] states that the requested information is not made public. SEPA went on to note that page 34 of this guidance informs operators how the information will be used and, where applicable, published.

Requests c) and d)

18. As noted above, SEPA did not provide additional submissions regarding requests c) and d) in its letter of 25 October 2019, but it indicated that it would provide a further update on the application of regulation 10(5)(b) to these requests later on.

19. On 22 November 2019, SEPA indicated that it would be withdrawing its reliance on 10(5)(b) and would disclose much of the information it was withholding under this exception on 16 December 2019.

20. SEPA emailed the investigating officer on 20 December 2019, and submitted that, due to technical difficulties, it had been unable to disclose the information on 16 December 2019. On 15 January 2021, SEPA advised the investigating officer that it now hoped to disclose the information to the Applicant by 24 January 2020.

21. On 24 January 2020, SEPA called the investigative officer again and indicated that it would be disclosing some 350 redacted documents to the Applicant that day, and that information was being withheld under regulation 10(5)(b), (d) and 10(4)(a) of the EIRs. SEPA also indicated that it would provide the Commissioner with a schedule of documents and copies of the information, along with submissions (on requests c) and d)) by the following week.

22. SEPA provided the Applicant with a hard copy of the disclosed information on 31 January 2020.

23. On 19 February 2020, the investigating officer contacted SEPA, noting that the Commissioner had not yet received a copy of the documents disclosed to the Applicant, and had not been provided with submissions on requests c) and d).

24. SEPA contacted the investigating officer on 28 February 2020, and provided a copy of information it was continuing to withhold from the Applicant, as well as the information it

[1] https://www.sepa.org.uk/media/219649/licensed-permitted-site-return-form-guidance.pdf

disclosed to the Applicant on 31 January 2020. SEPA also provided submissions on requests c) and d), outlined below.

Request c)

All correspondence between the William Tracey Group and SEPA between 2011 and 2017 which mention the Tarbolton Landfill site.

25. SEPA explained that, while it had originally identified one draft letter as falling within the scope of request c), it now considered this letter to more accurately fall under the scope of request d) and it was withholding it under regulation 10(5)(d) of the EIRs. In relation to request c), SEPA submitted that it no longer held any information falling within the scope of the request, and so it was relying on regulation 10(4)(a) of the EIRs.

Request d)

All audits, test results and correspondence SEPA have in their possession in relation to the liquids and solids both hazardous and non-hazardous that entered the Dunniflats facility and where said liquids and solids were eventually disposed of.

26. SEPA explained that it was continuing to withhold information that fell within the scope of request d) and that it considered it to be comprised of five distinct groups of information, Group A, B, C, D and E.

- Group A
  This information was held by SEPA on behalf of Revenue Scotland, and SEPA argued that it was excepted from disclosure under regulation 10(4)(a) of the EIRs.
- Group B
  This information comprised Protected Taxpayer Information (PTI) and was being withheld under regulation 10(5)(b) of the EIRs (38 documents).
- Group C
  This information related to SEPA's investigative processes and it was being withheld under regulation 10(5)(b) of the EIRs (13 documents).
- Group D
  This information comprised legal advice and was being withheld under regulation 10(5)(d) of the EIRs (9 documents).
- Group E
  This information consists of a table of waste quarterly returns, and the Waste Destination column was redacted under regulation 10(5)(e) of the EIRs (2 documents).

27. The investigating officer contacted SEPA on 8 September 2020, asking further questions regarding the exceptions it had applied and the information it was withholding.

28. On 25 September 2020, SEPA provided a partial response to this letter. It maintained that it did not now hold any information falling within the scope of request c), and it upheld regulation 10(5)(d) of the EIRs in relation to the information falling within Group D of request d). SEPA submitted that it would respond to questions about the exception being applied to Group B documents (request d)) in a later response.

29. SEPA provided this response on 9 October 2020. It explained that it was now withholding Group B information under regulation 10(5)(d) of the EIRs and provided detailed submissions supporting its view.

30. On 10 November 2020, the investigating officer contacted SEPA and asked it to provided additional explanation in relation to the Group B (of request d)) documents it was withholding under 10(5)(d) of the EIRs.

31. SEPA responded to this email on 3 December 2020 and provided more details on why it considered the information contained within Group B to be excepted from disclosure under regulation 10(5)(d) of the EIRs. In this email, SEPA also identified that there were three documents in the Group B documents that it was now willing to disclose (with personal data redactions made under regulation 11(2) of the EIRs) and that there was one document that it now considered was held on behalf of Revenue Scotland which it was withholding under regulation 10(4)(a) of the EIRs.

Commissioner's analysis and findings

32. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and SEPA. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

33. It is clear from SEPA's correspondence with both the Applicant and the Commissioner, and from the information itself, that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the disposal of waste, and so the Commissioner is satisfied that it falls within either paragraph (a), (b) or (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). The Applicant has not disputed this, and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Scope of investigation

Request a)

34. The Commissioner will consider whether SEPA was correct to refuse to comply with request a) under regulation 10(4)(b) of the EIRs, on the basis that the request is manifestly unreasonable.

Request b)

35. The Commissioner will consider whether SEPA was correct to withhold information under regulation 10(5)(e) of the EIRs, on the basis that disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information.

Requests c) and d)

36. The Commissioner will consider whether SEPA was correct to withhold information falling under the scope of requests c) and d) under 10(5)(b) of the EIRs. SEPA disclosed some of this information to the Applicant during the investigation and the Commissioner will determine whether this disclosed information was correctly withheld or whether the exception was misapplied at the time SEPA carried out a review.

37. The Commissioner will consider whether SEPA is correct to now claim that regulation 10(4)(a) applies to request c) and that it does not hold any information falling within the scope of that request.

38. In relation to request d), the commissioner will consider whether SEPA is right to contend that it does not hold the Group A documents (regulation 10(4)(a) of the EIRs), that Group C documents are excepted under regulation 10(5)(b) of the EIRs, Group B and D documents are excepted under regulation 10(5)(d) of the EIRs and redactions made to Group E documents are excepted under regulation 10(5)(e) of the EIRs.

Request f)

39. The Commissioner will consider whether SEPA is correct to claim that regulation 10(4)(a) applies to this request, on the grounds that no information is held.

Regulation 5(1) of the EIRs - Duty to make environmental information available

40. 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.

41. 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)).

42. During this investigation (on 31 January 2020), SEPA provided the Applicant with 98 documents, most of which had some personal data redactions under regulation 11(2) of the EIRs. In addition to the redaction of personal data, three documents had out of scope information redacted, one document had information redacted under regulation 10(5)(d), six documents also had information redacted under 10(5)(b) of the EIRs, and two documents had information redacted under 10(5)(e) of the EIRs. SEPA had previously withheld all of this information under regulation 10(5)(b) of the EIRs.

43. In addition to the redacted documents that were disclosed, SEPA continued to withhold 60 documents in full, 13 were withheld under 10(5)(b) and 47 were withheld under regulation 10(5)(d) of the EIRs.

44. As noted above, the Applicant has asked the Commissioner to decide whether SEPA was correct to apply the exception contained in regulation 10(5)(b) of the EIRs to information falling within the scope of requests c) and d) in its review outcome, given that some of this information was disclosed during the investigation. The Applicant also submitted that it was satisfied with the redactions made under regulation 11(2) of the EIRs, and so the Commissioner will not consider SEPA's application of this exception in his decision notice.

SEPA's handling of requests c) and d) at the time of the review outcome

45. Under regulation 10(5)(b) of the EIRs, 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 an individual to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.

46. As with all exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure.

47. Although there is no definition of "substantial prejudice" in the EIRs, 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.

48. In its review outcome of 29 March 2019, SEPA submitted that it was withholding information that fell within the scope of requests c) and d) under regulation 10(5)(b) of the EIRs.

Request c)

All waste input and output data from the William Tracey Group between 2007 – 2017 including the details of all the original producers of waste ash.

