

Protection of the environment (regulation 12(5)(g))

Environmental Information Regulations

Contents

Introduction.....	2
Overview.....	2
What the EIR say	3
The scope of the exception	3
The elements of the environment	4
Protection of the environment	5
Adverse effect.....	5
Public interest test.....	6
Public interest in the exception.....	7
Public interest in disclosure.....	7
Other considerations.....	8
Neither confirm nor deny	8
More information	8

Introduction

The Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.

An overview of the main provisions of the EIR can be found in the [Guide to the Environmental Information Regulations](#).

This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and to promote good practice.

This guidance explains to public authorities what information is covered by the exception in regulation 12(5)(g) and how the public interest test applies to it.

Overview

Regulation 12(5)(g) provides an exception from the duty to make environmental information available if it would harm the protection of the environment to do so.

'The environment' in this context has a wide meaning, as shown by the list of the elements of the environment in regulation 2(1)(a).

To refuse a request for environmental information under the exception in regulation 12(5)(g), public authorities will need to establish:

- that the information in question relates to the aspect of the environment that is being protected;
- how and to what extent the protection of the environment would be affected; and
- that the information is not on emissions

Even when the exception is engaged, public authorities must carry out the public interest test.

- There is a public interest in avoiding harm to the environment, but the weight of this argument will depend on the nature of the harm.
- There is a general public interest in making environmental information available.
- The balance of the public interest will depend on the circumstances of the case.
- Public authorities can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosure.

The exception does not allow public authorities to neither confirm nor deny that they hold information.

What the EIR say

Regulation 12(5)(g)states:

12.—(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(g) the protection of the environment to which the information relates.

As with all EIR exceptions, this is a qualified exception. Even if the exception is engaged, a public authority must go on to apply the public interest test set out in regulation 12(1)(b). It can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.

Regulation 12(9) provides that the exception is not available for information on emissions.

The scope of the exception

The purpose of the exception is to allow a public authority to refuse to disclose environmental information if it would harm the protection of the environment to do so.

In general terms, making environmental information available to the public ultimately contributes to a better environment, by increasing people's awareness and understanding of environmental issues. Parliament introduced the EIR in order to implement the provisions of Directive 2003/4/EC. This principle is recognised in the Directive. Our guidance on [How the exceptions and the public interest test work in the Environmental Information Regulations](#) discusses this further.

However, there may be situations when disclosing the information would actually have an adverse effect on the environment. The Directive says that a request may be refused if disclosure would adversely affect “the protection of the environment to which such information relates, such as the location of rare species” (Article 4(2)(h)). So if, for example, a public authority holds information about the breeding site of a rare bird species and disclosing the location of the site would expose the site to interference or damage, then the exception may be relevant because disclosure could adversely affect the protection of the environment.

The elements of the environment

The exception refers to the protection of the environment. What is meant by ‘the environment’ is indicated by Regulation 2(1)(a) which lists:

“... 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”

This definition is wide-ranging and the phrase “such as” implies that it is not an exhaustive list of the elements that make up the environment. Our guidance document on [What is environmental information](#) provides a further explanation of what is covered by the elements of the environment listed here.

The list of the elements of the environment in regulation 2(1)(a) does not refer to animals, plants or other living organisms specifically but rather to “biological diversity and its components”. As far as living organisms are concerned, this implies that protection of the environment in regulation 12(5)(g) is about the protection of biodiversity, that is, living organisms as part of the environment and their interrelation with the other elements of the environment. It would include the protection of a badger sett or the location of a rare plant, in so far as they are part of the natural environment of a particular area. In this context, protection of the environment does not mean preventing cruelty to individual animals unless there is an effect on biological diversity. For example, protecting the welfare of domestic pets is not about the protection of the environment because it does not affect biological diversity, whereas a measure to control the trade in endangered species does relate to the protection of the environment.

The term biological diversity does not only refer to naturally occurring organisms, as the list specifically includes genetically modified organisms.

The definition is not solely concerned with the natural environment. It includes the landscape, and the landscape is affected by human activity. Man-made structures such as archaeological sites and historic buildings could also fall within the definition in as much as they are part of the landscape; the system for listing buildings of architectural or historic importance is an example of the protection of the environment.

Protection of the environment

The exception is concerned with an adverse effect on the "protection" of the environment, which means maintaining the quality of the environment. Furthermore, the adverse effect must be on the protection of the environment "to which the information relates". Therefore, the information in question must relate to the element of the environment that is being protected; it cannot simply be any information that would have some effect on environmental protection if a public authority disclosed it. If, for example, the exception is used to withhold information because disclosure would adversely affect the protection of the breeding site of a protected species, the information must itself relate to that breeding site.

