



Environmental Information Regulations 2004

An introduction to the Environmental Information Regulations (EIR) exceptions

The Environmental Information Regulations 2004 (the "EIR") give rights of public access to environmental information held by public authorities. This is part of a series of guidance notes to help public authorities understand their obligations and to promote good practice.

It gives an introduction to the exceptions to the right to access environmental information under the EIR.

Overview

- The EIR derive from a European Directive, so it is important to interpret the regulations by considering their main purpose.
- There is an express presumption of disclosure under the EIR.
- Regulation 12 of the EIR sets out the exceptions which allow public authorities to refuse to disclose environmental information.
- All the exceptions in the EIR (except those relating to personal data) are subject to a public interest test.

What do the EIR say?

Regulation 5(1) of the EIR provides that "a public authority that holds environmental information shall make it available on request".

Regulation 12(2) states that "A public authority shall apply a presumption in favour of disclosure". Public authorities should therefore bear this in mind when considering any request.

A public authority may only refuse to disclose information where an exception applies.

- The exception at regulation 12(3) applies to information which is the personal data of a person other than the requester. For more details on this and on regulations 5(3) and 13 which also relate to personal data, please see our guidance: [The exemption for personal information](#).

- Regulation 12(4) applies to certain circumstances and categories of information.
- Regulation 12(5) applies where the disclosure would have one of the adverse effects listed in that regulation.

For the exceptions listed under regulations 12(4) and (5), there is a further condition to be met. The information can only be withheld “if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”.

The public interest test

The public interest test applies to all the exceptions contained in the EIR, except those relating to personal data. This means that even if an exception is engaged and the authority wishes to withhold the information, it must go on to consider whether it is in the public interest to disclose it. Please see our guidance: [The public interest test](#) .

Separating out and extracting part of the information

When applying any of the EIR exceptions, an authority must ensure that it only refuses any information that is specifically covered by the exception. The authority should extract or summarise the remaining, non-excepted information and issue that to the applicant, unless it is not reasonably capable of being separated.

The exceptions

Regulation 12(3) Personal data

If the information requested under the EIR includes third party personal data, a public authority may only disclose it in accordance with regulation 13. Please see our guidance: [The exemption for personal information](#).

Regulation 12(4)(a) Information not held when receiving a request

For the purposes of the EIR, information is held when it:

- “is in the authority’s possession and has been produced or received by the authority; or
- is held by another person on behalf of the authority.”

The key issue in this exception is whether the information is held at the time “when an applicant’s request is received”.

Regulation 12(4)(b) Manifestly unreasonable

The word “manifestly” means that a request should be obviously or clearly unreasonable. There should be no doubt as to whether the request was unreasonable. Volume and complexity alone may not be sufficient to make a request manifestly unreasonable. The fact that a request would be considered vexatious or repeated under the Freedom of Information Act 2000 (the “FOIA”) does not, in itself, make a request made under the EIR manifestly unreasonable.

There are no cost limits for responses to requests for environmental information; it may therefore be possible for some exceptionally costly requests to be considered manifestly unreasonable.

Please see our guidance on [Vexatious and repeated requests](#) and [Vexatious requests - a short guide](#) for more information.

Regulation 12(4)(c) The request is too general

When a request has been made in general terms and it is difficult to determine what information the applicant actually wants, an authority does not have to disclose information. To claim the exception, an authority must follow the requirements of regulation 9(2). Where it receives a request which is “too general”, it must contact the applicant within 20 working days and help him or her to refine or clarify the request. Please see our guidance on [Advice and Assistance](#) and [Interpreting a request](#).

Regulation 12(4)(d) Material in the course of completion, unfinished documents and incomplete data

This exception covers most work in progress. The authority must consider the status of the information at the time of the request.

Example:

In [the Secretary of State for Transport v the Information Commissioner \(EA/2008/0052, 5 May 2009\)](#) the Information Tribunal disagreed with the Information Commissioner’s decision notice, in which the Commissioner had found that the exception did not apply where a final version of the information existed. The tribunal found that regulation 12(4)(d) was engaged, saying: “The request therefore related to the Draft Report and not to the final version. The fact that the Draft Report itself related to another document does not change that position. Its status does not change simply because a final version exists.”

The public interest test is an important consideration; we consider that the public interest in maintaining this exception will decline once the final version of a document has been completed.

When refusing a request under this exception, the authority must specify the information together with “the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed”.

Regulation 12(4)(e) Disclosure of internal communications

This exception should be interpreted broadly and may cover a wide range of internal communications. In practice the scope of this exception is likely to be narrowed by the application of the public interest test.