Request d)

All correspondence between the William Tracey Group and SEPA between 2011 and 2017 which mention the Tarbolton Landfill site.

49. SEPA submitted that its officers have statutory powers to investigate breaches of environmental legislation. When an investigation has been completed, SEPA will assess all the evidence that has been gathered and consider all relevant factors, including SEPA's enforcement policy and guidance on the use of enforcement action in reaching a decision on what level of enforcement action will be taken. SEPA noted that there is a wide range of enforcement actions available to it.

50. SEPA explained that it undertakes enforcement action in accordance with the options outlined in the document entitled *SEPA's Enforcement Policy*[2] and it noted that further information can also be found in its *Guidance on the use of enforcement action*[3]. SEPA explained that the enforcement decision making process it undertakes is described in Section 4 of the *Guidance* document, and it provided an extract from this document;

Deciding on the right enforcement action is not simply about applying a set of prescriptive rules that determine the type of enforcement action depending on the combination of factors involved. Using the facts and/or evidence we will decide how important each factor is in the circumstances of each case. In general terms, the more significant the impact, the greater the scale of the offending and/or the more deliberate the behaviour, the more likely it is that the appropriate form of enforcement action is a referral to COPFS [the Crown Office and Procurator Fiscal Service] *for consideration of prosecution.*

51. SEPA explained that, as of 29 March 2019, the enforcement decision making process was still ongoing and that a formal decision on the means of enforcement action had not been finalised. SEPA argued that disclosure of any evidence gathered during the investigation while the matter is ongoing would undermine its investigative process. SEPA also explained that its investigations, findings and submissions on the matter could lead to, and inform, any subsequent decision on prosecution made by the procurator fiscal

52. SEPA submitted that the next stage of the enforcement process is a detailed consideration of the outcomes of the investigation, including an assessment of the evidence which has been gathered. SEPA submitted that it expected this process to be concluded by the end of October 2019, and that following this, there were a number of potential regulatory actions/decisions that could be taken forward.

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[2] https://www.sepa.org.uk/media/219244/enforcement-policy.pdf

[3] https://www.sepa.org.uk/media/219242/enforcement-guidance.pdf

53. SEPA confirmed that it held information falling under the scope of requests c) and d) and that it was withholding this information under regulation 10(5)(b) of the EIRs, as it was currently carrying out an investigation under its enforcement powers.

54. In their application to the Commissioner, the Applicant disputed SEPA's reliance on regulation 10(5)(b), arguing that it was not aware of any ongoing enforcement action, and it did not consider this a suitable reason to withhold information.

55. During the investigation, SEPA contacted the Commissioner and explained that a decision regarding the outcome of the ongoing enforcement investigation had been reached on 15 November 2019, and that, as a result of this, it was no longer withholding all of the information under regulation 10(5)(b) of the EIRS. SEPA explained that it would be considering what information, which it had previously withheld under regulation 10(5)(b) of the EIRs, could be disclosed to the Applicant and what exceptions would be applied to the information that would continue to be withheld.

56. SEPA subsequently submitted that it did not, in fact, hold any information falling within the scope of request c), and it applied regulation 10(4)(a) to this request. SEPA also submitted that it did hold information falling under the scope of request d), and it disclosed some of this information to the Applicant but argued that the remaining information was exempt under a number of exceptions (see below), including regulation 10(5)(b) of the EIRs.

57. The Commissioner will now consider whether SEPA was correct to notify the Applicant, on 29 March 2019, that it held information falling within the scope of requests c) and d) and that all of the information was excepted from disclosure under regulation 10(5)(b) of FOISA.

Request c)

58. As noted above, SEPA carried out a further appraisal of the withheld information to determine what information could be disclosed following completion of the enforcement investigation carried out in November and December 2019. During these further searches, SEPA explained that it became clear that the draft letter (which it had previously considered to fall within the scope of request c)) had never been sent and was an attachment to an email sent to one of its solicitors asking for legal advice on its content. Confirmation that the letter had never been sent was verified by a search of SEPA's Recorded Delivery postal records. It was at this stage that SEPA concluded that the letter did not constitute *correspondence between the William Tracey Group and SEPA*, as it had not been finalised and sent to the intended recipient.

59. SEPA explained that the draft letter was now included in the Group D documents identified as falling within the scope of request d), and it submitted that it did not actually hold any information falling within the scope of request c) and so the exception in regulation 10(4)(a) applied.

60. SEPA provided the Commissioner with details of the searches it had undertook for information falling within the scope of request c).

61. The Commissioner is satisfied that no information is held falling within request c) (his rationale for coming to this conclusion is set out below). Consequently, the Commissioner must find that SEPA wrongly applied regulation 10(5)(b) of FOISA to the information captured by request c), on the grounds that it does not actually hold any information falling within the scope of this request. The Commissioner does not require SEPA to undertake any action in relation to this failure.

Request d)

62. SEPA argued that all of the information falling under the scope of request d) was withheld under regulation 10(5)(b) of the EIRs as it formed part of the information under consideration in an active enforcement investigation. At the time of its review response, SEPA submitted that the investigation was still active.

63. SEPA explained that, following the completion of the enforcement investigation and the issuing of Final Warning letters on 16 December 2019, the enforcement process had been completed. At this point, some of the information in question was no longer linked to an investigation, so SEPA undertook a further appraisal of the withheld information to determine what information could be disclosed. Following this appraisal, some of the information was disclosed to the Applicant, either in full or in part, while the remaining information was withheld under a number of different exceptions.

64. SEPA contended that all of the information falling under the scope of request d) was correctly withheld under the terms of regulation 10(5)(b) of the EIRs in the period between the issuing of its review response on 29 March 2019 and its disclosure on 31 January 2020.

65. Furthermore, SEPA maintained that the Group C documents, which it continued to withhold following the disclosure on 31 January 2020, were still excepted from disclosure under regulation 10(5)(b) of the EIRs, and it provided additional submissions explaining why the exception applied.

66. In these additional submissions, SEPA stated that it was withholding 13 documents, and excerpts from a further six documents, under regulation 10(5)(b) of the EIRs. This information is captured by request d) and is contained in the Group C list of documents. The documents in Group C contain information that relate to the investigations carried out by SEPA officers between 2007 and 2014.

67. SEPA argued that there are a number of items where it considers that disclosure of either the format and/or content would provide information about how it conducts criminal enforcement actions, including those in relation to waste and landfill sites.

68. SEPA noted that eleven documents and two emails have been withheld in full and sections of four documents and two emails were redacted prior to information being disclosed to the Applicant

69. The documents which have been withheld include internal reports and briefing papers setting out enforcement options and internal updates to relevant officers and managers on the progress of ongoing criminal investigation. The documents also include an operational order containing instructions in relation to the conduct of that investigation, and formal disclosure record sheets completed throughout a criminal investigation in order to ensure that SEPA complies with its legal duty to reveal all relevant material obtained during an investigation to COPFS (in order that COPFS can, in turn, meet its obligations in relation to disclosure).

70. SEPA argued that these documents contain information on how it conducts its investigations into environmental crime, and in particular how it carries out its investigations into waste crime. SEPA contended that placing this type of information into the public domain would cause substantial prejudice to its ability to conduct an inquiry of a criminal nature, by revealing the nature of investigation techniques being used, and the manner in which those techniques are applied. SEPA argued that such information would be of particular interest to those involved in organised waste crime and that disclosure would adversely affect its ability to conduct such investigations

71. The Commissioner has viewed the contents of the 13 documents that have been withheld in full, along with the redactions that have been made to six further documents under regulation 10(5)(b), and he is satisfied that the information does provide details of how SEPA conducts its investigations and that its disclosure could cause the harm outlined above.

