

NOTE: This guidance is currently undergoing revision. An updated version will be published here when the revision process is complete.

Section 39 - Environmental Information

Chapter 01: The exemption under Section 39

Stating the exemption

Section 39 of the Freedom of Information Act provides that:

1. "Information is exempt information if the public authority holding it-
(a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or
(b) would be so obliged but for any exemption contained in the regulations.
2. The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection in subsection (1).
3. Subsection (1) (a) does not limit the generality of section 21(1)."

Chapter 02: General Points

2.1 The effect of this section is to ensure that requests for "environmental information" within the meaning of the Environmental Information Regulations 2004 (EIRs) are dealt with under the separate access regime set out by those Regulations. This guidance chapter provides a definition of environmental information that will help to identify which regime should apply. The Department for the Environment, Food and Rural Affairs is preparing separate guidance on the operation of the EIRs where they apply.

Regulations under section 74

Section 74, allows Ministers to make the (EIRs) which replace the Environmental Information Regulations 1992 as amended by the Environmental Information (Amendment) Regulations 1998. The replacement Regulations give effect in the UK to the provisions of Directive 2003/4/EEC on public access to environmental information. These provide for the handling of all requests for environmental information as defined in the regulations. This means that requests for environmental information may only be handled in accordance with the requirements of the EIRs.

Information may be disclosed or refused under these regulations in accordance with their provisions. All the exceptions in the EIRs are subject to a public interest test. Regulation 5 (6) of the EIRs provides that;

"Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply."

Requests for environmental information may only be decided in accordance with the EIRs. The exemption provisions of the FOI Act (or any other legislation) cannot therefore be used if the request concerns information as defined in Regulation 2, even if the FOI Act includes exemptions which may appear to be relevant or appropriate.

2.2 Environmental Information

Regulation 2 provides that :

"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-

1. 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,
2. 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 (a),
3. 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 (a) and (b) as well as measures or activities designed to protect those elements,
4. reports on the implementation of environmental legislation,
5. cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c), and
6. the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

2.3 Definition of terms

- **'Air'** should be taken to include the air within buildings and other natural and man-made structures above or below ground and in air conditioning systems.
- **'Water'** should be taken to include underground and surface waters (both natural and in man-made structures) sewage and foul water; the latter to include inland waters (i.e. rivers, canals, lakes), estuaries and seas; water table and aquifers.
- **'Soil'** should be taken to include the in situ upper layer of the mantle rock in which plants grow.
- **'Land and Landscape'** should be taken to include all land surfaces, buildings, caves and underground strata. Land covered by water is also included.
- A **'natural site'** should be taken to include areas identified by reason of their flora, fauna, geological or physiographical features (e.g. Sites of Special Scientific Interest) or general environmental quality (e.g. Areas of Outstanding Natural Beauty).
- **'Biological diversity'** should be taken to include species both living and dead.
- **'Human health and safety'** and **'conditions of human life'** include human response to physical, chemical and biological agents delivered through environmental media of water, air, land, and biodiversity etc.

- **'Built structures'** should be taken to include structures, roads and other infrastructure created by mankind and includes ancient and historic monuments.
- The **'state'** should be taken to include physical, chemical, electromagnetic, radiological and biological conditions at any moment in time.
- **'Emissions, discharges and other releases into the environment wherever they occur'** should be taken to include the direct or indirect release of substances, liquids, gases, radiation, vibrations, light or noise from individual or diffuse sources into or onto air, water or land.
- **'Measures (including administrative measures)'** can include environmental management programmes, procurement plans and programmes, permit schemes, management contracts, housing maintenance programmes, land-use planning regimes and permits, regeneration and transport development plans and proposals as well as the policies of central and local government.
- **'Activities'** should be taken to include the range of activities involved in achieving desired outcomes.
- **'Affecting or likely to affect'** includes direct and indirect effect. Strategic Environmental Assessments, Environmental Impact Assessments, sustainability appraisals and Regulatory Impact Assessments help public authorities identify the potential impacts of policies, plans and programmes, including any unintended environmental effects as well as assessing desired outcomes. Examples include schools admissions policies that may have the effect of either increasing or reducing travel to school, congestion charging schemes that may result in a greater use of public transport, policies that relate to the locations of hospitals, GP surgeries, waste and recycling facilities, and the availability of funds for crime reduction work, cultural activities and the arts, or the provision of business infrastructure.
- **'Economic analyses'** include financial analyses.

General points

2.4 Experience from the implementation of the environmental information regime has established that 'environmental information' is interpreted very broadly. The Government has treated all information relating to GM crop trials, to pesticide testing, to diseased cattle and to land-use planning (including the reasons for decisions to approve as well as to refuse planning permission) as environmental information. The definition would also include reports on the implementation of environmental legislation and any analysis resulting from an appraisal of policy, including any Regulatory Impact Assessment (RIA). It is important to note that the definition 'environmental information' can include a wide range of information which is not, in itself, about elements of the physical environment.