We consider that it may cover circumstances similar to those in [Section 35](#) of the FOIA (Policy Formulation, ministerial communications, Law Officers’ advice and the operation of a Ministerial Private Office) or [Section 36](#) (The Effective Conduct of Public Affairs), covering a “private thinking space” for officials.

The EIR state that “internal communications include communications between government departments”. This also covers communications between central government departments and their internal executive agencies.

Example:

In [Friends of the Earth v the Information Commissioner & Export Credits Guarantee Department \(EA/2006/0073, 20 August 2007\)](#) Friends of the Earth had argued that this exception was confined to communication within a single individual government department. However the Information Tribunal upheld the view of the Information Commissioner that the exception does cover communications between separate government departments.

Communications between the following will **not** constitute “internal communications” under this regulation:

- a central government department and a local authority;
- two local authorities.

Whether a communication from an external adviser amounts to an internal communication depends on the facts of the case. In the exceptional circumstances of the following case, the tribunal found that such a communication did constitute an internal communication. However regulation 12(4)(e) will not be applicable in all situations involving external advisers.

Example:

In [The Secretary of State for Transport v the Information Commissioner \(EA/2008/0052, 5 May 2009\)](#) the Tribunal considered whether a copy of a draft report prepared by an external adviser amounted to an internal communication under regulation 12(4)(e). In this particular case, Sir Rod Eddington, former Chief Executive of British Airways, had been appointed by HM Treasury (“HMT”) and the Department for Transport (“DfT”) to produce a report. The Tribunal considered his role and how the draft report was produced, looking at evidence such as the fact he had an office at the DfT and used business cards bearing his contact details there, with HMT and DfT logos, as well as the contention that he led and worked closely with a team of civil servants to produce the draft report. All this led the Tribunal to conclude that Sir Rod’s role was very much embedded into the public authority. It therefore overturned the ICO’s decision notice and found that, in the exceptional circumstances of this case, the information did constitute an internal communication and that regulation 12(4)(e) was engaged.

The tribunal commented: “We do not consider that it is possible, or desirable, to attempt to devise a standard test as to what amounts to internal or external communication, for example, by reference to the nature of the communication or its audience. It will depend on the context and facts in each situation”.

When applying this exception to information from another body, consideration should be given to the relationship between the two bodies. An authority needs to explain why it considers a particular communication from another body or person is covered by this exception.

Regulation 12(5) Adverse effect

The exceptions listed under regulation 12(5) are based on the consequences of disclosure. A public authority may refuse to disclose information “to the extent that its disclosure would adversely affect” one of the areas listed in this regulation.

This criterion of “adverse effect” is similar to that of “prejudice” under the FOIA, although not identical. For instance, the “prejudice” criterion under the FOIA is “would, or would be likely to, prejudice”, whereas for adverse effect

the harm must be at least probable rather than merely likely. Please see our guidance: [Prejudice and Adversely Affect](#).

Regulation 12(5)(a) International relations, defence, national security or public safety

The term “international relations” refers to relationships between the UK and other governments or international bodies such as the UN, EU or an international court. Please see our FOIA guidance: [The Defence Exemption](#) and [International Relations](#) for more information.

The term “national security” relates to some defence matters and wider security concerns. “Public safety” may be interpreted widely. It covers information whose disclosure would adversely impact upon the protection of the public, public buildings and industrial sites from accident or acts of sabotage and where the disclosure of information would have an adverse effect upon the health and safety of the public.

In relation to national security, regulation 15 allows a Minister of the Crown (or a person designated by a minister) to approve a refusal to disclose the information by certifying that disclosure would adversely affect national security and would not be in the public interest.

In accordance with regulation 12(6), an authority is able to opt neither to confirm nor deny whether the information exists and is held, if this would adversely affect any of the matters listed under regulation 12(5)(a). This is subject to the public interest test.

Regulation 12(5)(b) The course of justice, the ability of a person to obtain a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature

The meaning of “the course of justice” is quite broad and would include the concept of legal professional privilege. The meaning of “an enquiry of a criminal or disciplinary nature” is also broad but its precise limits are not yet clear. In this exception, as well as in subsections (d) and (f), the term “public authority” includes Scottish public authorities.

Please note, in addition, that regulation 3(3) provides that when a public authority is acting “in a judicial or legislative capacity”, it is not covered by the EIR. The extent to which this regulation applies depends upon the interpretation of it in relation to the function of the authority in question. Our view is that “judicial capacity” excludes courts and tribunals from the EIR.

Regulation 12(5)(c) Intellectual property rights

An authority may refuse a request for information protected by intellectual property rights. “Intellectual property rights” are rights granted to creators and owners of works that are the result of human intellectual creativity. These

works could be in the industrial, scientific, literary or artistic domain. Intellectual property rights include copyrights, patents, trademarks and protected designs. They may be in the form of, for example, an invention, a manuscript, a suite of software, or a business name. Intellectual property rights have more protection under the EIR than under the FOIA.

