

# Freedom of Information Act Environmental Information Regulations



**Information Commissioner's Office**  
Promoting public access to official information  
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## The public interest test

The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) give rights of public access to 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.

This guidance explains to practitioners what the public interest test is and when and how to apply it. It sets out in general terms the type of factors to consider, while directing practitioners to other specific guidance on individual exemptions and exceptions. It is not intended to provide a comprehensive guide to the public interest regarding specific exemptions.

This guidance replaces the existing guidance about the public interest test (Awareness guidance No. 3).

### Overview

- The “public interest” is that which serves the interests of the public.
- The public interest test applies to relevant sections of both the FOIA and the EIR.
- Many FOIA exemptions and all EIR exceptions are “qualified”, meaning that they are subject to a public interest test.
- Even if a qualified exemption or exception is engaged (ie covers the requested information), the information must still be disclosed unless the public interest in maintaining the exemption or exception is greater than the public interest in disclosing it.
- The decision involves the balancing of factors on each side.
- Under the FOIA, an authority must apply the public interest separately to each exemption. However under the EIR, after applying the public interest test separately to each exception, the authority must then aggregate all the public interest factors when considering whether to disclose or not.

## What is the public interest test?

The term “the public interest” is not defined in either the FOIA or the EIR. However something which is “in the public interest” may be summarised as something which serves the interests of the public. The public interest test entails a public authority deciding whether, in relation to a request for information, it serves the interests of the public either to disclose the information or to maintain an exemption or exception in respect of the information requested. To reach a decision, a public authority must carefully balance opposing factors, based on the particular circumstances of the case. Where the factors are equally balanced, the information must be disclosed.

## What does the Freedom of Information Act say?

Section 1 provides a general right of access to information. Within the FOIA, there is an assumption in favour of disclosure.

Section 2 modifies that right by setting out circumstances when a public authority may refuse a request for information, by reference to exemptions stated in Part II of the FOIA.

The public interest must not be used on its own to refuse to disclose information; it must only be used in conjunction with an exemption.

There are two main types of exemption:

- **Absolute exemptions.** These are listed under section 2(3) of the FOIA: sections 21, 23, 32, 34, 36 (part), 40 (part), 41 and 44. Where an absolute exemption applies, there is no right to the information under the FOIA. The public interest test is not relevant to absolute exemptions.
- **Qualified exemptions.** These exemptions fall into two categories:
  - Class-based
  - Prejudice-based

Class-based exemptions cover all information falling within a particular category. An example is section 42 which covers information subject to legal professional privilege. Where a class-based exemption is claimed, there is no need to demonstrate any prejudice or harm to any particular interest in order to engage the exemption.

For prejudice-based exemptions, the FOIA uses the following wording: “disclosure... would, or would be likely to, prejudice”.... interests or factors specified in the exemption. Prejudice-based exemptions only come into play if a particular disclosure would prejudice the purpose of the exemption; an example is section 27 which covers information affecting international relations. An authority must establish the likely prejudice that would be caused before going on to consider the public interest test. For further details on prejudice, please refer to the ICO’s guidance about Prejudice and adverse effect ([Awareness guidance 20](#)).

Where a public authority identifies that a qualified exemption applies, it should also consider:

**The duty to confirm or deny and the public interest test**

Under section 1(1)(a) of the FOIA, an authority is under a duty to “confirm or deny” whether it holds information requested. This duty does not arise where “the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information” (section 2(1)(b)).

**The duty to communicate and the public interest test**

Under section 1(1)(b) of the FOIA, in response to a request, an authority must communicate information it holds. There is no need to comply with that provision where “the public interest in maintaining the exemption outweighs the public interest in disclosing the information” (section 2(2)(b)).

For further details on individual exemptions, please refer to the ICO’s guidance (see link, below).

**What do the Environmental Information Regulations say?**

Regulation 5 sets out a public authority’s duty to make information available on request.

Regulation 12(1) sets out circumstances when a public authority may refuse to disclose information which has been requested, namely when an exception to disclosure under regulation 12(4) or (5) applies and when “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

The EIR list the exceptions in regulations 12(4) and (5). A significant difference from the FOIA is that the public interest test applies to all the exceptions contained in regulations 12(4) and (5).

The EIR allow an authority to neither confirm nor deny that information exists and is held, but only if that confirmation or denial would adversely affect interests referred to in regulation 12(5)(a) (international relations, defence, national security or public safety) and would not be in the public interest.

For further details on the exceptions, please refer to ICO guidance (see below).

**Adverse effect**

An additional test applies for exceptions listed under regulation 12(5): “a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -.....”.

This criterion of “adverse effect” is analogous to that relating to the “prejudice-based” exemptions under the FOIA (see above), although not identical. For further

details on adverse effect, please refer to the ICO's guidance about Prejudice and adverse effect ([Awareness guidance 20](#)).

### Applying the public interest test: points to bear in mind



- The application of the public interest test is a balancing exercise. An authority must weigh up opposing, pertinent considerations as to what would be in the public interest.
- Before applying the test, establish whether the requested information engages a particular exemption or exception. (This is the only stage required for an absolute exemption under the FOIA).
- In applying the test, only public interest considerations relevant to the individual exemption being claimed should be taken into account in relation to maintaining the particular exemption, rather than general public interest considerations which might appear to be relevant ([Bellamy v the Information Commissioner and the DTI, \(EA/2005/0023, 4 April 2006\)](#)).
- Under the FOIA, conduct the test separately for each exemption claimed. However the position differs for the EIR, following the decision of the Court of Appeal in the Ofcom case (see below).

