

Code of Practice on the discharge of  
the obligations of public authorities  
under the Environmental Information  
Regulations 2004  
(SI 2004 No. 3391)

February 2005



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**Code of Practice on the discharge of the obligations of public authorities  
under the Environmental Information Regulations 2004  
(SI 2004 No. 3391)**

**Issued under Regulation 16 of the Regulations,  
February 2005**

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**FOREWORD TO THE CODE OF PRACTICE**

**INTRODUCTION**

1. The Code of Practice, to which this is a foreword, is prepared in accordance with Regulation 16 of the Environmental Information Regulations 2004 (EIR) and provides guidance to public authorities as to the practice that would be desirable for them to follow in connection with discharging their functions under the EIR. However, if public authorities do not follow the Code's recommendations it will be difficult for them to meet their obligations under the Regulations.

2. The definition of ‘public authority’ for the purposes of the EIR is wider than that under section 3(1) of the Freedom of Information Act 2000 (FOIA). Those bodies subject to both the FOIA and the EIR will need to consider the Code provisions relevant to the appropriate regime (this Code or the FOIA section 45 Code). Public authorities covered only by the EIR need only consider this Code of Practice on access to information.

Recommendations for EIR public authorities on record keeping, management and destruction are set out in the FOIA section 46 Code of Practice.

3. This Code applies where a request for environmental information is received, as defined in the EIR. Any request for other information should be handled in accordance with the FOIA and other access regimes such as the Data Protection Act as appropriate. Where a request relates to information, part of which is environmental and part of which is not, then each part of the request should be handled in accordance with the relevant legislation.
4. This foreword does not form part of the Code itself.
5. An access to environmental information regime has been in place since 1992, in the form of the Environmental Information Regulations 1992, as amended by the Environmental Information (Amendment) Regulations 1998, and also the Environmental Information Regulations (Northern Ireland) 1993 and 1998. The introduction of replacement Regulations in England, Wales and Northern Ireland (and of similar regulations in Scotland) enables compliance with the UK’s commitments under the UNECE Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (the “Aarhus” Convention), and with EU 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 (Recital 1, Directive 2003/4/EC).
6. The Government is committed to greater openness in the public sector. FOIA and EIR will further this aim by helping to transform the culture of the public sector to one of greater openness, enabling members of the public to scrutinise the decisions of public authorities more closely and ensure that services provided by the public sector are more efficiently and properly delivered. Conformity with the Code will assist this.
7. The Code is a supplement to the provisions in the EIR. It is not a substitute for legislation. Public authorities should seek legal advice as considered necessary on general issues relating to the implementation

of the EIR or its application to individual cases. They should also refer to the Government's Guidance on the EIR and to any guidance issued by the Information Commissioner.

8. The provisions of the EIR granting a general right of access came into force on 1<sup>st</sup> January 2005 and the Commissioner's powers to handle appeals and issue guidance will also take effect on 1<sup>st</sup> January 2005.
9. This code of practice outlines to public authorities the practice that it would, in the opinion of the Secretary of State, be desirable for them to follow in connection with the discharge of their duties under the Environmental Information Regulations 2004 (EIR).
10. The aims of the Code are to:
  - facilitate the disclosure of information under the EIR by setting out good administrative practice that it is desirable for public authorities to follow when handling requests for information including, where appropriate, the transfer of a request to a different authority;
  - to set out good practice in proactive dissemination of environmental information;
  - to protect the interests of applicants by setting out standards of advice and assistance that should be followed as a matter of good practice;
  - to ensure that third party rights are considered and that authorities consider the implications for access to environmental information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party;
  - to encourage, as matter of good practice, the development of effective review and appeal procedures of decisions taken under the EIR.
11. Although there is a power under EIR for the Secretary of State to issue the Code, the provisions of the Code are not legislation. However, authorities are expected to abide by the Code unless there are good reasons, capable of being justified to the Information Commissioner, why it would be inappropriate to do so.
12. The requirements for dealing with requests for environmental information are contained in the EIR and public authorities must comply with these provisions at all times. However, Regulation 16 applies section 47 of the FOIA, which places a duty on the Information Commissioner to promote good practice by public authorities ("good practice" includes compliance with the provisions of the Code), and section 48 of the FOIA which enables the Information Commissioner to issue a "practice recommendation" to a public authority if it appears to

him that the practice of the authority does not conform with that proposed in the Code.

