

Environmental Information Regulations 2004

This Guidance is intended to assist ICO caseworkers and public authorities gain an understanding of the exceptions to the right to access information under the Environmental Information Regulations 2004. The Regulations were laid before Parliament at the end of October, but are not expected to be finalised until they are due to enter into force on the 1st January 2005. Therefore, this guidance aims to provide an initial introduction to the exceptions in the Regulations, more detailed guidance on individual exceptions will be available in due course. The understanding of the exceptions will also be clarified as experience in dealing with requests and complaints is gained.

Regulation 12 – Exceptions to the Duty to Disclose Environmental Information

Regulation 12 deals with the exceptions to the Environmental Information Regulations 2004 (EIR). This allows public authorities to refuse to disclose environmental information when it has been requested. There is no requirement for a public authority to withhold information which would fall within an exception. The exceptions are not mandatory and a public authority may choose to release the information anyway. However, all the exceptions in the EIR are subject to a public interest test.

12(1) and (2), the public interest test – Regulation 12(1)(b) states that a public authority may refuse to disclose environmental information requested if, *'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.'* This means that even if an exception applies and the authority wishes to withhold the information, they must further consider whether it is in the public interest to do so.

The Public Interest in Disclosure

Weighing up whether or not it is in the public interest to disclose or withhold information is a balancing act, where both the factors in favour of disclosure and the factors in favour of refusal, must be determined and evaluated.

There is a strong inherent public interest in releasing environmental information. Environmental information has received special attention since 1990 when the European Community issued its first Directive on access to environmental information (90/313/EEC). It has long been recognised that in order to protect the environment it is important for people to have access to environmental information, to be able to participate in environmental decision-making and have access to justice. In the words of the current European Directive (2003/4/EC),

'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.'

The main aim of the Regulations is to provide greater access to environmental information than has been possible previously and regulation 12(2) directs public authorities to apply a presumption in favour of disclosure. This instruction weights the public interest in favour of release from the outset. A similar instruction is to be found in the Directive, namely, 'the grounds for refusal...shall be interpreted in a restrictive way...'

It is important to clarify that it is the *public* interest not private interests that are to be considered, and that public interest is not equivalent to simply what the public find interesting. The Commissioner has identified several generic points to take into account when considering the public interest test (for more details see Freedom of Information Awareness Guidance No 3) –

- Furthering the understanding of and participation in the public debate of issues of the day
- Promoting accountability and transparency by public authorities for decisions taken by them
- Promoting accountability and transparency in the spending of public money
- Allowing individuals and companies to understand decisions made by public authorities
- Bringing to light information affecting public health and public safety

This list is not intended to be exhaustive and authorities should take care to consider all aspects that may be relevant to the public interest and be able to justify reliance on these aspects when withholding information.

Regulation 12(3) Personal information. As under the Freedom of Information Act, rights of access to the applicant's own personal data are provided by the Data Protection Act. Requests for third party data can be made under the Regulations but disclosure will only be made, in accordance with Regulation 13, if this does not involve a breach of the Data Protection Act. Freedom of Information Awareness Guidance No 1 is directly applicable to requests for personal information under the Regulations.

Regulation 12(4) Exceptions Based Upon the Type of Information

Regulation 12(4) provides a number of exceptions from the duty to provide information on request based upon the **type** of information held or the **nature of the request** rather than upon the **content** of the information.

The exceptions in question are as follows:

- **Regulation 12(4)(a) The public authority does not hold the information when an applicant's request is received.** It is obviously only possible to provide information which the public authority holds. The exception appears to provide for the refusal of a request if information is received or recorded after a request has been submitted. While this may be technically correct, public authorities should be mindful of the

reputational damage that may arise if it subsequently emerges that it came into possession of the information requested while it was still in the process of dealing with a request and could have provided the information to the requester. In any event, they must consider the public interest in providing such information.

- **Regulation 12(4)(b) The request for information is manifestly unreasonable.** The Regulations do not define the term “manifestly unreasonable”. However, the word “manifestly” implies that a request should be obviously or clearly unreasonable. There should not, in other words, be good ground to doubt whether the request was in fact unreasonable.

A number of types of request may be covered. For instance the request may be vexatious, that is designed principally to put the public authority to the expense of responding rather than being a genuine request for information. The Information Commissioner has published comprehensive advice on vexatious requests under the Freedom of Information Act (Awareness Guidance 22). This will be largely applicable to requests under the EIR.

Although there is no cost ceiling on requests under the EIR (see separate advice on charging), a request for large amounts of information and where response would seriously disrupt the everyday work of the public authority may be fairly considered as being manifestly unreasonable if the cost of response far outweighs the public interest in the disclosure of the information.

- **Regulation 12(4)(c) The request is too general.** It is not necessary to respond to a request which has been formulated in such a general manner so as to make it difficult to determine what information the applicant actually wants.

