

# Decision Notice

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**Decision 011/2016: Mr Phil Conran and the Scottish Environment Protection Agency**

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## **Compliance Fee**

Reference No: 201501224

Decision Date: 22 January 2016



Scottish Information  
Commissioner

## Summary

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On 2 June 2015, Mr Conran asked the Scottish Environment Protection Agency (SEPA) for information relating to Compliance Fee data provided under the Waste Electrical and Electronic Equipment Regulations 2013 (the WEEER). SEPA withheld the information as commercially sensitive under regulation 10(5)(e) of the EIRs.

Following investigation, the Commissioner accepted that SEPA was entitled to withhold the information.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(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

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1. On 2 June 2015, Mr Conran made an information request to SEPA. Mr Conran made reference to the WEEER<sup>1</sup> and, in relation to Producer Compliance Schemes (PCSs) registered in Scotland, asked for the following information:
  - a) the amount of evidence (in tonnes) for 2014 met through the use of the Compliance Fee broken down by category.
  - b) which PCSs made use of the Compliance Fee to meet their obligations?Mr Conran also stated that in the event that the data in b) above was considered commercially sensitive, he would request the information in part a) with reasons as to why that in part b) was not considered suitable for disclosure.
2. SEPA responded on 2 June 2015, applying the exemption in section 39(2) of FOISA (and therefore responding under the EIRs), because it considered the information requested to be environmental information. SEPA informed Mr Conran that, having considered the public interest test, it was withholding the information under regulation 10(5)(e) of the EIRs as it was considered to be commercially sensitive.
3. On 2 June 2015, Mr Conran wrote to SEPA, requesting a review of its decision on the basis that he did not accept the reasons given for withholding the information.

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<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2013/3113/contents/made>

4. SEPA notified Mr Conran of the outcome of its review on 26 June 2015. SEPA upheld the original decision, explaining (in relation to part a) of the request), that it held the amount of evidence (in tonnes) in aggregated form only: it did not hold a breakdown by category.
5. On 26 June 2015, Mr Conran wrote to the Commissioner. He applied to the Commissioner 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. Mr Conran stated he was dissatisfied with the outcome of SEPA's review because he did not accept that a claim of confidentiality could be established. He accepted that the pricing of the Compliance Fee could be confidential, but maintained the information requested should be disclosed.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Conran made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 24 July 2015, SEPA was notified in writing that Mr Conran had made a valid application. SEPA was asked to send the Commissioner the information withheld from him. SEPA provided the information and the case was allocated to an investigating officer.
8. 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 answer specific questions, with particular reference to its application of regulation 10(5)(e) of FOISA.
9. SEPA provided submissions to the effect that it still considered the information to be excepted from disclosure in terms of regulation 10(5)(e), with reasons.

## **Commissioner's analysis and findings**

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10. 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 her by both Mr Conran and SEPA. She is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

11. It is clear from SEPA's correspondence with both Mr Conran and the Commissioner, and from the information itself, that the information sought by Mr Conran is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the WEEER and the collection and disposal of waste. The Commissioner is satisfied that it would fall within either paragraph (b) of the definition of environmental information contained in regulation 2(1) (factors relating to waste) or paragraph (c) of that definition (as information on measures affecting or likely to affect those factors listed in paragraph (b)). Mr Conran has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Regulation 5(1) of the EIRs**

12. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.

13. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

#### **Regulation 10(5)(e) of the EIRs**

14. SEPA submitted that the information withheld and which fell within the scope of Mr Conran's request was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
15. SEPA further submitted that the evidence in tonnage, as requested at part a) of the request, could not be disclosed without the risk of identifying the PCSs who made use of the Compliance Fee to meet their obligation, as requested at part b) of the request. This is considered further below.
16. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
17. As with all of the 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)).
18. The Aarhus Convention: an Implementation Guide<sup>2</sup> (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (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 that type of information as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
19. 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:
  - Is the information commercial or industrial in nature?
  - Does a legally binding duty of confidence exist in relation to the information?
  - Is the information publicly available?
  - 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?*

20. SEPA submitted that the WEEER place a legal duty on producers to report the amount of Electrical and Electronic Equipment (EEE) they place onto the market. It also places a legal

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[http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

duty on such producers to pay for a proportionate share for the collection of Waste Electrical and Electronic Equipment (WEEE).