13. Public authorities and others are encouraged to contact the Information Commissioner's Office for advice and assistance about their duties under the Regulations. The Information Commissioner can provide valuable, detailed assistance to help organisations achieve compliance through the development of good practice. Further, Regulation 9 of the EIR places a duty on public authorities to provide advice and assistance to applicants and potential applicants. Authorities will have complied with this duty in any particular case if they have conformed with the Code in relation to the provision of advice or assistance in that case.

### **MAIN DIFFERENCES BETWEEN REQUIREMENTS UNDER THE FOIA AND EIR THAT MUST BE REFLECTED IN THIS CODE**

14. The main differences are:

- i. the range of bodies covered by the EIR is wider to allow for consistency with the EC Directive, and includes public utilities and certain public private partnerships and private companies, such as those in the water, waste, transport and energy sectors;
- ii. requests for environmental information need not be in writing;
- iii. the information held by a public authority includes holding information held on behalf of any other person;
- iv. the duty to provide advice and assistance requires a public authority to respond within 20 working days when requesting more particulars from the applicant;
- v. the time limits for responding to a request apply to ALL requests including those involving consideration of the public interest. Regulation 7 allows for an extension from 20 to 40 working days for complex and high volume requests;
- vi. no exception is made for requests that will involve costs in excess of the 'appropriate limit' within the meaning of the Fees Regulations made under sections 9, 12 and 13 of the FOIA. Except in specified limited circumstances, ALL requests must be dealt with and any charges imposed must be reasonable;
- vii. there are differences in the exceptions available under EIR and the exemptions available under FOIA;
- viii. the requirement for public authorities to have in place a complaints and reconsideration procedure to deal with

representations alleging non-compliance with the EIR is mandatory.

Each of these differences is explained in greater detail in the EIR Guidance that can be found at <http://www.defra.gov.uk/environment/pubaccess/>. The Guidance also explains the scope of environmental information and provides further information on terminology, including “emissions” and “held by or for”.

## **DUTY TO PROVIDE ADVICE AND ASSISTANCE**

15. Regulation 9 of the EIR places a duty on public authorities to provide advice and assistance to applicants. A public authority is deemed to have complied with this duty in any particular case if it has conformed with this Code in relation to the provision of advice and assistance in that case. The duty to assist and advise is enforceable by the Information Commissioner. If a public authority fails in its statutory duty, the Commissioner may issue a decision notice under section 50, or an enforcement notice under section 52 of the FOIA.
16. Public Authorities should not forget that other Acts of Parliament may be relevant to the way in which authorities provide advice and assistance to applicants or potential applicants, e.g. the Disability Discrimination Act 1995 and the Race Relations Act 1976 (as amended by the Race Relations (Amendment) Act 2000).

## **COPYRIGHT**

17. Public authorities should be aware that information that is disclosed under the EIR might be subject to copyright protection. If an applicant wishes to use any such information in a way that would infringe copyright, for example by making multiple copies, or issuing copies to the public, he or she would require a licence from the copyright holder. HMSO have issued guidance, which is available at [http://www.hmso.gov.uk/copyright/managing\\_copyright.htm](http://www.hmso.gov.uk/copyright/managing_copyright.htm) or by telephone on 01603 621000.
18. [http://www.hmso.gov.uk/copyright/guidance/gn\\_19.htm](http://www.hmso.gov.uk/copyright/guidance/gn_19.htm) explains more fully the distinction between the supply of information held by public authorities under Freedom of Information legislation and the re-use of that information and those circumstances where formal licensing is required.
19. Reports on the environment may be commissioned by public authorities from outside organisations. In general, public authorities should seek to ensure that the copyright of any such reports rests with them. If not, it should be made clear to the outside organisation that under the terms of the EIR, the public authority will likely be making copies of their reports, or parts thereof, available to the public in

response to EIR applications, and it may not be solely environmental information contained in reports that will be disclosed.