72. Having considered the nature of the information which was held, and given the timing of the enforcement activity described by SEPA, the Commissioner is satisfied that there was a reasonable risk of substantial prejudice to potential enforcement action, and thus to the success of any subsequent prosecution, had the information been disclosed in response to the Applicant's information request or their requirement for review. Disclosure would, therefore, have prejudiced substantially, or would have been likely to prejudice substantially, SEPA's ability to conduct an inquiry of a criminal nature.

73. Consequently, the Commissioner finds that the information falling within the scope of request d) was properly excepted from disclosure under regulation 10(5)(b) of the EIRs, at the time of the Applicant's requirement for review.

74. In addition, the Commissioner has reviewed the content of the Group C documents that SEPA has continued to withhold under regulation 10(5)(b) of the EIRs, along with the submissions made by SEPA, and he is satisfied that the information contained in the Group C documents continues to fall under the exception.

Public interest test

75. The Commissioner must now go on to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

76. SEPA acknowledged that there is a general public interest in information being accessible, because this enhances the scrutiny of decision-making processes and thereby improves accountability. However, SEPA argued that, on balance, it considered the public interest lay in withholding the information.

77. SEPA referred to paragraph 41 of *Decision 125/2007 City of Edinburgh Council*[4], in which the Commissioner stated he would:

> *consider it to be contrary to the public interest for an investigation of this type to be prejudiced as a result of the release of information and evidence prior to the conclusion of the investigation (and of any subsequent prosecution)*.

78. SEPA submitted that it continues to consider that, based on the feedback from colleagues and in the specific circumstances of the enforcement action that was ongoing at the time of the request, the release of the withheld information into the public domain, would or would be likely to, prejudice substantially…the ability of any public authority to conduct an enquiry of a criminal or disciplinary nature.

79. In addition, SEPA submitted that the information still being withheld in the Group C documents contains information on how it conducts its investigations into environmental crime, and in particular how it carries out its investigations into waste crime. It argued that disclosing this information into the public domain would cause substantial prejudice to

[4] https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200601096.aspx

SEPA's ability to conduct an inquiry of a criminal nature, by revealing the nature of the investigation techniques being used, and the manner in which those techniques are applied.

80. SEPA argued that the balance of public interest lies in ensuring that this type of information is not released into the public domain, future investigations are not compromised by releasing information about how information is gathered, the freedom with which SEPA gathers information and reports to the Crown Office and Procurator Fiscal Service (COPFS) is not prejudiced and that SEPA can continue to carry out investigations to the highest standard.

81. The Applicant did not make any specific submissions on the public interest test but commented that, in its view, SEPA had not applied a presumption in favour of disclosure, when considering the public interest test.

82. The Commissioner has considered the withheld information, along with the arguments put forward by SEPA and the Applicant. The Commissioner recognises that there is a strong public interest in transparency and in understanding how SEPA enforces environmental protection matters in Scotland.

83. However, the Commissioner must also bear in mind the relevance of the information to an investigation that was ongoing at the time of the requirement for review. There is a clear public interest in SEPA being free to take the most appropriate and effective action in the interests of the public and the environment, without that action being undermined by the information being disclosed under the EIRs.

84. On balance, the Commissioner finds, in all the circumstances, that the public interest in making the information available at the time of the request was outweighed by that in maintaining the exception in regulation 10(5)(b). The Commissioner also finds that the public interest in disclosing the Group C documents, which SEPA has continued to withhold under regulation 10(5)(b) of the EIRs, lies in maintaining the exception.

85. As noted above, after SEPA reached a decision in relation to the enforcement action in November / December 2019, it withdrew its reliance on 10(5)(b) to withhold all of the information under request d), and instead applied different exceptions to each of the four groups of documents it had identified as falling within the scope of the request, namely Group A, B, C, D and E documents.

86. The Commissioner has already found that the Group C documents have been correctly withheld under regulation 10(5)(b) of the EIRs and he will now consider the information that SEPA is still withholding from the Applicant and the exceptions that have been applied.

Regulation 10(4)(b) of the EIRs

87. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.

88. The Commissioner's general approach[5] is that the following factors are relevant when considering whether a request is vexatious (under section 14 of FOISA) or manifestly unreasonable (under regulation 10(4)(b) of the EIRs). These are that the request:

    i) would impose a significant burden on the public body

    ii) does not have a serious purpose or value

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

    iv) has the effect of harassing the public authority

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

89. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

Request a)

All correspondence between the William Tracey Group and SEPA [from 20017 to 2017].

Applicant's comments

90. The Applicant argued that compliance with request a) was not manifestly unreasonable and that such arguments run contrary to previous communications with a member of SEPA staff who had advised that all of the files in relation to the Tarbolton Landfill site and the William Tracey Group were held in one room at SEPA's offices. The Applicant submitted that it was happy to cover reasonable costs for this information to be provided.

SEPA's submissions

91. SEPA submitted that it considered the factors outlined in the Commissioner's guidance and it concluded that the request would impose a "significant burden" on SEPA, as complying with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of resources, including financial and human, away from other statutory functions.

92. SEPA explained that, because of the nature of the information requested by the Applicant, it requires significant input from the staff most closely involved with the regulation of the specified sites and named operators.

93. SEPA argued that the scope of request a) appears to be disproportionate, in that it seeks all correspondence between SEPA and a named operator, with multiple licensed sites, for a ten year period. In contrast, SEPA noted that, while request c) also sought correspondence between SEPA and a named operator, it included defined parameters for the subject of the correspondence; this is not the case with request a).

94. In order to comply with the request, SEPA explained that it would have to search all of its 39 sites and it estimated that there would be approximately 300 documents held per site. SEPA based this number on a previous information request it had handled which had looked at one site (in that case, 500 documents were found to be held, but SEPA considers 300 documents

[5] http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Manifestly_unreasonable_requests.aspx

to be a more reasonable average). In total, then, around 11,700 documents would need to be collated to comply with the request.

Location and retrieval

95. SEPA submitted that it would take about seven hours on each site to locate and retrieve all relevant information, which, for 39 sites, would total some 273 hours. Again, SEPA based this estimate on a previous information request it had dealt with, in which it had taken 10 hours to locate and retrieve similar information on one site (but it considers seven hours per site to be a reasonable estimate in this case). SEPA submitted that, in order to respond to the request within 20 working days, it would need to collate the information within three working days, and this would require 13 officers working full-time on the task for three days.

96. There are a range of different graded officers that would be required to carry out his work. For 34 sites, it would be a Grade E officer (mid-point salary scale is £23,900); for one site, it would be a Grade F officer (mid-point salary scale is £35,422), and for four other sites, it would be a Grade C officer (mid-point salary scale for that Grade is £44,903).

97. SEPA provided the calculated costs for each of the three Grade officers outlined above. SEPA submitted that a Grade E officer would need to spend 238 hours undertaking the work (£3,831.80), a Grade F officer would need to spend 7 hours undertaking the work (£136.22), and a Grade C officer would need to spend 28 hours carrying out the work (£690.76). SEPA estimated that the total cost of the staff time required to locate and retrieve all relevant information would be £4,658.78. SEPA submitted that it would have to complete this task in three days (in order to leave time for the other tasks to be carried out and to comply with the relevant timescales in the EIRs) and so it would require 13 officers to carry out the work.

98. SEPA noted that it has not included any costs involved in retrieving information held in off-site storage.

99. SEPA submitted that if its staff were involved in the processes required by complying with request a) it would be prevented from effectively carrying out its statutory duties over this time period.

100. SEPA explained that the tasks outlined above are the only ones that it could charge for if it was to issue the Applicant with a Fees Notice for providing the information, but it would have to undertake considerably more work to comply with the request, work that it could not charge for under the EIRs. SEPA provided a breakdown of the costs it would incur (and the time each piece of additional work would take) but which it would not be able to recover. Details of these costs (and times) are below.

