Guidance Note B4: Applying the EIR 2004

If you are answering a request for environmental information, you must also read Guidance Notes B3: Background to the EIR and E7: EIR exceptions

Differences from the FOI Act

1. **There is no requirement under the EIRs for requests to be in writing.** You must make reasonable provision to handle verbal requests from the public for environmental information and be prepared to make a written note of the request and date it, and seek the applicant's confirmation that the note accurately reflects their request. Technically environmental RFIs could be handed in or made to staff on duty at site entry points or reception desks; in these cases it may be possible at the time to note the information requested, the details of the applicant, and that the nature of the information requested has been clearly understood by both the applicant and the member of staff receiving it. Alternatively, and preferably, advise the applicant of an appropriate MOD contact, and asked them to submit their RFI by e-mail or telephone during office hours. Common sense should be applied in these circumstances, depending on the nature, subject and possible complexity of the RFI. This information should be logged on the Access to Information Toolkit (AIT) as soon as possible, either by using the Toolkit directly, or by passing the details to the contacts designated in local instructions.

2. **The time available for public authorities to respond** to a request is slightly different. Although, as with FOI, the Regulations require that requests for information be complied with 'as soon as possible and in any event within 20 working days of receipt of the request', the FOI Act permits public authorities to take longer than 20 working days to reach a decision on whether the public interest in disclosure outweighs the exemption in question. The EIRs do not. Public authorities may only take longer than 20 working days to respond to a request if the complexity or volume of the information requested makes it impracticable for it to either comply or make a decision to refuse the request. In such cases the period for responding to the applicant may be extended to 40 working days. See Guidance Note B3 regarding provisions for "stopping the clock" in respect of requests made under EIRs 2004.

3. **The grounds for potentially refusing to disclose the information** requested are different from the FOI Act. In part, this is due to the exemptions being described differently, but it is also crucial that officials appreciate that all the grounds for refusing access to environmental information are subject to a public interest test. See Guidance Notes E1: Withholding information and E7: EIRs exceptions.

4. **Charging for information.** The Regulations, like the FOI Act, do not require a public authority to levy a charge for providing access to information. However, the EIRs go further than the Act and stipulate that no charge may be made for inspection of public registers of environmental information held by an authority, or for examination - at the place which the public authority makes available - of the information requested. See Guidance Note D9: Charging. When an authority is able to make a charge, whether for information proactively disseminated, or provided on request, that charge must not exceed the cost of providing the information unless that public authority is entitled to levy a market-based charge for the information. Provision exists for authorities, who are subject to the EIRs **and who are also subject to the Fees Regulations made under sections 9 and 12 of the FOI Act**, to apply the same fee structure up to the 'appropriate limit', to requests to provide environmental information, taking into account all the circumstances of the request, so long as that fee would, in their view, be reasonable for the supply of that information.

5. **Crucially, there is no 'appropriate limit' on the cost of dealing with a request under the EIRs, meaning that an authority cannot refuse to process a request on grounds similar to those found in section 12 of the FOI Act**.

Exceptions

6. The Defra EIR guidance; http://www.defra.gov.uk/corporate/opengov/eir/index.htm makes clear that exceptions should be interpreted narrowly and a refusal should only be made where we are satisfied that it is in the public interest to do so. The presumption should always be for disclosure of the information, where it is in the public interest to do so. See Guidance Note E7: EIR exceptions

6.1 Requests for information may be refused under certain limited circumstances. These include information that, if released, would adversely affect:

- International relations
- Defence
- Public safety
- National Security
- Internal communications within a public authority
- The confidentiality of proceedings of public authorities, where such confidentiality is protected by law
- The course of justice
- Intellectual property rights
- Commercial or industrial confidentiality

6.2 There are also exceptions relating to:

- Voluntary supplied information
- Personal data, particularly if the disclosure may breach an individual's rights under the Data Protection Act.
- There is also a special exception intended to protect the environment to which the information relates.

6.3 Requests for information may also be refused where they are:

- manifestly unreasonable and could place a substantial and unreasonable strain on the resources of the organisation
- vexatious
- formulated in too general a manner (although in such cases you should discuss with the applicant whether the request can be formulated in a way that will enable the required information to be supplied See Guidance Note D3: Duty to Provide Advice and Assistance

6.4 It is important to note that none of the exceptions are absolute. For all of these exceptions, MOD 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, disclosure should follow. See Guidance Note E4: Applying the Public Interest Test.

6.5 Where a request is refused, the reasons for this must be explained to the applicant in writing as fully as possible and their right of representation and reconsideration should always be explained. The reasons for refusal must be robust and explained in accordance with the requirements of the Regulations.

Step by Step Guide to Dealing with Borderline EIR/FOI requests for information

7. It will not always be clear from a request which regime the information falls to be considered under:

- On receipt of an information request, the recipient should look at the request carefully to determine exactly what information is being requested. If it is unclear the recipient should seek clarification from the applicant.
- The recipient should then check whether the information is held, whether it is already publicly available and whether it can be released without further consideration.
- If the information cannot be released without considering a refusal, the recipient should consider if the information is environmental information. To determine this the recipient should look at the definition in Regulation 2 to see whether it fits the definition. For example, any of the factors, states, measures, reports mentioned in 2 a) to f) and the relationship of the information to the environment and the degree of closeness of that relationship. If the connection with the environment is remote it is unlikely to fall within the definition of environmental (see section on Proximity/Remoteness below).
- If it is clear at this point that the request is an EIR or FOI request, the correct exceptions/exemptions should be applied together with the public interest test, where applicable.
- If the recipient is still unsure as to whether the information is environmental, as defined by the Regulations, the authority should use the regime it considers to be the most appropriate. If the authority remains unsure, and the request is very borderline, it may be advisable to consider using both regimes. The public authority can respond by stating that to the extent that the information is "environmental information" it is exempt under the EIRs and to the extent that it is not "environmental information" it is exempt under FOI stating the reasons and the public interest arguments. Where the information in question is covered by one or more exemptions (under FOI) or exceptions (under EIR) and the public interest favours withholding the information, the application of the public interest test will almost always lead to the same conclusion under either regime. What is important is that the public authority demonstrates that it has carried out its duty in providing the information requested, or of refusing to disclose the information after proper consideration of the public interest test. This approach can also be used for mixed EIR and FOI requests.

Proximity/remoteness to the definition of environmental information

8. The concept of proximity/remoteness requires that the information requested should be sufficiently connected to the environment to be covered by the definition of environmental information. The requested information should be tested to see that the precise wording of the relevant part of Regulation 2 is met. It is not enough for the information to appear to be "environmental". For example in the case of information falling under Regulation 2(c), (e) and (f) the specific information requested must have a direct effect on the environmental elements and substances in 2 (a) and 2(b) before it can be considered as environmental.

8.1 The principle of remoteness is based on the Judgement from the European Court of Justice on breaches of the rules on labeling of foodstuffs produced from genetically modified organisms. It is the only relevant case law in this area. The Court ruled that in this case the purpose of the marketing controls was to remove obstacles to trade in GMO products and to inform the consumer. So the information at issue, which included information about products that were improperly labelled and producers that were penalised for improper marketing, was not environmental information. For the full guidance and examples of borderline cases please go to: http://www.defra.gov.uk/corporate/opengov/eir/guidance/pdf/boundaries.pdf