## **PRACTICE RECOMMENDATIONS**

20. The Information Commissioner has a duty to enforce compliance and promote good practice. The following (described in paragraphs 21-24) are the principal tools at his disposal. The Information Commissioner (the Commissioner) is issuing guidance for public authorities on dealing with requests for environmental information, which may be helpful in setting out in more detail the Commissioner's enforcement powers.
21. In accordance with the powers provided in section 74 of the FOIA, Regulation 16(5) of EIR provides that the general functions of the Commissioner under sections 47-49 of the FOIA shall apply under EIR. Under section 47 of the FOIA, the Information Commissioner has a duty to promote the observance of this Code by public authorities. If it appears to the Commissioner that the practice of a public authority in the exercise of its functions under the EIR does not conform with that proposed in the Code of Practice, he may give to the authority a recommendation, under section 48 (known as a "practice recommendation"), specifying the steps which should, in his opinion, be taken to promote such conformity. Unless the public authority appeals against the decision of the Commissioner the public authority must comply with the recommendation of the Commissioner. There is no statutory time limit for this; it will depend on the circumstances of the case but the Commissioner can specify a particular time limit for compliance in the recommendation in question, and will take into consideration the measurements of Articles 9(1) and 9(4) of the Aarhus Convention in setting any time limit.
22. A practice recommendation must be given in writing and must refer to the particular provisions of the Code of Practice with which, in the Commissioner's opinion, the public authority's practice does not conform. A practice recommendation is simply a recommendation and cannot be directly enforced by the Commissioner. However, a failure to comply with a practice recommendation may lead to a failure to comply with the EIR. Further, a failure to take account of a practice recommendation may lead to an adverse comment in a report to Parliament by the Commissioner.

## **INFORMATION NOTICES**

23. Regulation 18 of the EIR applies the enforcement and appeal provisions of FOIA to environmental information. The Information Commissioner determines whether the practice of a public authority conforms to this Code. Where an application has been received under section 50 of the FOIA, under section 51 of the FOIA, he may serve an

information notice on the authority requiring it to provide information relating to its conformity with the Code.

24. Under the provisions of section 54 of the FOIA, if a public authority fails to comply with an information notice the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice. The court may then inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

## **CODE OF PRACTICE**

### **ON THE DISCHARGE OF THE OBLIGATIONS OF PUBLIC AUTHORITIES UNDER THE ENVIRONMENTAL INFORMATION REGULATIONS 2004 (SI 2004 No. 3391)**

The Secretary of State, after consulting the Information Commissioner, issues the following Code of Practice pursuant to Regulation 16 of the Environmental Information Regulations 2004.

Laid before Parliament on 16 February 2005 pursuant to Regulation 16 of the Environmental Information Regulations.

#### **I TRAINING**

1. All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided.
2. Requests for environmental information may come in the form of verbal requests which has specific implications for training provision.
3. In planning and delivering training, authorities should be aware of other provisions affecting the disclosure of information such as the FOIA, the Data Protection Act 1998, and anti-discrimination legislation (such as the Disability Discrimination Act).

#### **II PROACTIVE DISSEMINATION OF INFORMATION**

4. Under Regulation 4, a public authority has a duty to progressively make the information available to the public by electronic means which are easily accessible, and to take reasonable steps to organize information relevant to its functions with a view to active and systematic dissemination.

5. Consideration should be given to making web sites accessible to all and simple to use, so that information can be readily found, for example by enabling search functions and having an alphabetical directory as well as tree structures. Information should not be 'buried' on a site.
6. Public authorities should consider how to publicise applicants' rights to information, for example as part of general information on services provided by the authority.
7. When public authorities are considering what information to disseminate proactively, they should not restrict themselves to the minimum requirements as listed in the Directive. For example, consideration should be given to disseminating frequently requested information, which will reduce individual requests for such information in the future.

### **III THE PROVISION OF ADVICE AND ASSISTANCE TO PERSONS MAKING REQUESTS FOR INFORMATION**

8. The provision of advice and assistance to persons making requests for environmental information differs from that provided to those making general requests for information under FOIA:
  - requests for environmental information need not be in writing;
  - EIR contains no equivalent to the 'appropriate limit' exemption under section 12 of the FOIA; and
    - the duty to provide advice and assistance under EIR requires the public authority to request that the applicant provide more particulars within 20 working days of the request where a request is formulated in too general a manner.
9. Every public authority should be ready to provide advice and assistance, including but not necessarily limited to the steps set out below. This advice and assistance should be available to those who propose to make, or have made requests and help them to make good use of the Regulations. The duty on the public authority is to provide advice and assistance "so far as it would be reasonable to expect the authority to do so".
- 10.. Appropriate assistance might include:
  - providing an outline of the different kinds of information that might meet the terms of the request;

- providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority; and
  - providing a general response to the request setting out options for further information that could be provided on request.
  - advising the person that another person or agency (such as a Citizens Advice Bureau) may be able to assist them with the application or make the application on their behalf.
11. This list is not exhaustive and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.
12. Public authorities should publish their procedures for dealing with requests for information. These procedures may include what the public authority's usual procedure will be where it does not hold the information requested. (See also VI - "Transferring requests for information"). It may also alert potential applicants to the fact that the public authority may want to consult other public authorities and/or third parties in order to reach a decision on whether the requested information can be released. Potential applicants may wish to be notified before any transfer of request or consultation is made. If this is the case, the published procedure should therefore alert them to say so in their applications. (See also VII - "Consultation with third parties".) The procedures should include an address or addresses (including an e-mail address where possible) to which applicants may direct requests for information or for assistance. A telephone number should also be provided and where possible the name of an individual who can provide assistance. These procedures should be referred to in the authority's publication scheme where it has one.
13. Public authorities may wish to consider publishing their procedures for reviewing refusals for requests. In addition, public authorities will also wish to consider providing information about other access regimes (where appropriate), provide guidance about frequently requested information, and provide information relating to previous disclosures.
14. Staff in public authorities in contact with the public should bear in mind that not everyone will be aware of the EIR or the FOIA and they should draw the legislation to the attention of potential applicants who appear unaware of them. Any question which cannot be dealt with on the spot should be treated as a request for information.
15. A request for information under the EIR can be in any form and need not be in writing. However, for a response to be made by the public authority it will need contact details to either provide the information or refuse the request. A request in writing includes a request transmitted by electronic means. Where a person finds it difficult to specify very

clearly the nature of their request, the public authority should ensure that appropriate assistance is given to enable that person to make a request for information. For example, if a request is formulated in too general a manner the public authority shall, as soon as possible and not later than 20 working days after receipt of the request, ask the applicant to provide more particulars and shall assist them in doing so. However, Public Authorities should be aware of the dangers of over-bureaucratising procedures when responding to requests for routine information.

### **Clarifying the Request**

16. Where the applicant does not describe the information sought in a way which would enable the public authority to identify or locate it, or the request is ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest or that he or she will be treated differently if he or she does. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought. Public authorities should also be prepared to explain why they are asking for additional information. The 20 day time limit stops running when a request for clarification is issued.
17. In seeking to clarify what is sought, public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.
18. If, following the provision of such assistance, the applicant is still unable to describe the information requested in a way that would enable the authority to identify and locate it, the authority is not expected to seek further clarification. The authority should disclose any information relating to the application that has been successfully identified and found that it can disclose. It should also explain to the applicant why it cannot take the request any further and provide details of the authority's complaints procedure and where applicable the applicant's rights under section 50 of the FOIA (see "Complaints Procedure" in section XII below).
19. Where the applicant indicates that he or she is not prepared to pay any charge requested, the authority should consider whether there is any information that may be of interest to the applicant that is available free of charge.

20. There is no EIR equivalent to the ‘appropriate limit’ under section 12 of the FOIA. A public authority is expected to deal with all requests for environmental information. However, cost may be relevant when considering whether to apply the exceptions relating to ‘manifestly unreasonable’ or ‘too general’. . Where the applicant makes a request that is clear but which involves the provision of a very large volume of information, and specifies a cost ceiling, the authority should consider providing an indication of what information could be provided within the cost ceiling.
21. There are no special provisions for dealing with requests that appear to be part of an organised campaign. Such requests are to be expected and dealt with in the usual way. Repeatedly requested information may be best made available by means of a publication scheme. Being part of a campaign does not necessarily make a request ‘manifestly unreasonable’.

### **Form and Format**

22. Regulation 6 allows for the applicant to be given the information available in a particular form or format unless there is another reasonable approach to supplying the information. A public authority should be flexible, as far as is reasonable, with respect to form and format, taking into account the fact, for example, that some IT users may not be able to read attachments in certain formats, and that some members of the public may prefer paper to electronic copies.
23. Although there is no specific reference in the Regulations to the provision of information in the form of a summary or digest, a request for environmental information may include a request for information to be provided in the form of a digest or summary. This should generally be provided so long as it is reasonably practical to do so, taking into account the cost. Many applicants will find a summary more useful than masses of data, and this should be taken into account when considering proactive dissemination.