Creating a schedule and converting to pdf

101. SEPA explained that it would need to create a schedule for each piece of correspondence and then convert each document to pdf format, and that this task alone would take some 780 hours. SEPA submitted that it reached this amount by calculating that one member of staff would be able to complete 15 documents in one hour (4 minutes per document), and as there are 11,700 documents, it would take 780 hours. The office required for this level of work is a Grade F Senior Administrative Officer, whose mid-point salary hourly rate is £12.70. The total cost of complying with this part of the process would therefore be £9,906. SEPA estimated that this work would have to be carried out in five working days (to meet the necessary timescales) and it would therefore require 23 officers to carry it out.

Reviewing the withheld information and updating the schedule with comments

102. Once the information had been inputted on a schedule and converted to pdf, the information would need to be reviewed in order to highlight concerns to the Information Team, and this would be done by inputting comments on to the prepared schedule of documents. SEPA calculated that it would take a member of staff an average of 2 minutes to review each document and mark up the schedule (if required). As there were 11,700 documents, this would take 390 hours. SEPA explained that a Grade D officer would be required for this work (at an hourly rate of £19.46 at the mid-point of the salary scale). In total, this would incur costs of £7,589.40. This task would have to be undertaken over five days (in order to meet the timescales set out in the EIRs) and so it would require 12 officers to carry out the work.

Process documents

103. Once the information had been reviewed, it would require to be processed. SEPA explained that it would have to undertake any third-party consultations (it does not expect there to be many third parties to contact), make a decision on the information and redact sensitive material. The documents would also need to be organised into a group for disclosing and withholding. SEPA submitted that a Grade E officer would be required to undertake this work and, at mid-point on the salary scale, it would involve an hourly rate of some £16.10. SEPA estimated that it would take approximately 2 minutes to process each document. The total costs for carrying out this particular task would be £6,279.00. This work would need to be carried out over five days (in order to meet the timescales in the EIRs) and that would require 12 officers to be involved in the work.

Final review of information

104. The last part of the process of complying with the request would require senior management to review the information (either an officer at Grade A, B or C). SEPA noted that, in dealing with a previously similar information request, only 85% of the 500 documents identified as falling within scope were disclosed. Therefore, it estimates that senior management would need to review 10,062 documents prior to release. SEPA consider that it would take one minute to review each document (and highlight any issues on a document by document basis), which would take 167.7 hours in total. The average hourly rate for a member of senior management to carry out this work is £29.13, so the total cost for part of compliance would be £4,885.10. To comply within the timescales, this work would need to be carried out over two days, and would therefore require 12 officers to carry out the work.

105. SEPA argued that if it had to carry out the above tasks (in order to comply with the request, but which it could not charge for) it would have a detrimental impact on its ability to carry out its statutory functions. SEPA submitted that it is likely it would have to close all of its offices during this time period as its entire administrative support staff would be involved in handling the request. Furthermore, in some instances it does not have the number of staff at the requisite grade that would be required to carry out the work in a short number of days.

106. For example, SEPA submitted that the final review that would be carried out by senior management would need to be done in two working days (in order to meet the EIRs timescales) and this would mean that 12 such managers would need to work on the review, which is more staff than SEPA has at that level. SEPA noted that senior management are also required to manage day to day operations and their removal (to work on processing this request) was likely to cause disruption to the day to day regulation and management of staff.

107. SEPA disputed the Applicant's contention that a member of its staff had previously advised that all of the correspondence between itself and the William Tracey Group was held in one room in its offices. SEPA submitted that the information within the scope of request a) relates to its correspondence with an operator with multiple licensed sites across various regulatory geographical teams. This information is also held electronically and in storage.

108. SEPA argued that, where the Applicant sought information relating to the Tarbolton Landfill site, as was the case in request c), most of the physical records were held in SEPA's Ayr office. SEPA noted that it withdrew its reliance on the exception contained in regulation 10(4)(b) of the EIRs, in relation to request c) at the review stage.

109. SEPA submitted that it recognised the significance of applying this exception, and that it took time to weigh up all the factors carefully, before concluding that regulation 10(4)(b) was appropriate in all the circumstances. SEPA noted that it did not apply the exception lightly and it submitted that it has only applied the exception twice since 2005.

Commissioner's findings on regulation 10(4)(b)

110. In the Commissioner's briefing on regulation 10(4)(b) of the EIRs[6], the Commissioner indicates that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its financial and human resources away from its other statutory or core operations.

111. SEPA submitted that compliance with the Applicant's request would impose a significant burden on its resources: it would involve at least 270 hours of staff time and this would have a detrimental impact on its ability to continue to carry out its statutory functions. SEPA has explained that it would only be able to recoup £4,658.78 of costs, while the true cost of compliance (including many steps that cannot be charged for under the EIRs) would be some £33,318.28.

112. The Commissioner has taken account of the exact wording of the Applicant's request which was wide-ranging and is seeking all correspondence between a single operator and SEPA in a ten year period. The Commissioner recognises that requests which are too wide-ranging might lead to a response taking longer or mean unnecessary work for the authority and, by extension, they may lead to the request being refused on cost grounds.

113. The Commissioner is satisfied that responding to this request, given its wide-ranging nature, would impose a significant burden on SEPA, which would, in the circumstances, have been manifestly unreasonable. Having reached this conclusion, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.

Public interest

114. SEPA acknowledged that there is a public interest in the transparency and openness of its operations and that this extends to the environmental information that is held. On the other hand, SEPA contended that there is a strong public interest in its ability to carry out its core functions effectively, without unreasonable disruption, and in maintaining the integrity of the EIR process.

[6] https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(4)(b)Manifestlyunreasonable.aspx

115. SEPA argued that the scope of request a) would require it to direct an excessive amount of time and resource to the handling of the specific request to the detriment of its ability to devote time and resource to the undertaking of its core statutory functions.

116. SEPA submitted that the public interest in the release of the specified information is outweighed by the public interest in maintaining the exception under the terms of regulation 10(4)(b) of the EIRs.

117. The Applicant argued that SEPA had not applied a presumption in favour of disclosure, as it is required to do under regulation 10(2)(b) of the EIRs.

118. In the Commissioner's view, there is an inherent public interest in disclosure of information which would ensure transparency about the nature and extent of the information a public authority holds, and which would permit adequate public scrutiny of its actions, particularly where it concerns its contact with a waste operator.

119. On the other hand, there is also a strong public interest in a Scottish public authority being able to carry out its statutory functions without unreasonable disruption. The Commissioner has considered the terms of this request in detail; it concerns all correspondence between a named operator and SEPA, for which there is a large volume of correspondence, wide-ranging in scope including topic and time period. The Commissioner recognises that there is a public interest in protecting the integrity of the EIRs, but it is not the intention of the legislation to require public authorities to devote excessive or disproportionate amounts of resource to a particular request.

120. On balance, the Commissioner accepts, in all the circumstances of this case, that the public interest in making the information available is outweighed by the public interest in preventing the disproportionate levels of disruption to SEPA that would result from providing information in response to this request.

121. The Commissioner concludes that SEPA was entitled to withhold the information requested under the exception in regulation 10(4)(b) of the EIRs. Although SEPA found that the public interest favoured maintaining the exception, there is nothing to suggest that it did not apply a presumption in favour of disclosure.

Regulation 10(5)(e) of the EIRs

122. Regulation 10(5)(e) 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 confidentiality of commercial or industrial information, where such confidentiality is provided for by law to protect a legitimate economic interest.

123. As with all 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)).

Request b)

> *All waste input and output data from the William Tracey Group between 2007 – 2017 including the details of all the original producers of waste ash.*

124. SEPA has withheld information in three columns of a multipage spreadsheet (G, I and J) under regulation 10(5)(e) of the EIRs. The spreadsheet contains thousands of rows and

comprises a licensed/permitted site return form[7], which is required to be completed by operators of waste management facilities that are licensed by SEPA. SEPA has published guidance on completing the form[8] including the information that it has to contain.