#### **Example:**

In [Ofcom v The Information Commissioner \[2009\] EWCA Civ 90 \(20 February 2009\)](#) the Court of Appeal considered Ofcom's appeal in a case involving a request for information relating to the location and other details of mobile phone masts. The Court overruled the Information Commissioner and found that the meaning of regulation 12(1)(b) of the EIR: "the public interest in maintaining the exception" is that public interest factors should be considered as a whole, looking at the overall weight of the public interest in order to decide upon where the balance of the public interest lies, rather than in respect of each separate exception. The authority should assess the position "in the round at the end of the process by considering whether the aggregate public interest in maintaining the applicable exceptions outweighs the public interest in disclosure".

The ICO considers that the practical implication of this for the EIR is that an authority should consider each exception separately. For each one that is engaged, it should then consider the public interest test and then proceed to aggregate all the public interest factors for the same piece of information in order to reach a decision.

**Example:**

A public authority considers that the exceptions in regulations 12(5)(d) and 12(5)(e) apply to information contained in paragraph 1 of a document. It may aggregate the public interest in favour of maintaining those exceptions in respect of paragraph 1.

It also considers that different information in paragraph 7 is covered by the exception in regulation 12(5)(e), but it must not aggregate the public interest arguments in respect of that.

Our view is that the decision applies only to the EIR.

**At what point should an authority apply the public interest test?**

The current view of the ICO is that the timing of the application of the public interest test under the FOIA should be at the date of the request or at least by the time for compliance with sections 10 and 17, and that a similar rule applies to the EIR. This view reflects that taken by the tribunal in [DBERR v the Information Commissioner and the Friends of the Earth \(EA/2007/0072, 29 April 2008\)](#).

**Relevant considerations in applying the public interest test**

There is an assumption in the FOIA that openness is, in itself, to be regarded as something which is in the public interest. The EIR expressly state in regulation 12(2) that “A public authority shall apply a presumption in favour of disclosure”. In applying the public interest test, a public authority should bear this in mind along with other considerations.

**Example:**

[Guardian Newspapers Limited and Heather Brooke v the Information Commissioner and the BBC \(EA 2006/0011 and EA 2006/0013, 8 January 2007\)](#)

The Information Tribunal stated that there is an assumption in favour of disclosure under the FOIA, even though not expressly stated. It said: “what it means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis”.

We set out below examples of the types of considerations, referred to in Information Tribunal decisions, that a public authority might take into account in applying the public interest test. Note that some arguments may apply in either direction, depending on the facts. This is not intended to be an exhaustive list; authorities should refer to ICO guidance for considerations applicable to specific exemptions and exceptions (see links, below).

#### **Examples of arguments that could weigh in favour of disclosure**

- General arguments in favour of promoting transparency, accountability and participation
- Disclosure might enhance the quality of discussions and decision making generally.
- The balance might be tipped in favour of disclosure by financial issues. For instance, if the information requested involved a large amount of public money, this might favour disclosure.
- The specific circumstances of the case and the content of the information requested in relation to those circumstances.
- The age of the information might tip the balance in favour of disclosure. The passage of time may impact upon the strength of the public interest arguments.
- The timing of a request, in respect of information relating to an investigation, may be relevant. This would depend on the stage the investigation had reached and how much information was in the public domain.
- The impact (beneficial or otherwise) of disclosure upon individuals and /or the wider public.

#### **Examples of arguments that could weigh in favour of maintenance of the exemption - but only where relevant to the specific exemption being claimed**

- The specific circumstances of the case and the content of the information requested in relation to those circumstances.
- The age of the information might tip the balance in favour of maintaining the exemption or exception. The passage of time may impact upon the strength of the public interest arguments.
- The likelihood and severity of any harm or prejudice that disclosure could cause.
- The significance or sensitivity of the information. For instance, is it “live”?
- The need for a “safe space” for government and civil servants to formulate and debate issues away from public scrutiny.
- The balance might lie in favour of maintaining the exemption or exception in view of the risk of disclosure inhibiting frankness and candour in debate and decision making, especially within government. The strength of this argument depends on clear evidence that it will have this effect.
- In respect of information relating to an investigation, the timing of the request may be relevant, depending on the stage the investigation had reached, and how much information was in the public domain.
- The impact (beneficial or otherwise) of disclosure upon individuals and /or the wider public.

### **Irrelevant considerations in applying the public interest test**

- The identity of the person making the request.
- The possibility that the information requested could be misunderstood or regarded as too technical or complex.
- The “status” of the information; for instance if it is classified, or if it relates to senior individuals.
- The number of exemptions being claimed.
- In relation to maintenance of the exemption, factors concerning a different exemption to the one being used are irrelevant.
- The accuracy of the information.
- Arguments that disclosure will lead to poorer record keeping.

### **Time limits on considering the public interest test**

Guidance on time limits in relation to the FOIA is available in the ICO's guidance about [Time limits on considering the public interest](#) (Good Practice guidance 4). Please also refer to [Time for compliance - FAQs](#) in relation to the EIR.

### **Other considerations**

Additional guidance is also available if you need further information on:

- The FOIA and individual exemptions - see [ICO guidance on FOIA](#)
- The EIR and individual exceptions – see ICO guidance: [An introduction to the EIR exceptions](#).

### **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 current 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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