The exception protects the rights of the authority as well as third parties. An authority must be able to demonstrate that there is a real risk that disclosure would undermine the intellectual property rights.

Regulation 12(5)(d) The confidentiality of the proceedings of a public authority where such confidentiality is provided by law

A public authority cannot use this exception for environmental information that relates to information on emissions; see regulation 12(9) below.

In this exception, as well as in subsections (b) and (f), the term “public authority” includes Scottish public authorities.

The proceedings in question may be those of the public authority receiving the request or any other public authority. The meaning of the term “proceedings” is not limited to formal proceedings and it will not include all activities of a public authority. However, it may not, for example, include papers discussed at meetings, where those have not been prepared exclusively for the purpose.

Example:

[Archer v Information Commissioner and Salisbury DC \(EA/2006/0037, 9 May 2007\)](#)

This case concerned an appeal against a refusal by a local authority to provide certain information contained in a “Joint Report” on a planning matter, referred to in council minutes. The Information Commissioner had originally decided that the information was exempt from disclosure under the FOIA. Eventually the parties agreed that the information request should be considered under the EIR. One of the points the Tribunal considered was whether the Joint Report fell within the definition of “proceedings” under regulation 12(5)(e). It said that minutes of the council meeting were already in the public domain, but decided that the exception did not cover the Joint Report, commenting: “...it is not clear to us from the evidence whether the Joint Report which was discussed at the meeting, was prepared exclusively for the discussions at the meeting, and we are not satisfied, therefore, that it qualifies as ‘proceedings’”.

There must be a duty of confidence in relation to the information in question, provided by law either on the basis of statute or by common law. It may also be helpful to refer to the notes on regulation 12(5)(e), below.

Regulation 12(5)(e) The confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

A public authority cannot use this exception for environmental information that relates to information on emissions; see regulation 12(9) below.

Unlike the FOIA, the EIR do not require a potential breach of confidence to be “actionable”.

This exception may cover a wide range of “commercial or industrial information” in the circumstances specified. It could cover either an individual or a body or the public authority itself. For instance, it could include information supplied in relation to a tendering or procurement process and information held by regulators. Please see our FOIA guidance on [Commercial interests](#) and [Information provided in confidence](#) .

Regulation 12(5)(f) The interests of the person who provided the information where that person –

- (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;**
- (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and**
- (iii) has not consented to its disclosure.**

A public authority cannot use this exception for environmental information that relates to information on emissions; see regulation 12(9) below.

In this exception, as well as in subsections (b) and (d), the term “public authority” includes Scottish public authorities.

This exception covers the interests of a person who:

- supplied information voluntarily,
- supplied it in the expectation that it would not be disclosed to a third party, and
- has not consented to disclosure of the information supplied.

Examples of the sort of information this exception covers could be where individuals provide information in response to a survey (where they have not given consent to release into the public domain), or in relation to privately owned papers deposited in a public record or archive. However this exception does not cover the supply of information under the FOIA.

Regulation 12(5)(g) The protection of the environment to which the information relates

A public authority cannot use this exception for environmental information that relates to information on emissions; see regulation 12(9) below.

This exception reflects the purpose of the EIR, and the EU Directive and Aarhus Convention upon which they are based. The purpose is to increase the protection of the environment by ensuring greater access to environmental information. For instance, it would clearly be contradictory if disclosure of information led to damage to the environment. An example of a disclosure which could have this effect might be information relating to the nesting sites of rare birds, or the location of vulnerable archaeological sites.

Regulation 12(9) Information relating to emissions

A public authority cannot use the following exceptions for environmental information that relates to information on emissions:

- **confidentiality of the proceedings of a public authority 12(5)(d)**
- **confidentiality of commercial or industrial information 12(5)(e)**
- **interests of the person who provided the information 12(5)(f)**
- **protection of the environment to which the information relates 12(5)(g)**

Emissions are not defined in the EIR, nor in the European Directive on access to environmental information.

The term “emissions” potentially captures a great deal of information. The phrase “relates to information on emissions” suggests that information will not necessarily need to be directly concerning emissions to fall within this provision. Our view is that the exception is not limited to emissions that have already taken place, but could include past, present and future emissions.

Therefore when considering the application of one of these four exceptions, an authority must check whether or not the requested information can be categorised as environmental information relating to information on emissions.

Other considerations

Please see our guidance: [What is environmental information?](#) .

More information

This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, tribunal and courts on freedom of information cases. It is a guide to our general recommended

approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please contact us.

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