21. In order to meet their obligations in relation to WEEE, producers may enter into contracts with a PCS, which will arrange for WEEE to be collected and treated, recycled or reused on behalf of their producer members. PCSs therefore recruit producers in a market-driven process, where a producer might pay for membership and services offered by a specific PCS. SEPA submitted that prices vary across the board and producers might opt to move between schemes, dependent on prevailing commercial circumstances.
22. SEPA explained that WEEE target obligations are calculated and notified to a PCS by 31 March of the relevant compliance year (although they may be adjusted pro-rata during the year, dependent on membership movement). It explained that PCSs are informed of their obligations in categories 1, 2-10, 11, 12 and 13, stating that a PCS may offset any obligations within categories 2-10.
23. PCSs obligations in each category, SEPA explained, are therefore dependent on the PCSs' producer members and the amount of EEE they place on the market within each of the categories. SEPA further explained that, in order to prove that they have met the targets set, PCSs have to provide "evidence notes", obtained from Approved Authorised Treatment facilities (AATF) and/or Approved Exporters (AE), showing the tonnage collected and treated, recycled or reused.
24. SEPA stated that obligations in each category can be met by:
  - (i) financing the recycling directly and procuring the evidence notes from AATFs or AEs (on a commercial and confidential basis);
  - (ii) trading with other schemes who may have surplus (on a commercial and confidential basis), or alternatively
  - (iii) opting not to buy from other schemes, but to pay a Compliance Fee as a method of complying with the WEEER.
25. Having considered the relevant submissions, the Commissioner is satisfied that the information is commercial in nature.

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

26. In its review outcome and in its submissions to the Commissioner, SEPA stated that there was an implied duty of confidence in relation to the information held. It explained there was an expectation of confidentiality by those who participated in the Compliance Fee process. It drew attention to the Department for Business and Skills' (BIS) 'Guidance on submitting proposals for a WEEE Compliance Fee Methodology'<sup>3</sup>, which indicates that the process should be considered confidential and that such confidentiality should be maintained.
27. In addition, SEPA made reference to regulation 82 of the WEEER, which states that information may be disclosed, by the Secretary of State, an appropriate authority or an enforcement authority, to any person for the purpose of facilitating the carrying out by them of their functions under the WEEER. Whilst accepting that regulation 82 does not prevent

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<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/443031/BIS-15-406\\_WEEE\\_Compliance\\_Fee\\_Evaluation\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443031/BIS-15-406_WEEE_Compliance_Fee_Evaluation_2015.pdf)

information from being disclosed, bearing in mind regulation 5(3) of the EIRs (which would disapply any enactment with that effect), SEPA submitted that it should be taken into consideration.

28. Having considered the context within which the information was supplied to SEPA, the Commissioner accepts that the information was supplied subject to an implied obligation of confidence.
29. While the Commissioner accepts SEPA's submissions on this point, those providing such information to a Scottish public authority must be aware that the information may still be disclosed under FOISA or the EIRs, where substantial prejudice is not evident or the balance of the public interest favours disclosure.

*Is the information publicly available?*

30. SEPA submitted that the information was not currently in the public domain and was held on a secure system, with limited authorised access only.
31. The Commissioner accepts that the withheld information was not publicly available when SEPA dealt with Mr Conran's request or his requirement for review (nor, indeed, is it so available now).

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

32. The term "legitimate economic interest" is not defined within the EIRs. The interest in question must, however, be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must, in the Commissioner's view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
33. In its responses to Mr Conran and in making submissions to the Commissioner, SEPA stated that disclosure of the information requested would cause substantial prejudice to the legitimate economic interests of the PCSs which opted to finance their obligations using the Compliance Fee mechanism.
34. SEPA provided full explanation and submissions as to why disclosure of the tonnage figure as requested at part a) of the request could not be considered in isolation. It explained that six PCSs were registered with SEPA and their details, along with other UK registered PCSs, were publicly available in the WEEE Public Register<sup>4</sup>. SEPA further explained that this register held details of all EEE producers and listed which PCS each producer was contracted to.
35. SEPA provided a further explanation as to how, if the information were disclosed, those within the industry would be able to link the tonnage figures requested at part a) to the PCSs who had made use of the Compliance Fee as requested at part b). Therefore, SEPA stated that disclosure of information held in relation to part a) of the request would, in effect, also be providing a disclosure in relation to part b) of the request. SEPA also provided evidence to the effect that it had undertaken third party consultation in coming to its decision to withhold the information.

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<sup>4</sup> <https://www.gov.uk/government/statistics/weee-registered-producers-public-register>