125. In addition to the licensed/permitted site return form, SEPA has also withheld information in two further documents which are in the Group E documents that fall under the scope of request d), each of which contain an excerpt from a spreadsheet, and in each case one column has been withheld under regulation 10(5)(e). The column that has been redacted under regulation 10(5)(e) contains Waste Destination information.

126. *The Aarhus Convention: an Implementation Guide*[9], which offers guidance on the interpretation of the convention from which the EIRs are 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 Aarhus Convention, but its meaning is considered further below.

127. 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 commercial or industrial in nature?

    ii) Does a legally binding duty of confidence exist in relation to the information?

    iii) Is the information publicly available?

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

Is the information commercial or industrial in nature?

128. It is clear from guidance published by SEPA (and the pro forma available online) that the information that is being withheld records information about the origin and destination of waste as well as the method of managing the waste. It is clearly information that relates to the commercial activities of a company (the operator) in a competitive environment and the Commissioner is satisfied it meets the definition of commercial information.

Does a legally binding duty of confidence exist in relation to the information and is it publicly available?

129. SEPA explained that the third parties who have commercial interests in relation to the withheld information include the Operator, their customers and suppliers. SEPA has argued that there is an implicit duty of confidence in withholding the information and it referred the Commissioner to its Operator Guidance for the licensed/Permitted site return form[10]. SEPA also argued that there is a legitimate economic interest in protecting the commercial operations of operators and their customers and suppliers. SEPA also provided the Commissioner with submissions from the Operator who explained why a binding duty of confidence existed in relation to the information. The Operator made detailed arguments on this point. The Commissioner has taken them into account but, due to confidentiality issues,

[7] https://www.sepa.org.uk/media/471784/licensed-permitted_site_return_form.xls

[8] https://www.sepa.org.uk/media/219649/licensed-permitted-site-return-form-guidance.pdf

[9] http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

[10] https://www.sepa.org.uk/media/219649/licensed-permitted-site-return-form-guidance.pdf

cannot outline its arguments in his decision notice. The Operator also submitted that the withheld information is not publicly available.

130. The Commissioner has considered the submissions made by SEPA and by the Operator, and he is satisfied that a legally binding duty of confidence exists in relation to the information contained in columns G, I and J of the site return form as well as the Waste Destination column which has been withheld in the two Group E documents.

131. The Commissioner is also satisfied that none of the information that is being withheld under regulation 10(5)(e) of the EIRs is published by SEPA or the Operator, and he accepts that the information is not publicly available.

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

132. SEPA argued that if the information were disclosed it would undermine the existing trust between itself and operators in general, as its Operator Guidance for the licensed/Permitted site return form[11] states that SEPA does not publish the information in the specified columns. SEPA referred the Commissioner to page 34 of the guidance, which explains that only a summary version of the information in the site return form will be held in public registers, and this does not include Waste Destination information.

133. The Operator provided detailed submissions explaining why disclosure of the information would harm its trade and how it would, or would be likely to, lead to a loss of business which would cause substantial harm to its legitimate economic interest. The Commissioner has taken these submissions into account but, due to confidentiality issues, cannot detail the submissions in his decision notice.

134. The Applicant contended that it was not aware of any commercial or industrial information which requires confidentiality to protect a legitimate economic interest, as the site was non-operational and had been for over a year.

The Commissioner's conclusions on substantial prejudice

135. Taking account of those submissions received from both the Applicant and SEPA and the Operator, the Commissioner is of the view that disclosure of the information would allow significant insight into the composition of the firm's working practices and its intellectual property. He notes the Applicant's argument that the site in question has not been operational for a year. However, the information provided details of how the Operator conducted its business on that site, and this information could be used to undermine its business on other sites. Therefore, the Commissioner is satisfied that the withheld information retains its relevance and sensitivity.

136. In the Commissioner's view, at the time of the request, disclosure could have given competitors enough information to understand how the Operator conducts its business on other sites, and this would give them a commercial advantage. The Commissioner accepts that public knowledge of how the Operator collects and delivers waste on this site would place them at a disadvantage on other sites, thereby causing substantial prejudice to their commercial interests.

137. The Commissioner is therefore satisfied that disclosure of this information, in response to the Applicant's request, would have caused, or would have been likely to cause, substantial

[11] https://www.sepa.org.uk/media/219649/licensed-permitted-site-return-form-guidance.pdf

prejudice to the confidentiality of a legitimate economic interest. Consequently, he is satisfied that SEPA was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information withheld by it.

The public interest

138. Having accepted that the exception in regulation 10(5)(e) applies to the information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

Submissions on the public interest from SEPA

139. SEPA submitted that it has taken into account the expectations of operators when submitting waste data returns under the terms of Waste Management license, and it noted that when it withheld information contained in the redacted columns, it was following standard practice at that time. SEPA submitted that it favours making additional information available, and it is working to progress this as part of its Open Data Strategy but, at the time of the request, operators had an expectation that the data in the withheld columns would not be published by SEPA.

140. SEPA contended that it was not in the public interest to proactively disclose the data for one operator in the sector and place them at a potential commercial disadvantage to their competitors. SEPA argued that the public interest in maintaining the exception outweighs the public interest in making the information available.

Submissions on the public interest from the Operator

141. The Operator recognised the general need for transparency, but argued that, since the information in question related directly to the operation of their business, it could not see how the public interest could be served through disclosure.

Submissions on the public interest from the Applicant

142. The Applicant argued that SEPA has not applied a presumption in favour of disclosure.

The Commissioner's conclusions on the public interest

143. The Commissioner accepts that there is a general public interest in transparency and accountability, particularly where this involves the disposal of waste and licensed waste management. In relation to the information withheld in this case, he acknowledges that its disclosure might add to public understanding of how and where waste is collected and disposed of and what the management method of that waste is.

144. However, he must also take into account the harm he has identified above, and his acceptance that the information was provided in confidence. There is a clear public interest in confidences not being breached.

145. The Commissioner, having carefully considered the public interest arguments put forward by both the Applicant and SEPA, has concluded that the public interest in making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that SEPA was entitled to withhold the information under regulation 10(5)(e). Again, there is nothing to suggest that SEPA did not apply a presumption in favour of disclosure.

Regulation 10(5)(d) of the EIRs

146. The exception in regulation 10(5)(d) 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 proceedings of any public authority where such confidentiality is provided for by law.

147. As with all exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). 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)).

Request d)

> *All audits, test results and correspondence SEPA have in their possession in relation to the liquids and solids both hazardous and non-hazardous that entered the Dunniflats facility and where said liquids and solids were eventually disposed of.*

148. SEPA is withholding 43 documents falling under the scope of request d) under regulation 10(5)(d) of the EIRs. These documents are contained in the Group B and D list of documents. The Group D documents (there are nine of these) consist of legal correspondence and the Group B documents (there are 34 of these) relate to Protected Taxpayer Information (PTI). There is another document that falls under Group B, which was disclosed to the Applicant but which has PTI information redacted under regulation 10(5)(d); these redactions will also be considered below as part of the Group B documents.

149. *The Aarhus Convention: an Implementation Guide* looks at this exception on page 86 but does not comprehensively define "proceedings of any public authorities". It suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.

150. The first matter to consider is whether the information relates to proceedings of SEPA, the confidentiality of which is provided for by law. The Commissioner must then consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings.

151. In many cases where this exception applies, there is a specific provision prohibiting the disclosure of the information. However, there will also be cases where the common law of confidence will protect the confidentiality of the proceedings. One aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege. This includes legal advice privilege, which applies to communications in which legal advice is sought or provided.

Group D documents (legal correspondence)

152. SEPA withheld the nine Group D documents on the grounds that their disclosure would prejudice substantially the confidentiality of the proceedings of SEPA, as they contain legal advice and are therefore subject to legal professional privilege.

