

**Ministry of Defence Access to Information
Guidance Note**

Version 6

June 2009

Guidance Note E7: EIR exceptions

Detailed guidance on EIR exceptions can be found on the DEFRA website

<http://www.defra.gov.uk/corporate/opengov/eir/guidance/index.htm>

Read also **Guidance Notes B3 EIRs and B4 Applying the EIR**

EIR exceptions

1. While the FOI Act contains “exemptions” which allow the withholding of information under that Act, EIRs make use of “exceptions” in respect of withholding environmental information. The following summarises the EIR exceptions.

1.1 While a public authority should apply a presumption in favour of disclosing environmental information, the EIRs make provision for a number of exceptions to the duty to disclose such information. However, there are fewer exceptions under EIRs in respect of the release of environmental information than exist under the FOI Act in respect of the release of non-environmental information.

1.2 There is a presumption under the regulations that environmental information must be released, unless there are reasons to withhold it.

1.3 Regulation 12 lists the exceptions under which a public authority can refuse to disclose information. All the exceptions are subject to a public interest test. Those weighing the public interest of whether to release or withhold information should interpret the exceptions very carefully.

A request for information can be refused (or part of the information withheld) if:

- Information is not held (then there is a duty to refer the request on)
- The request is manifestly unreasonable
- The request is too general (after fulfilling duty to advise and assist)
- The request is for unfinished documents or data (in which case estimated time for completion must be given)
- The request is for internal communications

A public authority may also refuse to disclose information or withhold part of it in order to protect the following:

- Confidentiality of proceedings
- International relations / public security / defence
- The course of justice and right to fair trial
- Commercial confidentiality
- Intellectual property rights
- Personal / voluntary data
- Environmental protection

If information relates to emissions, a public authority cannot refuse to disclose it on grounds of confidentiality of proceedings, commercial confidentiality, personal/ voluntary data or environmental protection.

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A fuller explanation may be found in Chapter 7 ("Exceptions") of the more detailed guidance provided by DEFRA at: <http://www.defra.gov.uk/corporate/opengov/eir/guidance/full-guidance/index.htm>

Public Interest Test

2. It is important to note that none of the exceptions is absolute. For all of these exceptions, the public authority can only refuse to disclose environmental information **if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.** There should always be a presumption in favour of disclosure, and, where there is a balance between the two public interests, information should be disclosed.

Environmental information relating to emissions

3. Where environmental information to be disclosed relates to information on emissions, a public authority cannot refuse to disclose that information under any of the following exceptions:

- the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- the interests of the person who provided the information where that person –
 - was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - did not supply it in circumstances such that that or any other public authority is entitled apart from EIRs 2004 to disclose it; and
 - has not consented to its disclosure; or
- the protection of the environment to which the information relates.

3.1 Emissions include discharges and other releases into the environment such as:

- (i) The direct or indirect release of substances, gases, vibrations, light or noise from individual or diffuse sources into or onto air, water or land;
- (ii) any trade effluent information;
- (ii) emissions from aerials that may be held by a public authority;
- (iii) residues from veterinary medicines if these are released into the environment; and
- (iv) pollen from contained areas.

Neither confirm nor deny

5. A public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect international relations, defence, national security or public safety and would not be in the public interest. It should be noted that, for the purposes of a "neither confirm nor deny" response, whether information exists and is held by the public authority is itself the disclosure of information. See Guidance Note *D7 The duty to confirm or deny*.

Separation of environmental information in order to release it

6. Wherever possible, refused information must be separated out or redacted, and the remaining part of any environmental information requested should be made available. The effect of this requirement can often be to reduce the scope of the refusal to a few paragraphs, or sentences, or even to a letter heading and address which can be blacked out or removed.

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Whether material is or is not “incapable” of being separated is a simple and practical test. Refused information will rarely be incapable of being separated from other information for the purpose of making the latter available. The test does not relate to resources available in a public authority to undertake the separation. Every effort should be made to redact refused information from a document or other source of information etc, in order to disclose the environmental information therein.

Personal data/information

7. Environmental information which contains personal data should not be disclosed if it contravenes the data protection principles or those specific sections of the Data Protection Act 1998 (DPA 98). However, the fact that personal information that has been requested contains personal data will not necessarily mean that this part of the request must be refused. As with other exceptions, it may be possible to separate the personal data from the other information requested, or to provide a summary that excludes any personal data, where the latter cannot be disclosed. Disclosure of personal data is permissible if there is no breach of the data protection principles or the other conditions.

7.1 If the information requested contains the personal data of a person *other than the applicant* then disclosure of that data must follow the requirements set out in Annex B. If you can provide the remainder of the information (e.g. by redacting the personal data or summarising the information such that the personal data is excluded), then you should do so. You can then seek to clarify with the applicant whether the personal data is required, and, if so, why.

7.2 If the information requested includes personal data of the applicant, then that part of the information requested should be treated as a subject access request under s.7 of DPA 98. It may be that the applicant is unaware that the request will include their own personal data. You should point out to the applicant as soon as possible that their request includes their personal data, and that this aspect of their request will be treated separately as a subject access request.

7.3 Before considering the release of any environmental information which also contains personal data, you should refer to the relevant sections of DPA 98 for further interpretation of this aspect of the EIRs 2004

Right of appeal

8. All of the exceptions require careful consideration before they are cited. An applicant who is refused environmental information under one (or more) of the exceptions has a right of appeal, first using the MOD’s internal complaints procedure, and subsequently to the Information Commissioner.

Approval to withhold information

9. If you consider that there are grounds to withhold environmental information, or to refuse to confirm or deny its existence, MOD policy requires that this decision be authorised at 1* civilian or military level. Any relaxation of this policy must be agreed in advance and documented in local procedures. The justification for this decision under EIRs 2004 must be fully documented in case of an appeal by an applicant to the Information Commissioner.

9.1 If a request for environmental information is refused, the refusal must:

- be made in writing;
- be made as soon as possible and no later than 20 working days after the date of receipt of the request;
- specify the reasons not to disclose the information requested, including (a) any exceptions relied on in EIRs 2004 and (b) the matters MOD considered in reaching its decision with respect to the public interest test or, where these apply, to data protection issues; and

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- inform the applicant (i) that he may make representations to MOD and (ii) of the enforcement and appeal provisions of the EIRs.

9.2 In cases where a refusal is being made on the grounds that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data, MOD should also specify – if known – the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.