## **IV TIMELINESS IN DEALING WITH REQUESTS FOR INFORMATION**

24. Requests for information must be responded to within 20 working days. The 20 day time limit can be extended to 40 working days if the complexity and volume of the information requested means that the 20 working days deadline cannot be complied with. Unlike FOIA, there is no provision to further extend the time limit for cases where the public interest has to be balanced.
25. Public authorities are required to comply with all requests for information as soon as possible and they must not delay responding

until the end of the 20 working day period under Regulation 5(2)(b) if the information could reasonably have been provided earlier.

26. Public authorities must aim to make all decisions as soon as possible and in any case within 20 working days, including in cases where a public authority needs to consider where the public interest lies. However, it is recognised there will be some instances where, because of the complexity and volume of the information requested it will not be possible to deal with an application within 20 working days. In such cases a public authority is expected to inform the applicant of this as soon as possible and within 20 working days, and should, be as specific as possible in their response to the applicant indicating when they will receive the information and the reasons for the delay, The 20 days will halt at the point that the authority issues a request for payment of an advance charge, and commences again at the point payment is received, Authorities must in any case comply with or refuse the request within 40 working days. Authorities may find it helpful to formulate a policy about how to apply the provision on making a time extension.
27. It is of critical importance for the body receiving a request to identify the request for environmental information in the first instance, and then to meet the timetable. Monitoring the timeliness of responses is easiest where requests for information are in writing. Where requests for environmental information are made otherwise than in writing (e.g. by telephone or in person) public authorities will need a system for recording the request. This may, for example, involve making a written note of the request and asking the applicant to confirm its accuracy.

## **V CHARGES**

28. The EIR does not require charges to be made but public authorities have discretion to make a reasonable charge for environmental information. However, if they are providing access to a public register, or if the applicant examines the information at the offices of the public authority or in a drop in library or other place which the public authority makes available for that examination, access to the information shall be free of charge. When making a charge, whether for information that is proactively disseminated or provided on request, the charge must not exceed the cost of producing the information unless that public authority is one entitled to levy a market-based charge for the information, such as a trading fund.
29. Where a public authority proposes to make a charge, a schedule of charges should be made available (including, e.g. a price list for publications, or the charge per unit of work which will be incurred to meet a request). When an advance payment is required, the applicant should be notified and the public authority should invite the applicant to say whether they wish to proceed with the request, or their request, or

part of it, or whether the request may be met in some other way (for example, by visiting the offices of the public authority to inspect the information or by making use of more easily identifiable data). Where a requirement for advance payment has been notified, the period between the notification and the receipt of payment will be disregarded in determining the response times for meeting requests (Regulation 8(5)). The request will remain active for up to 60 working days from the date of notification. If no payment is received during this time the request lapses but the applicant may make a new application at any time. When a fee payment is received the public authority should release the information promptly and within the appropriate time limit.

30. Public authorities should ensure that any charges they make are reasonable, and in accordance with the EIR and the guidance. <http://www.defra.gov.uk/environment/pubaccess/>

## **VI TRANSFERRING REQUESTS FOR INFORMATION**

31. A request whether in writing or received in any other form can only be transferred where a public authority receives a request for environmental information that it does not itself hold and which is not held by any other person on its behalf. If a public authority in receipt of a request holds some of the information requested, a transfer can only be made in respect of the information it does not hold but is held by another public authority.
32. Public authorities should bear in mind that "holding" environmental information under the EIR includes holding a copy of a record produced or supplied by another person or body and, unlike FOIA, it extends to holding a record on behalf of another person or body. Where information is held on behalf of another person or body it will be appropriate to consult on whether the environmental information requested should be supplied unless the outcome can be predicted with reasonable confidence. (See also VII – Consultation with Third Parties). (Special provisions apply to the National Archives and other public record holding bodies under Regulation 17 including the Public Records Office Northern Ireland).
33. The authority receiving the initial request must always deal with that request in accordance with the EIR. When the authority receiving the original request does not hold all the information requested it must still deal with the request for information it does hold. The authority must also advise the applicant that it does not hold part of the requested information, or all of it, whichever applies. However, before doing this, the authority must be certain as to the extent of information requested that it holds itself. If information is freely available via a third party's public register, an authority may point to that register as part of

providing advice and assistance, but this does not alter the authority's responsibility to respond to the request, for example if the applicant requests the information in the format in which it is held by the authority.