Group B documents (PTI)

153. SEPA contended that its role and activities in relation to the Scottish Landfill Tax (SLfT), qualifies as proceedings as they include "*a range of investigative, regulatory and administrative/governance processes and other activities carried out according to a statute*[12]", namely the Revenue Scotland and Tax Powers Act 2014 (RSTPA). SEPA also referred to the principles outlined in *Decision 158/2014*[13] in relation to the application of regulation 10(5)(d) of the EIRs.

154. The Commissioner notes that "proceedings", in the context of this regulation, will cover a range of activities, but will usually be confined to internal deliberations in some form or another. The matters under consideration here relate to SEPA's enforcement activities on which legal advice was required and obtained. Having considered SEPA's submissions on this point, the Commissioner accepts that obtaining legal advice in this context (the Group D documents) falls within the intended meaning of "proceedings". In addition, the Commissioner is satisfied that the information that relates to SEPA's responsibilities under RSTPA (the Group B documents) also fall within the meaning of "proceedings".

155. For information to be confidential under the common law, two main requirements must be met:

- the information must have the necessary quality of confidence about it and so must not be generally accessible to the public already; and
- the information must have been communicated in circumstances imparting an obligation of confidentiality.

Does the information have the necessary quality of confidence?

156. SEPA submitted that it was satisfied that the main requirements for information to be confidential were met, as the information in the Group D documents was not publicly accessible. In addition, SEPA submitted that the confidentiality of the Group B documents, which is considered to be (PTI), is "provided for by law", as laid out in Part 3 of the RSTPA.

157. The Commissioner accepts SEPA's submission that no other party, other than its legal team, has seen or had access to the information in the Group D documents. In addition, the Commissioner is satisfied that the PTI information in the Group B documents is confidential as a result of the requirements of the RSTPA. In the circumstances, he is content to accept that all of the information withheld under this exception has (and had, at the time SEPA dealt with the request) the necessary quality of confidence.

Was the information communicated in circumstances imparting an obligation of confidentiality?

158. The law relating to legal professional privilege (including legal advice privilege) is one aspect of the common law of confidentiality. A communication to which legal advice privilege applies will have been communicated in circumstances imparting an obligation of confidentiality.

159. SEPA submitted that the information contained in the Group D documents was a record of it seeking legal advice from a legal adviser in circumstances in which legal professional privilege could apply. In the circumstances, the Commissioner accepts that the Group D documents were (and remain) subject to legal advice privilege.

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[12] https://www.itspublicknowledge.info/Law/EIRs/EIRsExceptions.aspx (para 46)

[13] https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400359.aspx

160. SEPA submitted that the information contained in the Group B documents meets the definition of "taxpayer information" set out in section 13 of RSTPA and it referred to section 15 of RSTPA which makes it a criminal offence for Revenue Scotland officials to disclose PTI unless it is expressly permitted by section 15(3). SEPA notes that this applies not only to Revenue Scotland officials, but to anyone exercising functions on behalf of Revenue Scotland (such as SEPA staff, carrying out duties in relation to SLfT).

161. SEPA also referred to Revenue Scotland Guidance document RSTP9007[14] which states:

In relation to SLfT specifically, SEPA may not provide or disclose PTI under sections 51(1A) or 113(1A) of the Environment Act 1995.

162. The cited sections read as follows:

Nothing in this section authorises the disclosure by SEPA to any person of protected taxpayer information which was obtained by SEPA in connection with a function of Revenue Scotland delegated to it by Revenue Scotland under section 4(1)(b) of the Revenue Scotland and Tax Powers Act 2014 (asp 16).

163. Given the nature of the information contained in the Group B documents, and the specific provisions of the RSTPA, the Commissioner accepts that the information in the Group B documents was (and remains) communicated in circumstances that imparted an obligation of confidentiality.

Would disclosure prejudice substantially, or be likely to prejudice substantially, the confidentiality of proceedings?

164. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. In this case, however, having considered the content of the information and its privileged status, the Commissioner accepts that its disclosure would, or would be likely to, prejudice the confidentiality of SEPA's proceedings substantially, as SEPA has argued. Consequently, the Commissioner accepts that the exception in regulation 10(5)(d) was correctly applied to the information contained in the Group B and Group D documents.

Public interest test

165. SEPA acknowledged that there is a general public interest in information being accessible, because this enhances scrutiny of decision-making processes and thereby improves accountability, and that the EIRs make a presumption in favour of disclosure wherever possible.

166. SEPA recognised that increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

167. SEPA also considered the general obligation of the EIRs in promoting openness and transparency.

168. In applying the public interest test to material consisting of legal advice (the Group D documents) SEPA took account of paragraphs 79 and 80 of *Decision 082/2019*[15]:

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[14] https://www.revenue.scot/legislation/rstpa-legislation-guidance/taxpayer-information/rstp9007

[15] https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201802070.aspx

…the Commissioner recognises the strong public interest in ensuring that the [authority] can receive legal advice in confidence, to enable it to discharge its functions as thoroughly and effectively as possible. This is particularly the case where the legal advice concerns an issue that is ongoing or which may recur.

The Commissioner considers disclosure of such information could adversely impact on the openness and frankness of the parties involved in seeking and providing legal advice, if they believed that advice might be disclosed, and this would not be in the public interest.

169. SEPA also took account of paragraph 37 of *Decision 147/2019*[16], which states:

The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC164 (QB)[17]. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

170. SEPA argued that in this particular case the balance of public interest lies in ensuring that it can receive legal advice in confidence, to enable it to carry out its functions, including criminal investigations into ongoing issues, as thoroughly and effectively as possible. SEPA contended that there were no factors relating to the legal advice contained in the Group D documents, which would result in the public interest in withholding the material being outweighed by the public interest in disclosing the material.

171. In applying the public interest test to Group B documents, SEPA reiterated that the information consists of PTI as set out in section 14 of the RSTPA. SEPA also argued that it is subject to statutory controls and guidance in its handling of protected taxpayer information, as laid out in the RSTPA and in specific guidance issued by Revenue Scotland in April 2015.

172. SEPA contended that it is in the public interest that tax revenues that are due can be fully investigated and recovered, and that the protection afforded to such information is maintained in the context of the EIRs.

173. The Applicant queried SEPA's application of the public interest test, contending that SEPA had not applied a presumption in favour of disclosure.

Commissioner's consideration of the public interest as it applies to the Group D documents

174. The Commissioner must consider any information which is the subject of legal professional privilege (Group D documents) in light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client. As noted above, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48 [18] and in the case of Department for Business, Enterprise and Regulatory Reform v Information Commissioner

[16] https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201900192.aspx

[17] http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+))

[18] http://www.bailii.org/uk/cases/UKHL/2004/48.html

and O'Brien [2009] EWHC 164 (QB) [19]. The Commissioner will apply the same reasoning to communication attracting legal professional privilege generally. More widely, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.

175. The Commissioner acknowledges that disclosure would enhance public understanding of the matters considered by SEPA in respect of its enforcement action and communications with its legal advisers. The Commissioner considers that it is in the public interest to ensure effective oversight of SEPA's actions and that disclosure of the information withheld by SEPA would, to some extent, enable such oversight.

176. On the other hand, the Commissioner recognises the strong public interest in ensuring that SEPA can receive legal advice in confidence to facilitate it in discharging its functions as thoroughly and effectively as possible.

177. The Commissioner considers that the disclosure of such information would discourage a public authority from seeking legal advice, or would deter frankness and openness by parties involved when seeking advice if there was knowledge that the advice may then be disclosed. If, for this reason, SEPA was unable to obtain impartial and objective legal advice in respect of its actions, this would not be in the public interest.

178. On balance, having examined the withheld information, the Commissioner is not satisfied that the public interest arguments presented by the Applicant in favour of making the legal advice available are so strong as to outweigh the public interest arguments in maintaining the exception. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in disclosure, and accepts that the information in the Group D documents was properly withheld under regulation 10(5)(d) of the EIRs.