There is an important qualification to this exception. It may only be claimed if, in line with the requirement of Regulation 9, the public authority has attempted to assist the applicant to refine or clarify the request. (See separate guidance on Advice and Assistance.)

- **Regulation 12(4)(d) The request relates to information which is unfinished or in the course of being completed.** Potentially the scope of this exception is quite wide. It will cover all sorts of work in progress whether in the area of policy formulation or ongoing scientific research. The important consideration is likely to be the public interest test. When faced with a request for information which is as yet incomplete, public authorities must consider whether the disclosure of the information would be misleading because incomplete or whether disclosure would make it difficult or impossible to complete the work. For instance, it may be judged to be contrary to the public interest to disclose information about an incomplete 10 year study if the findings after, say 5 years are likely to be misleading. If, on the other hand, the 5 year findings are likely to be valid in themselves, there is unlikely to be a public interest in refusing a request.

When refusing a request on this ground, a public authority must inform the applicant the date upon which it is expected to be completed. If the information is being prepared by another authority, the applicant should be informed of the identity of this authority and the expected date of completion if these are known.

- **Regulation 12(4)(e) The request involves the disclosure of internal communications.** The term “internal communications” includes communications between government departments. Although there is some doubt as to the scope of this exception, the general intention appears to provide an exemption from disclosure for information which may not yet represent the settled view of the authority. The effect is therefore both to provide some protection for the “private thinking space” of senior officials or elected members and also to guard against the risk of the disclosure of advice or other information provided by more junior officials which might, wrongly, be taken to represent an official view.

Although the scope of the exception is again potentially wide, in practice it is likely to be narrowed by the application of the public interest test. When refusing a request for information on the ground that it relates to internal communications, public authorities must be satisfied that disclosure would firstly cause some harm, for instance by misleading the public or making the formulation of policy difficult or impossible and, secondly, that there is not a stronger public interest in increasing public input into the formulation of policy.

Regulation 12(5) lists the exceptions relevant to where disclosure **would adversely affect...** this test of harm is stronger than that in the Freedom of Information Act 2000, in which some exemptions apply if the information ‘would, or would be likely to, prejudice’... Therefore, to engage a 12(5) exception in the EIR the authority must be able to show with certainty the harm that releasing the information in question would cause. It would not be sufficient for an authority to claim that releasing the information *might* result in an adverse effect. For more detailed guidance, see FoI Awareness Guidance 20 - Prejudice and Adverse Affect.

Regulation 12(5) Exceptions Based Upon the Content of the Information Requested

The Regulations provide a series of exceptions from disclosure based upon the **content** of information requested. These are all subject to a test of adverse affect and, importantly, to the public interest test. In practice, there may be a number of areas of overlap, for instance between different categories of information for which confidentiality is provided by law.

The exceptions in question are as follows:

- **Regulation 12(5)(a) International relations, defence, national security & public safety.** Subject to the public interest test, if the disclosure of information would adversely affect any of these matters, it is exempt from disclosure.

The terms “international relations”, referring to relationships between the UK and other governments or international bodies such as the UN, EU or an international court, and “defence”, referring to the defence of the UK and the security, capability and effectiveness of UK forces, are unlikely to give rise to interpretative difficulty. (The exception reflects exemptions in the Freedom of Information Act upon which the Commissioner has published advice in the form of Awareness Guidance Nos 10 and 14.)

There may be some debate as to the breadth of the terms “national security” and “public safety”. (The equivalent term in the Directive upon which the EIR is based is the less familiar “public security”.) Taken together, they cover both information whose disclosure would impact adversely upon the protection of the public, public buildings, industrial sites etc from accident or acts of sabotage and information whose disclosure would have an adverse affect upon the health and safety of the public.

Although not specifically linked to this exception, Regulation 15 provides that a minister of the crown (or a person designated by a minister) may certify that a refusal to disclose information is because the disclosure...would adversely affect national security; and would not be in the public interest. It is not necessary to obtain a certificate in order to rely upon the exception relating to national security. The main effect is to disapply the normal complaints and appeal procedures. Instead, appeals against certificates can be made either by the Commissioner or the complainant to the Information Tribunal. The Tribunal may overturn the certificate having applied judicial review principles.

- **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 inquiry of a criminal or disciplinary nature.** The purpose of this exception is reasonably clear. In effect it exists to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. The exception is also designed to ensure that disclosures do not prevent public authorities from conducting criminal and disciplinary investigations. The exception will cover information which is covered by legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.

The term “inquiry of a disciplinary nature” is potentially a wide one and may cover both non-statutory disciplinary matters in the personnel area but also a range of regulatory activities which may give rise to disciplinary action taken against members of regulated professions. Other regulatory activities may be protected by the exception relating to the confidentiality of proceedings (see below).