34. If the authority to whom the initial request was made believes that some or all of the information requested is held by another public authority, the authority should consider what would be the most helpful and expeditious way of assisting the applicant with his or her request. In most cases this is likely to involve:

- contacting the applicant and informing him or her that the information requested may be held by another public authority;
- suggesting that the applicant re-applies to the authority that is believed to hold the information;
- providing him or her with contact details for that authority;
- if the public authority receiving the request and the authority holding the information are publicly perceived as indelibly linked, explaining to the applicant the difference between the two authorities.

35. However, in some cases the authority to whom the original request is made may consider it to be more appropriate to transfer the request for information that it does not itself hold to another authority. In such cases, the authority should always consult with the other authority with a view to ascertaining whether it does hold the information and, if so, whether it should transfer the request to it. A request (or part of a request) should not be transferred if there is any reason to doubt that the second authority holds the information. When consulting a second authority the identity of the person requesting the information should not be disclosed unless that person has consented.

36. Before transferring a request for information to another authority, the authority should firstly consider whether a transfer is appropriate. If a transfer is appropriate the authority should first obtain the consent of the applicant who may have valid reasons for not wishing their request to be transferred to a third party. If consent is given the applicant should always be provided with sufficient details concerning the date and destination of transfer.

37. Where a request or part of a request is transferred from one public authority to another, the receiving authority must comply with its obligations under the EIR in the same way as it would for a request that is received direct from an applicant. The time for complying with such a request will be measured from the day that the receiving authority receives the request.

38. All transfers of requests should take place as soon as is practicable, and the applicant should be notified as soon as possible once this has been done by issuing a refusal letter under Regulation 14.
39. Where a public authority is unable either to advise the applicant which public authority holds, or may hold, the requested information or to facilitate the transfer of the request to another authority (or considers it inappropriate to do so) it should consider what advice, if any, it can provide to the applicant to enable him or her to pursue his or her request. In this event the public authority should also issue a refusal letter in accordance with Regulation 14. The refusal letter should explain that the public authority does not hold the information.

## **VII CONSULTATION WITH THIRD PARTIES**

40. Public authorities must always remember that unless an exception is provided for in the EIR in relation to any particular information, they will be obliged to disclose that information in response to a request. Authorities are not obliged by the EIR to consult in respect of information which may be wholly or jointly owned by third parties, but may make a commitment to do so.
41. All EIR exceptions are subject to the public interest test; unlike FOIA, the EIR contains no 'absolute' exceptions. Moreover, lack of consent of a third party does not necessarily preclude disclosure, as in each case the public interest must be balanced. If the public interest in disclosing the information outweighs the public interest in withholding it, the information must be disclosed. (Information on emissions must be disclosed in accordance with Regulation 12 and personal data must be considered in accordance with DPA requirements).
42. A public authority may consider that consultation is not appropriate where the cost of consulting with third parties would be disproportionate because, for example, many third parties are involved or there has been earlier consultation on the status and sensitivity of the information. It should be noted that in this context 'third party' is specifically a person or body affected by the information that is the subject of the consultation. In such cases the authority should consider what is the most reasonable course of action for it to take in light of the requirements of the EIR, the potential effects of disclosure, and the public interest.
43. Where the consent of a number of third parties may be relevant and those parties have a representative organisation that can express views on behalf of those parties the authority may, if it considers consultation appropriate, consider that it would be sufficient to consult that representative organisation. If there is no representative organisation, the authority may consider that it would be sufficient to consult a representative sample of the third parties in question.

44. The fact that the third party has not responded to consultation does not relieve the authority of its duty to disclose information under the EIR, or its duty to reply within the time specified in the EIR.
45. In all cases, it is for the public authority that received the request, not the third party (or representative of the third party) to weigh the public interest and to determine whether or not information should be disclosed under the EIR. A refusal to consent to disclosure by a third party does not in itself mean information should be withheld, although it may indicate interests involved. Note that in the case of public records transferred to a public record office there is a requirement to consult (see Regulation 17).