36. The Commissioner cannot comment in detail on those submissions or the outcome of any third party consultation within the Decision Notice, as to do so would be likely to disclose elements of the requested information. Having considered these submissions, however, she is satisfied that it is highly likely that the disclosure of any information held regarding part a) could be linked to the information held in relation to part b) of the request. She therefore accepts that parts a) and b) cannot be considered separately.
37. SEPA explained that each PCS makes contractual agreements with AATFs, AEs and others, including other PCSs, to meet their obligations in relation to WEEE. Commercial contracts are made, with a fee paid per tonne depending on the category of waste. SEPA stated that such arrangements are made on a confidential commercial basis. As mentioned above, PCSs also have the option to use the Compliance Fee system as a means of legitimately meeting their obligations.
38. SEPA stated that if PCSs knew the extent to which any given PCS had used the Compliance Fee, this would be likely to influence market behaviours and pricing. It explained that if a potential selling PCS knew that a PCS was short in the year covered by this request (up to March 2015), then it was likely that they might be short the following year. Such knowledge, SEPA claimed, would have the potential to distort the market, potentially artificially uplifting the market price offered by PCSs with excess WEEE within particular categories.
39. SEPA also stated that each PCS negotiates its terms each year and, if disclosed, the information could be used by rivals, affecting a PCS's negotiating power in the market. It stated that disclosure might also have an effect on any PCS's ability to recruit producers, who might not fully understand that the use of a Compliance Fee could lead to additional costs being incurred by those producers.
40. SEPA stated that such knowledge would have an impact on contractual price agreements between PCSs and producers, PCSs and recyclers, PCSs and local authorities (AATFs) and PCSs among themselves.
41. In this regard, the Commissioner notes that the BIS guidance, referred to above, comments that
- The existence of a Compliance Fee is intended to discourage PCSs collecting WEEE significantly above their targets and then seeking to sell that surplus at excessive prices to PCSs that are short of their target amount in any category for which they have obligations.*
42. The Commissioner has to be satisfied that the harm to the economic interest in question (and thus to the confidentiality to be protected) would be real, actual and of significant substance. She accepts SEPA's submissions as to the commercial sensitivity of the information at the time it carried out its review.
43. Having taken all of SEPA's submissions and the supporting third party comments into consideration, together with the information withheld, the Commissioner is satisfied that disclosure of the information would have caused, or would have been likely to cause, substantial harm to the ongoing legitimate economic interests of any of the PCSs who made use of the Compliance Fee. SEPA also commented that its own legitimate economic interests would be prejudiced substantially if the information were made available, but the Commissioner has not found it necessary to consider these arguments here.

### *Consideration of the public interest*

44. Having upheld the use of the exception contained within regulation 10(5)(e) in relation to the pricing information, the Commissioner is required to consider the public interest test set out in regulation 10(1)(b) of the EIRs. The test 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.
45. SEPA considered that disclosing the information requested would put PCSs which used the Compliance Fee at a disadvantage in relation to competitors, which would not be in the public interest. It explained that the use of the Compliance Fee is an element of the wider competitive market established by WEEER, whereby the successful operation of the market-based system ensures that the United Kingdom meets its obligations under the EU WEEE Directive.
46. SEPA also forwarded third party comments which supported the public interest favouring the information being withheld, specifically in maintaining the operation of a healthy and competitive WEEE compliance market.
47. Mr Conran, on the other hand, submitted that businesses should have access to all relevant information to enable them to decide which operator to use. He explained that the information should be disclosed to show how the system worked and to ensure that no market benefit was being gained by the operators involved. He recognised that the pricing of the Compliance Fee could be considered confidential (although that is not what is requested here), but stated that this did not mean PCSs should not be held to account over their use of the Compliance Fee, which he considered a fundamental aspect of the market. He submitted that non-disclosure was a clear breach of transparency expectations.

### *Commissioner's conclusions*

48. The Commissioner accepts the general public interest in transparency and accountability, particularly where this involves compliance with legislation, in this case the WEEE. She acknowledges that the withheld information might cast some light on these matters and has borne in mind that those providing information to a Scottish public authority should be aware that, at times, such information will have to be disclosed as a result of a request under the EIRs.
49. The withheld information clearly relates to the operation of PCSs and producers of EEE meeting their legal obligations under the WEEER. The Commissioner recognises the public interest in transparency in relation to such operations and compliance with both the WEEER and the relevant EU directive. Whilst the Commissioner recognises that such disclosure may be of interest to those within the industry, she does not see how disclosure of the withheld information would add anything of substance to transparency regarding the systems designed to comply with the WEEER.
50. The Commissioner has also taken account of all of the submissions made by SEPA in favour of maintaining the exemption. She has already acknowledged the risk of substantial commercial prejudice in this case. She accepts that this would not be in the public interest. It is in the public interest for those organisations operating within a competitive market to be able to do so, along with potential competitors, on a fair and equal footing. The Commissioner has borne in mind the relatively specialised nature of the work under



consideration here, with all the implications of the targets and obligations being set on an annual basis and the fluidity of PCS membership.

51. On balance, having considered the withheld information in the context of all relevant submissions she has received, the Commissioner finds that the public interest in disclosing the requested information is outweighed by that in maintenance of confidences and in fair trading. Therefore, in all the circumstances of this case, she concludes 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.

## **Decision**

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The Commissioner finds that the Scottish Environment Protection Agency complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Conran.

## **Appeal**

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Should either Mr Conran 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**22 January 2016**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

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"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

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...

(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;

...

#### 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)-

...

(b) is subject to regulations 6 to 12.

...

#### 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.

...

- (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-

...

- (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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