2.5 The definition has not however been extensively tested in the domestic or European courts, although in two cases the High Court has given the expression "information relating to the environment" a fairly wide meaning. The High Court has established that whether information is or is not environmental information is a question of fact. It held that the definition could include the source of information relating to the state of the environment, including the name, if that is necessary to assess the credibility of the information. For this reason, in the *Ibstock* case, the name of an informant who gave information about munitions dumped down a mineshaft was considered to be a part of

the environmental information that should be released¹. (note, however, that this case pre-dates the Data Protection Act 1988.) The High Court also decided that the content of a concession agreement relating to the construction of a motorway was environmental information for the purposes of the 1992 Regulations².

2.6 The European Court of Justice has also indicated that it will adopt a broad view of the definition of environmental information. A statement of views given by a countryside protection authority that was capable of influencing the outcome of development consent proceedings has been found to be environmental information³.

2.7 The Regulations apply to any information 'held by or on behalf' of a body whether or not it was obtained as a result of that body's environmental responsibilities. It includes information collected before the Regulations came into force. It thus includes information held within the body's buildings or elsewhere, held on its own behalf or on behalf of others (e.g. for consultants or private companies), and it includes information held by others on behalf of the public authority (e.g. by consultants, private companies or in archives). Environmental information includes information passed for safekeeping to the National Archives and other record offices⁴.

Geographical scope

2.8 There is no geographical restriction on this definition. The information may relate to anywhere in the world. So, for example, information on the estates of embassies or on overseas aid programme grants for schemes that impact upon the environment are included within the definition of environmental information for the purpose of these Regulations.

Format

2.9 Environmental information can be in any recorded format; written, visual, audio taped or database form. It includes information contained in documents, pictures and records, where records are taken to include registers, reports, returns, computer records and other non-documentary records. Maps will generally contain environmental information. No types of information are excluded from the potential ambit of environmental information. It includes, for example, all types of decision letters, applications, inspection reports, concession agreements, contracts, tables, databases, spreadsheets, e-mails, photographs, sketches and handwritten notes or drawings and covers opinions and advice as well as facts.

2.10 Environmental information does not, however, include non-existent information that could be created by manipulating existing information. Nor does it include information that does not exist until further research has been carried out. Similarly, it does not

¹ R v. British Coal Corporation ex parte Istock Building Products Limited [1995] JPL 836

² Case No: CO/4553/98 in High Court of Justice Queens Bench Division: R v The Secretary of State for the Environment, Transport & The Regions and Midland Expressway Limited Ex Parte Alliance Against the Birmingham Northern Relief Road and Others

³ Case No: C-321/96 - Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat, ECJ judgement of 17 June 1998 (Sixth Chamber)Pinneberg

⁴ Any information in the possession of the public authority or which is stored elsewhere and is held by a natural or legal person on behalf of, or solely in connection with services provided to a public authority is 'held' by it. Therefore the EIR, unlike the FOI Act covers information that a public authority holds on behalf of a third party. Regulation 3

include information destroyed in accordance with established records management procedures (but note that the Regulations, like the FOI Act, create an offence of altering records to avoid disclosure).

Accuracy

2.11 Environmental information includes information relating to the way relevant information was obtained, and any guidance about its potential accuracy or potential to mislead. Public authorities are therefore advised to consider the accuracy of any information they hold. Information could be based upon opinion rather than fact. If so, this should be made clear. In addition, information could be inferred, dependent on forecasts, or derived from samples. It could come from a third party and be of unspecified reliability or selected by a supplier in order to argue a particular point of view. In cases where validation could be costly, bodies would be well advised to protect themselves by issuing a disclaimer addressing issues to be taken into account in interpreting information released to the public - this could include its accuracy, its source and any other known limitations that would need to be taken into account in interpreting it. For example, where the information requested is derived from a very small statistical sample, it may be appropriate to make clear that this is the case and that it would be unwise to rely upon it.

Historical information

2.12 There is no time limit on historical data. If environmental information currently exists it is covered by the Regulations, no matter when the information was created or gathered.

Chapter 03: When to use the exemption under section 39

Type of exemption

3.1 Section 39 is a mandatory exemption which over-rides all the provisions in the FOI Act relating to the handling of requests and refusals. The question of whether information is or is not environmental information is a question of fact. This means that once it has been established as a matter of fact that the request relates to environmental information the request must be considered in accordance with the requirements and procedures of the EIRs. It is not open to public authorities to choose which regime to apply.

If only part of the information requested is environmental information, the request may need to be dealt with under both regimes, with the FOI Act regime continuing to apply to that information which does not fulfil the definition of environmental.

The public interest

The same public interest test is applied by both the Act and the Regulations.

- If the information is environmental, the request must be processed under EIR.
- If the information may be sensitive, consider whether exemptions under EIR may apply.
- If a relevant exemption applies, then the public interest test is applied.