## **VIII ENVIRONMENTAL INFORMATION REGULATIONS AND PUBLIC SECTOR CONTRACTS**

46. When entering into contracts public authorities should refuse to include contractual terms that purport to restrict the disclosure of environmental information held by the authority and relating to the contract beyond the restrictions permitted by the EIR. Public authorities cannot “contract out” of their obligations under the Regulations. This means that they cannot sign a contract that gives an undertaking to a private firm (or anyone else) that they will not comply with their obligations under the Regulations. Unless an exception provided for under the EIR is applicable in relation to any particular information and the balancing of public interest favours refusal, a public authority will be obliged to disclose that information in response to a request, regardless of the terms of any contract. Where personal data is concerned this will be done in accordance with the requirements of Regulation 13 and the Data Protection Act 1998.
47. When entering into contracts with non-public authority contractors, public authorities may be under pressure to accept confidentiality clauses so that information relating to the terms of the contract, its value and performance will be exempt from disclosure. Public authorities should reject such clauses wherever possible and explain the relevance of the public interest test. Where, exceptionally, it is necessary to include non-disclosure provisions in a contract, an option could be to agree with the contractor a schedule of the contract that clearly identifies information that should not be disclosed. But authorities will need to take care when drawing up any such schedule, and be aware that any restrictions on disclosure provided for could potentially be overridden by their obligations under the EIR, as described above.
48. In any event, public authorities should not agree to hold information ‘in confidence’ which is not in fact confidential in nature. Authorities should be aware that certain exceptions including those for commercial

confidentiality, and voluntarily supplied data, are not available when the information requested is about emissions into the environment.

49. Any acceptance of confidentiality provisions must be for good reasons and capable of being justified to the Commissioner.
50. It is for the public authority to disclose information pursuant to the EIR, and not the non-public authority contractor, unless that contractor received the request and is, itself, a body subject to the EIR. However, a public authority may have concerns regarding contractual matters and not wish the contractor to release information without consulting them. In these cases, contracts or other working arrangements should be made to ensure appropriate consultation about the handling of requests for information exchanged between the parties. Any such constraints should be drawn as narrowly as possible and according to the individual circumstances of the case. Apart from such cases, public authorities should not impose terms of secrecy on contractors.
51. With contracts in existence prior to EIR 2004 being enacted, if an authority receives a request for information whose release would mean an actionable breach of confidence, the authority should refer to the guidance issued by the Information Commissioner:  
<http://www.informationcommissioner.gov.uk>

Public authorities in this position should seek their own legal advice as appropriate.

52. Under the EIR, some contractors, including public utilities that have been privatised, are subject to the requirements of the EIR.  
<http://www.defra.gov.uk/environment/pubaccess/guidance/index.htm>

## **IX ACCEPTING INFORMATION IN CONFIDENCE FROM THIRD PARTIES**

53. A public authority should only accept information from third parties in confidence if it is essential to obtain that information in connection with the exercise of any of the authority's functions and it would not otherwise be provided. Even in these circumstances it will be necessary to explain the relevance of the public interest test and the fact that there could be circumstances in which the public interest in disclosure equals or outweighs the adverse effects of disclosure on a third party. In addition, public authorities should not agree to hold information received from third parties "in confidence" which is not confidential in nature (paragraph 47). Again, acceptance of any confidentiality provisions must be for good reasons, capable of being justified to the Commissioner. (Special provisions apply to archives (paragraph 32).

## X CONSULTATION WITH DEVOLVED ADMINISTRATIONS

54. Public authorities should consult with the relevant devolved administration before disclosing information provided by or directly concerning that administration, except where:

- the views of the devolved administration can have no effect on the decision of the authority (for example where there is no applicable exception so the information must be disclosed under EIR); or
- where the outcome may be predicted with reasonable confidence and in the circumstances, consultation would be too costly or time consuming.

55. Similarly, the devolved administrations should consult with the relevant non-devolved public authority before disclosing information provided by or directly concerning that authority, except where the views of the public authority can have no effect on the decision whether to disclose, or where consultation would be disproportionate in the circumstances.