- **Regulation 12(5)(c) Intellectual property rights.** Whereas the exception discussed below relating to the confidentiality of commercial or industrial information provides protection to information whose disclosure would adversely affect the commercial interests of a third party, the exception relating to intellectual property will also protect the interests of the public

authority itself. In broad terms, the exception will protect information that forms the basis of registered rights such as patents, trademarks and designs, unregistered rights, such as copyright, and unregistered design rights. It does not cover confidential information that does not benefit from such legal protection. The exception should only be applied, where there is a real risk that the disclosure (or further dissemination after disclosure) would seriously undermine the rights concerned. If the information would enjoy protection, even after disclosure, from the Copyright Designs and Patents Act, for instance, the case against disclosure would be considerably weaker.

- **Regulation 12(5)(d) The confidentiality of the proceedings of a public authority where such confidentiality is provided by law.** 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 entirely clear but will include a range of investigative, regulatory and other activities carried out according to a statutory scheme. Confidentiality may be provided either by explicit statutory restrictions on disclosure, by rights to a fair trial etc guaranteed by the Human Rights Act or by the common law. The effect of the public interest test is that on receipt of a request a public authority must consider whether, despite a prohibition or restriction, there is a stronger public interest in disclosure.
- **Regulation 12(5)(e) The confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.** Again confidentiality may be provided either by explicit statutory restrictions on disclosure or by the common law. The information covered by the exception will include a range of commercially sensitive information such as trade secrets, information supplied by contractors, information supplied as part of a tendering or procurement process and information held by regulators. The Commissioner has published Awareness Guidance 5 on the exemption in the Freedom of Information Act relating to commercial interests. Although the focus of the Regulations is upon information relating to the commercial interests of parties other than the public authorities, this guidance is likely to be of assistance. (The commercial interests of the public authority itself may be covered by the exception relating to intellectual property rights – see above.)
- **Regulation (12)(5)(f) The interests of the supplier of the information.** The cases envisaged are those where the information was supplied on a voluntary basis in the expectation that it would not be disclosed to a third party and where the supplier has not consented to disclosure. In effect information which is protected by the common law duty of confidence. An example of the information potentially covered by this exception is privately owned information which has been deposited in a public record office or archive.
- **Regulation 12(5)(g) Protection of the Environment.** The ultimate aim of the EIR, and the EU Directive and Aarhus Convention upon which it is

based, is to increase the protection of the environment by ensuring greater access to environmental information. It would clearly be contradictory if disclosure of information would lead to damage to the environment. An example of a disclosure which would have this effect might be information relating to the nesting sites of rare birds.

Regulation 12(6) and (7) neither confirm nor deny – This provision enables an authority to decline to confirm or deny whether the information requested exists, or is in their possession, if that confirmation or denial would involve releasing information which would adversely affect the interests listed in 12(5)(a) international relations, defence, national security or public safety. This **only** applies in respect of regulation 12(5)(a). This implies that in every other case, the authority will have to confirm whether the information requested exists or is in their possession. Regulation 12(7) confirms that in relation to 12(6), whether information exists or in the possession of the authority, is itself classified as the disclosure of information.

Regulation 12(9) Emissions – this provides that the following exceptions **do not apply** where the information in question **relates** to emissions,
12(5)(d) confidentiality of proceedings
12(5)(e) confidentiality of commercial/industrial information
12(5)(f) information voluntarily supplied
and 12(5)(g) protection of the environment .

Emissions are not explicitly defined in the Regulations, nor in the European Directive on access to environmental information (2003/4/EC). However, a commonly cited definition is found within the European Directive on Integrated Pollution Prevention and Control. An emission is defined here as the 'direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources (...) into the air, water or land'. This very broad definition captures a great deal of information. In addition, the regulations say '...relates to information on emissions...' this is again very broad terminology and suggests that information will not necessarily need to be directly concerning emissions to fall within this provision. It will be important to ensure, when considering the application of one of these four exceptions, that the information cannot be categorised as an emission.

Regulation 12(10) clarifies that for the purposes of regulation 12(5)(b) the course of justice, fair trial or inquiry of a criminal or disciplinary nature, (d) the confidentiality of proceedings and (f) information supplied voluntarily, the references to public authority shall include reference to a Scottish public authority. This is important as Scotland is adopting separate legislation in order implement access to environmental information in line with the European Directive and in general, the EIR do not apply to Scottish public authorities. However, this provision ensures that cross-border issues will not affect the practical application of the regulations.

Regulation 12(11) When applying the exceptions in Regulation 12, the authority should be aware that they may **only** withhold information which, having applied the public interest test, falls within an exception and, is not in

the public interest to release. All other information requested, which is reasonably capable of being separated, must be disclosed. This may mean that an authority could be required to redact or summarise information. Only when the authority can demonstrate to the Commissioner that the information is not capable of being separated from the exempt information will refusal to disclose on these grounds be considered acceptable.