Commissioner's consideration of the public interest as it applies to the Group B documents

179. It is clear from the RSTPA and the guidance published by Revenue Scotland[20] that PTI cannot be disclosed without meeting one of the specific conditions set out in section 15(3) of the RSTPA. It is also clear to the Commissioner that none of those conditions apply in this case and that, as a result, the information contained in the Group B documents must be kept confidential and must not be placed in the public arena.

180. Having examined the withheld information, the Commissioner is satisfied that all of Group B documents comprise PTI and he does not consider that the public interest arguments presented by the Applicant in favour of making the PTI available (which would be in any event be unlawful) outweigh the public interest in maintaining the exception.

181. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in disclosure, and accepts that the information in the Group B documents was properly withheld under regulation 10(5)(d) of the EIRs. Again, he considers that there are no grounds for concluding that SEPA did not apply a presumption in favour of disclosure.

Regulation 10(4)(a) of the EIRs

182. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public

[19] http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html

[20] https://www.revenue.scot/legislation/rstpa-legislation-guidance/taxpayer-information/rstp9007

interest in making the information available. If no such information is held by the authority, regulation 10(4)(a) of the EIRs permits the authority to give the applicant notice to that effect.

183. In line with regulation 2(2)(a) of the EIRs, environmental information is "held" by a Scottish public authority if it is in its possession and it has been produced or received by that authority.

184. As with all of the exceptions in regulation 10, the exception in regulation 10(4)(a) must be interpreted in a restrictive way (regulation 10(2)(a)) and a presumption in favour of disclosure must be applied (regulation 10(2)(b)).

185. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was at the time the request was received) actually held by the public authority.

186. SEPA has submitted that it does not hold any information falling within the scope of requests c) and f), and it has applied regulation 10(4)(a) to these requests.

187. SEPA has also applied the exception contained in regulation 10(4)(a) to some information falling under the scope of request d). This information has been labelled Group A. The Group A documents relate to Protected Taxpayer Information (PTI), and SEPA has argued that it does not hold this information, as it is held on behalf of Revenue Scotland.

188. The Commissioner will consider each of these requests in turn

Request c)

All correspondence between the William Tracey Group and SEPA between 2011 and 2017 which mention the Tarbolton Landfill site.

189. As noted above, SEPA originally identified one draft letter as falling within the scope of request c), but it later considered this letter to more accurately fall under the scope of request d). Therefore, its current position is that it holds no information falling within the scope of request c) and that regulation 10(4)(a) of the EIRs applies.

190. The Applicant asked the Commissioner to investigate this point, noting that SEPA originally confirmed that it did hold information falling under the scope of request c). The Applicant noted that SEPA originally applied regulation 10(5)(b) to request c), and argued that this suggests that SEPA did in fact hold the information when its request was initially received. The Applicant contended that SEPA has failed to provide reasons on why the exception applies.

191. SEPA provided further information on how it had reached the view that regulation 10(4)(a) applied to request c). It explained that, during a detailed review of the collated information, the letter which had been identified as falling within the scope of request c) was actually related to a request for legal advice from SEPA's internal legal team by the Waste Crime Team in July 2014.

192. Following completion of the enforcement investigation carried out in November and December 2019, SEPA carried out a further appraisal of the withheld information to determine what information could be disclosed. During these further searches, SEPA submitted that it became clear that the draft letter in question had never been sent. Confirmation that the letter had never been sent was verified by a search of SEPA's Recorded Delivery postal records. It was at this stage that SEPA concluded that the letter did not constitute *correspondence between the William Tracey Group and SEPA*, as it had not been finalised and sent to the intended recipient.

193. SEPA explained that the draft letter was now included in the documents identified as falling within the scope of request d), and it formed part of the Group D documents discussed above. Given this, SEPA concluded that it did not actually hold any information falling within the scope of request c) and so the exception in regulation 10(4)(a) applied.

194. The Commissioner has reviewed the content of the draft letter that SEPA and is satisfied that it is not captured by request c). The Commissioner is satisfied that SEPA does not (and did not at the time of the request) hold any information falling within the scope of request c).

195. The Commissioner notes that SEPA's original reliance on regulation 10(5)(b) of the EIRs had led the Applicant to conclude that information was held; its change of position, to argue that the information was not held, was confusing. This confusion could have been avoided if SEPA had read through the information it held more thoroughly.

196. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Given that the Commissioner is satisfied the information requested was not held by SEPA, he does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a).

Request f)

All correspondence between SEPA Ayr Office and SEPA head office, relating [to] the Ash Waste Stream from 2007-2017.

197. SEPA explained that this request sought correspondence between SEPA "head office" and its Ayr office on a subject that was related to regulatory matters. When determining the scope of the request, SEPA determined that the reference to "head office" meant its office in Stirling. SEPA submitted that there is no direct relationship in regulatory matters between staff in its Ayr office and its "head office".

198. SEPA staff, who had direct involvement with the subject of the request, carried out searches for relevant information. This included staff from Chemistry, Dataflows, SEPA's Ayr office (both administration and regulatory Unit Manager) and staff based at "head office" (Stirling). SEPA provided the Commissioner with the outcome of these searches, noting that no relevant information was identified. The searches interrogated both electronic and hard copy information. SEPA submitted that it does hold correspondence relating to ash waste, but that it does not hold information that meets the Applicant's criteria, namely correspondence between SEPA's "head office" in Stirling and its Ayr office, on the subject of the ash waste stream.

199. SEPA explained that correspondence relating to the subject of the ash waste stream is included within the scope of other requests made by the Applicant, and that such correspondence was released where it was not subject to an exception. SEPA submitted

that, as it does not hold the information, there is no conceivable public interest in requiring that information to be made available.

200. The Applicant contended that there must be some correspondence on this matter, and disagreed with SEPA's reasoning not to disclose this information. The Applicant also argued that it was in the public interest for the information to be disclosed. It noted that, since the closure of the Tarbolton Landfill site, there has been great public interest in relation to the alleged toxic ash that was deposited there.

201. The Commissioner has considered the submissions made by SEPA and he has examined details of the searches SEPA conducted. The Commissioner notes that the request was circulated to a number of different teams/individuals within SEPA and that searches were carried out on hard copy and electronic documents, including specific drives, emails and Laserfiche. In each instance, a nil response was returned. The Commissioner notes the Applicant's view that some information must be held, but he would stress that it is not unusual for there to be a gap between the information that applicants expect an authority to hold, and that which is actually held. In the circumstances, given the search terms used by SEPA and the staff utilised to conduct searches, the Commissioner is satisfied that SEPA does not hold any information falling within the scope of request f).

202. As noted above, the exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Given that the Commissioner is satisfied the information requested was not held by SEPA, he does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a). The Commissioner notes the Applicant's public interest arguments, but given that he has accepted that the information is not held, there is nothing to be disclosed.

Request d)

All audits, test results and correspondence SEPA have in their possession in relation to the liquids and solids both hazardous and non-hazardous that entered the Dunniflats facility and where said liquids and solids were eventually disposed of.

203. As explained above, SEPA originally withheld all of the information falling within the scope of request d) under regulation 10(5)(b) of the EIRs. However, during the investigation, SEPA withdrew its reliance on that exception and it disclosed some information to the Applicant. SEPA also determined that the remaining information being withheld under request d) fell within one of four specific groups of documents, Group A, B, C, D and E. Each group of documents were withheld under different exceptions.

204. Group A documents were withheld under regulation 10(4)(a) of FOISA, with SEPA arguing that this information comprised PTI and was being held on behalf of Revenue Scotland and, therefore, was not held by SEPA for the purposes of the EIRs. As noted above, under regulation 2(2)(a) of the EIRs, environmental information is held by a Scottish public authority if it is in its possession and it has been produced or received by that authority.

205. SEPA explained that Revenue Scotland has delegated some of its functions (Landfill Tax Compliance and Intelligence) to SEPA under section 4 of the RSTPA. It submitted that a dedicated team of SEPA officers carry out activities using powers delegated under section 13 of the RSTPA and they create and handle PTI in accordance with the requirements of Part 3 of the RSTPA. These officers work in SEPA's SLfT Team. To this end, SEPA explained that

all of its staff who work in the SLfT or line manage SLfT staff are treated as "relevant officials" for the purpose of the obligation of confidentiality in relation to PTI.