## XI REFUSAL OF REQUEST

**Advice on withholding of information is covered in Chapter 7 of the Guidance.**

56. Where a request for information is refused or partially refused in accordance with an exception, the EIR requires that the authority notify the applicant which exception has been claimed and why that exception applies. Public authorities should not unless the statement would involve the disclosure of information which would itself be withheld in accordance with the EIR merely paraphrase the wording of the exception. They should state clearly in the decision letter the reason why they have decided to apply that exception in the case in question. The EIR also requires authorities, when withholding information, to state the reasons for claiming that the public interest in maintaining the exception outweighs the public interest in disclosure. Public authorities should specify the public interest factors (for and against disclosure) that they have taken into account before reaching the decision (again, unless the statement would involve the disclosure of information which would itself be withheld in accordance with the EIR). They should also include details of the complaints procedure

57. For monitoring purposes public authorities should keep **a record of all** applications where either all or part of the requested information is withheld, the basis on which it was withheld (including the exception or exceptions which were applied), and, where relevant, a full explanation of how the public interest test was applied and the factors which were

considered. Public authorities should also keep copies of redacted information, together with a copy of the information that the applicant actually received in case of a subsequent complaint. Senior managers in each public authority will need this information to determine whether cases are being properly considered and whether the reasons for refusals are sound. The information will also be required if the applicant appeals against the refusal, or refers the case to the Information Commissioner. This could be done by requiring all staff that refuse a request for information to forward the details to a central point in the organisation for collation. Details of information on complaints about applications which have been refused (see XII - “Complaints procedure”) could be collected at the same central point.

## **XII REVIEW AND COMPLAINTS PROCEDURES**

58. Each public authority must have a review procedure in place. This procedure may be used by any person who considers that their request has not been properly handled or who are otherwise dissatisfied with the outcome of the consideration of their request and where the issue is such that it cannot be resolved informally in discussion with the official dealing with the request. Information relating to the complaints procedure should be included in an authority’s publication scheme if it has one, or made readily available elsewhere. Under Regulation 18, the enforcement and appeal provisions of the FOIA will apply in respect of a complaint made after 1st January 2005.
59. Any decision made in relation to a request under the EIR that contains a refusal must be in writing and public authorities are obliged under Regulations 14 (5) to notify the applicant of his or her right of complaint. They should provide details of their own complaints procedure, including how to make a complaint and inform the applicant of the right to complain to the Commissioner under section 50 of the FOIA if he or she is still dissatisfied following the authority’s review. However, as a matter of good practice authorities should provide details of their complaints procedure when responding to all requests. It is for the applicant to decide whether they are content with the response they receive; they may have concerns that they wish to pursue in circumstances where the public authority claims to have fully complied with their request.
60. Any written reply from the applicant (including one transmitted electronically) expressing dissatisfaction with an authority’s response to a valid request for information should be treated as a complaint, as should any written communication from a person who perceives the authority is not complying with its publication scheme where it has one. These communications should be handled in accordance with the authority’s review procedure pursuant to Regulation 11, even if the applicant does not state his or her desire for the authority to review their decision or the handling of their application.

61. The complaints procedure should be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the EIR, including decisions taken about where the public interest lies. It should be possible to reverse or otherwise amend decisions previously taken. Complaints procedures should be clear and not unnecessarily bureaucratic. They should be capable of producing a prompt determination of the complaint.
62. In all cases, complaints should be acknowledged and the complainant should be informed of the authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the applicant and explain the reason for the delay. The complainant should always be informed of the outcome of his or her complaint.
63. Authorities must consider each complaint, decide whether they have complied with their requirements under EIR and respond to the complainant within 40 working days from the time when the complaint was received.
64. Records should be kept of all complaints and of their outcome. Authorities should have procedures in place for monitoring complaints and for reviewing, and if necessary amending procedures for dealing with requests for information where such action is indicated by more than occasional reversals of initial decisions.
65. Where the outcome of a complaint is that information should be disclosed which was previously withheld, the information in question should be disclosed with immediate effect.
66. Where the outcome of a complaint is that the procedures within an authority have not been properly followed by the authority's staff, the authority should apologise to the applicant. The authority should also take appropriate steps to prevent similar errors occurring in future.
67. Where the outcome of a complaint is that an initial decision to withhold information is upheld or is otherwise in the authority's favour, the applicant should be informed of his or her right to apply to the Commissioner and be given details of how to make an application for a decision on whether the request for information has been dealt with in accordance with the requirements of the EIR. As failure to deal with a complaint promptly may be grounds for complaint to the Information Commissioner, authorities should set out details of the timescale for dealing with complaints in their complaints procedure, which should be made readily available.