Adverse effect

Our guidance on [How the exceptions and the public interest test work in the Environmental Information Regulations](#) explains what is meant by adversely affect and the test for whether a particular interest would be adversely affected, in the context of the EIR.

Under regulation 12(5)(g) a public authority may refuse to disclose information "to the extent that" its disclosure would adversely affect environmental protection. The phrase "to the extent that" means the authority must consider what exactly the adverse effect would be and how the protection of the environment would be affected by disclosure. A key question to ask is, whether disclosing the information would actually enable a person to do something that would harm the elements of the environment in question?

Harm could result, for example, simply from the effect of a large number of people going to look at a sensitive site, or alternatively from an individual deliberately stealing or interfering with a protected species. Disclosing the exact location, with a full grid

reference, of a rare plant may enable someone to steal or damage it. However, if the actual information held by the authority is at such a general level that it is not possible to pinpoint the exact location, it may be that disclosure would not adversely affect the protection of the plant.

The system for designating Sites of Special Scientific Interest (SSSIs) is part of the protection of the environment, but maps showing their location are published on the National Biodiversity Network Gateway (<http://data.nbn.org.uk>). Therefore, disclosing the location of these sites would not adversely affect the protection of the environment; rather, publicising this information is part of the process of protecting the environment. On the other hand, disclosing the location of a proposed site before the formal designation process begins could mean that the site is damaged or interfered with before it receives legal protection, and so in that case there could be an adverse effect on the protection of the environment.

Public authorities wishing to use this exception to withhold environmental information must therefore consider carefully how and to what extent disclosure would adversely affect the protection of the environment. A good example of how to carry out this assessment is the guidance produced by the Countryside Agencies and published by the National Biodiversity Network (www.nbn.org.uk) on how the exception can apply to information about sensitive environmental features¹. Public authorities should also bear in mind that the exception does not only apply to information on sensitive sites, but can also apply to other types of environmental information where disclosure would adversely affect the protection of the environment.

Public interest test

Even when a public authority has decided that regulation 12(5)(g) is engaged, it still has to carry out the public interest test. The authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

¹ Countryside Agencies' Open Information Network, [The 'Environmental Exception' and access to information on sensitive features](#), 2007.

Public interest in the exception

It is in the public interest to avoid harming or causing any adverse effect to environmental protection. As noted above, the EIR implement EU Directive 2003/4/EC which says (in Recital 1) that "increased public access to environmental information and the dissemination of such information contribute ... eventually, to a better environment". Given that the Directive and the EIR are intended to contribute to a better environment, there is inevitably a public interest in avoiding doing something that would harm the environment. Therefore, the fact that regulation 12(5)(g) is engaged at all means that there is some public interest in not disclosing the information.

However, this does not mean that the public interest in maintaining this exception always outweighs that in favour of disclosure. To begin with, regulation 12(2) says that "a public authority shall apply a presumption in favour of disclosure". Furthermore, to say that disclosure would adversely affect the protection of the environment means that it is more probable than not (ie there is a more than 50% chance) that there will be some adverse effect. How severe this effect will be, and how extensively and frequently it occurs, will depend on the circumstances of the case. If there would be some adverse effect but it would not be particularly severe or would have a limited effect, then the weight of the public interest in the exception is less than it would otherwise be.

Public interest in disclosure

There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.

The weight of this interest will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually inform public debate.

There may of course be other factors in favour of disclosure, depending on the particular circumstances of the case. For example, accountability for spending public money, the number of people affected by a proposal, any reasonable suspicion of wrongdoing and the need to present a full picture to aid public understanding.

The public authority must consider the relative weight of the public interest arguments both for maintaining the exception and for disclosure, in all the circumstances of the case.

Our guidance document on [How exceptions and the public interest test work in the Environmental Information Regulations](#) includes further advice on identifying relevant public interest arguments and attaching weight to those arguments.

Other considerations

This guidance relates only to the EIR. If the information is not environmental information, the EIR are not relevant and public authorities will instead need to consider exemptions under FOIA.

Neither confirm nor deny

The exception does not allow public authorities to neither confirm nor deny (NCND) whether they hold information. Under the EIR, a public authority can only refuse to confirm or deny whether it holds information if it would adversely affect the interests in regulation 12(5)(a) (international relations, defence, national security of public safety) and would not be in the public interest. The EIR differ in this respect from FOIA, where most exemptions include NCND provisions.

More information

This guidance has been developed drawing on ICO experience. Because of this, it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please [Contact us: see our website](#) www.ico.org.uk.