206. The Head of Tax Policy for Revenue Scotland issued a paper setting out the policy position entitled *SEPA and Protected Taxpayer Information* which lays out the role of SEPA officers in relation to functions of Revenue Scotland. A copy of this document was provided to the Commissioner. SEPA submitted that the section entitled Protected taxpayer information *provides clarity about Revenue Scotland's policy position on the practical application of the rules on PTI*. Paragraphs 7 and 8 of this document (outlined below) define two circumstances where SEPA staff, carrying out functions for Revenue Scotland, are handling PTI.

    Paragraph 7

    Information about taxpayers sent by Revenue Scotland to SEPA/RS (that is SEPA staff carrying out functions for Revenue Scotland) is PTI. This is because it is identifying information held by a relevant person (staff of SEPA) in connection with a function of Revenue Scotland. SEPA/RS will be carrying out functions on behalf of Revenue Scotland, therefore the RSTPA s15 confidentiality provisions apply.

    Paragraph 8

    Information about taxpayers gathered by SEPA/RS is PTI. The same principles set out in the paragraph above apply here.

    SEPA explained that information and records gathered and created in the circumstances above are stored on a separate secure server which can only be accessed by members of the SLfT.

207. SEPA submitted that it has considered the content of the Commissioner's Briefing on regulation10(4)(a)[21] (specifically paragraph 11, relating to regulation 2(2) of the EIRs), which states:

    Scottish public authorities may have information on their premises or in their systems which they do not hold in their own right, but on behalf of another person. When information is present within an authority's premises and systems only because it is held on behalf of another person, the information is not held by the authority for the purposes of the EIRs.

208. SEPA submitted that it handles PTI under delegated powers from Revenue Scotland, and it referred to RSTPA Section 4 – Explanatory notes[22] in which it is stated that *Revenue Scotland will retain responsibility and accountability for the collection and management of both devolved taxes*.

209. SEPA contended that the information in the Group A documents does not relate to a core function of SEPA, rather it refers to functions carried out under delegated powers under the RSTPA, and that the information in question is not duplicated in information held by SEPA. It submitted that regulation 10(4)(a) has been applied to information which has not been handled by SEPA environmental officers or formally disclosed to SEPA environmental officers via the disclosure gateway.

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[21] https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(4)(a)Informationnotheld.aspx

[22] http://www.legislation.gov.uk/asp/2014/16/notes/division/3/3/3/1

210. SEPA clarified that, where information has been shared with relevant SEPA tax officers, the SLfT or disclosed to SEPA environmental officers by the SLfT, it has been included in the information in the Group B documents, withheld under regulation 10(5)(d) of the EIRs.

211. SEPA contended that the information contained in the Group A documents is held on behalf of Revenue Scotland and is, therefore, not held by SEPA for the purposes of the EIRs.

212. The Applicant disagreed with SEPA's reliance on regulation 10(4)(a) of the EIRs and they argued that SEPA does and should hold the relevant information. The Applicant contended that SEPA did, in fact, hold the information when their request was initially received and, therefore, the reliance on regulation 10(4)(a) contradicts the previous exceptions that were applied.

Is the information held by SEPA?

213. SEPA has argued that that the information contained in the Group A documents is held solely on behalf of Revenue Scotland, and that it is not held by SEPA. As noted above, SEPA has explained why it considers this to be the case, noting that the information is stored on a separate secure server and it can only be accessed by SEPA staff who are carrying out functions on behalf of Revenue Scotland. SEPA has also referred the Commissioner to various sections of the RSTPA to support its case.

214. The Commissioner considers that there are several factors that will determine whether or not an authority holds information in its own right or whether it is held on behalf of another party. For instance, there must be an appropriate connection with the authority, which means that the information is for the purposes of carrying out its functions. The Commissioner is satisfied that such a connection exists in this case as SEPA is responsible for collecting Scottish Landfill Tax (SLfT) on behalf of Revenue Scotland. Additionally, the Commissioner considers that there should be a legal relationship between both parties, and he notes that in this case there is a firm legal relationship between SEPA and Revenue Scotland, regarding SEPA's duty to collect landfill tax, and this is set out in the RSTPA.

215. Another relevant factor is whether or not the party knows that the information is being held for them, or on their behalf. This is clearly the case here, as the RSTPA establishes that SEPA has legal duties to collect SLfT; therefore, Revenue Scotland will know that SEPA is holding information for them, in relation to SLfT.

216. Furthermore, the Commissioner will also consider the location of the information and whether there are any restrictions on its access. SEPA has explained that the information it holds on behalf of Revenue Scotland is held on a separate secure server which can only be accessed by members of the SLfT team. As noted above, SEPA has explained that the SLfT team is comprised of SEPA officers who carry out activities using powers delegated under section 13 of the RSTPA, and they create and handle PTI in accordance with the requirements of Part 3 of the RSTPA.

217. Given the above, the Commissioner is satisfied that access to the information in the Group A documents is restricted to those individuals that have powers delegated under the RSTPA, and that this supports SEPA's arguments that it does not hold the information in its own right, but that it is only held on behalf of Revenue Scotland. The Commissioner therefore accepts that regulation 10(4)(a) applies to the Group A documents that fall under request d).

218. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Given that the Commissioner is satisfied the information requested is not held by SEPA, he does not consider there to be any conceivable public interest in requiring that the

information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a).

219. It would, of course, be open to the Applicant to make an information request to Revenue Scotland for the information which the Commissioner has concluded is not held by SEPA.

Decision

The Commissioner finds that the Scottish Environmental Protection Agency (SEPA) partially complied with with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that SEPA correctly applied the following exceptions to each request

- Request a) – the information was correctly withheld under 10(4)(b) of the EIRs.
- Request b) – the information was correctly withheld under 10(5)(e) of the EIRs
- Request d) – the information was originally correctly withheld under 10(5)(b) of the EIRs.
- Request f) – the information was correctly withheld under 10(4)(a) of the EIRs.

and by doing so it complied with the EIRs.

SEPA also complied with the EIRs, when it applied the exceptions contained in regulations 10(4)(a), 10(5)(b), 10(5)(d) and 10(5)(e) to the information in request d) that it had originally withheld under 10(5)(b) of the EIRs.

However, the Commissioner also finds that SEPA failed to comply with the EIRs when it wrongly applied regulation 10(5)(b) in its initial response to request c), when it later established that it did not hold this information.

As SEPA later notified the Applicant, under regulation 10(4)(a) of the EIRs, that it did not hold any information falling within the scope of request c), the Commissioner does not require SEPA to take any action in respect of this failure in response to the Applicant's application.

Appeal

Should either the Applicant or SEPA 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.

Margaret Keyse
Head of Enforcement

4 March 2022

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

…

(6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

…

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

…

39 Health, safety and the environment

…

(2) Information is exempt information if a Scottish public authority-

(a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or

(b) would be so obliged but for any exemption contained in the regulations.

…

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

…

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

(a) in its possession and it has been produced or received by that authority; or

…

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

…

5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(b) is subject to regulations 6 to 12.

…

7 Extension of time

(1) The period of 20 working days referred to in-

(a) regulation 5(2)(a);

(b) regulation 6(2)(a); and

(c) regulation 13(a),

may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.

(2) Where paragraph (1) applies the Scottish public authority shall notify the applicant accordingly as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information.

(3) Notification under paragraph (2) shall-

(a) be in writing;

(b) give the authority's reasons for considering the information to be voluminous and complex; and

(c) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

10 Exceptions from duty to make environmental information available–

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

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

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

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

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

(b) apply a presumption in favour of disclosure.

…

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

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

…

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

…

(b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

…

(d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

…

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