

The EIRs

Part III: the exceptional Regulations

In the third of a series of articles looking at the EIRs, Paul Gibbons, aka FOIMan, discusses the exceptions from the duty to disclose

In the previous two articles of this series on the Environmental Information Regulations 2004 ('EIRs'), we've explored why the EIRs exist, how to decide whether they are relevant, and the extent to which they differ from the Freedom of Information Act 2000 ('FOIA'). One of the key similarities between the EIRs and FOIA is the fact that requests will occasionally need to be refused. Indeed, for most practical purposes, where information is being disclosed, it will not matter which legislation applies. It is when there is a feeling that information might need to be held back that it becomes really important to apply the correct rules.

Just as FOIA contains exemptions that justify withholding information, the EIRs contain 'exceptions' — the same thing by a different name. If the requested information falls under the definition of environmental information set out at Regulation 2 of the EIRs, and the public authority believes that it should be withheld, then the relevant exception(s) will need to be applied.

In this piece, we consider firstly some general considerations when applying exceptions. Then we will look at each of the available exceptions in turn, highlighting their main features.

Exceptions

There are effectively three different kinds of exception in the EIRs.

There are what might be termed 'practical refusal' exceptions. These include provisions to refuse a request when the information is not held, when the request is 'manifestly unreasonable', and where a request is too general. There are class-type exceptions covering personal data, 'unfinished' or 'incomplete' data, and 'internal communications'. Finally, there are exceptions which apply where the disclosure of the information would 'adversely affect' specified circumstances. This last is very similar to the concept of 'prejudice' in many of the FOIA exemptions.

Aside from one, all of the exceptions are set out at Regulation 12. At 12(1) we are told that:

'a public authority may refuse to disclose environmental information

requested if—

*(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.'*

This means that all of the exceptions, except for those for personal information, are subject to a public interest test (and in fact, there are circumstances where the public interest will need to be considered in relation to personal data too). This is another way that the EIRs differ from FOIA; the latter makes provision for some information to be withheld without considering the public interest through the availability of absolute exemptions.

One apparent further difference between FOIA and the EIRs in this respect is that Regulation 12 goes on to say at (2):

'A public authority shall apply a presumption in favour of disclosure.'

FOIA contains no such statement, and there has been speculation as to what difference this makes in terms of the interpretation of exceptions and exemptions. In practice, although it has often been remarked upon, decisions have rarely if ever turned upon this point. Early decisions commented that whilst there wasn't a 'presumption in favour of disclosure' in FOIA, there was an 'assumption' (*Office for Government Commerce v Information Commissioner*, [2008] EWHC 737 (Admin) at para. 71).

There hasn't been much clarity on this matter, with one Tribunal commenting that it was "not minded to speculate on what, if any, difference exists between the so-called default setting attributable to the disclosure of information requested under FOIA on the one hand, and on the other the express presumption set out in the EIR." (*Friends of the Earth v The Information Commissioner and the Exports Credits Guarantee Department*, EA/2006/0073, 20th August 2007, para. 53). It does however, act as a pointer that the approach to exceptions in the EIRs is different to that taken in respect of exemptions under FOIA. As we explored earlier in this series, the EIRs are based on a European Directive (2003/4/CE).

That Directive states that:

'Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal.'

Practical refusal exceptions

Just as with FOIA, requests may be refused if information is not held. Unlike FOIA, the EIRs provide a specific exception to be applied in these circumstances. The exception is worded:

'it does not hold that information when an applicant's request is received...'

This means that a public authority will not be obliged to disclose information that is created or acquired after the request is received. As discussed in the last article in this series, the definition of 'held', whilst worded differently, has been interpreted in line with the accepted definition under FOIA.

Requests can also be refused when they are 'manifestly unreasonable'. Arden LJ commented in the Court of Appeal that the difference between 'manifestly unreasonable' in the EIRs and 'vexatious' in FOIA is 'vanishingly small' (*Dransfield v IC & Devon CC; Craven v IC & DECC* [2015] EWCA Civ 454). Essentially, if a public authority considers a request to be vexatious (in line with the approach taken in *Dransfield*), and it is asking for information on the environment, then the exception at Regulation 12(4)(b) can be applied. The same decision confirmed that this exception can be applied in circumstances where the cost of compliance is excessive. This is important as there is no 'appropriate limit' in the EIRs, so the relevant regulations governing cost limits under FOIA will not apply.

The only way to justify refusal of expensive requests is to argue that they are manifestly unreasonable.

The Information Commissioner suggests that in calculating staff time, the formula of £25 for staff time, taken from the Fees Regulations (full title 'Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI No. 3244 Regulations'), can be used, but that the £600/£450 limits will not routinely apply as they would under FOIA. The Commissioner's guidance stresses that the level at which a request for environmental information might become 'manifestly unreasonable' will differ depending on the circumstances, including its size and the resources available to an authority. As with FOIA, it will be a good idea to keep

records of how the decision to refuse on these grounds has been reached, together with any calculations involved.

One question that arises is: what if the process of establishing whether or not the information is environmental is itself manifestly unreasonable? In other words, how are we to know which legislation to apply if we are arguing that it would take too long to read through the information concerned? This was addressed by Wikeley J. in the Upper Tribunal decision on *Craven*, who suggests that public bodies should take the following approach in their responses:

'to the extent that the information is environmental information, the exception at 12(4)(b) will apply...to the extent that it is not, the provision at section 14 of FOIA will apply.'

Under FOIA, where a request is unclear, the authority will not have to provide any information until an applicant has provided clarification. The EIRs similarly provide that

requests may be refused where a 'request is formulated in too general a manner'. The exception will not apply though unless the authority has provided advice and assistance in line with Regulation 9. It is also worth noting that 'too general' is not interpreted as meaning 'too much' (authorities would be advised to apply the exception for manifestly unreasonable requests in these latter circumstances).

As with other exceptions, the 'practical refusal' exceptions are subject to a public interest test. This is somewhat odd when it comes to the consideration of whether information is held, or indeed whether a request is too general. Either information is held or it isn't; either it is too general or it is not. It is usually safe to ignore the concept of public interest when applying these exceptions in practice. In the case of 'manifestly unreasonable' requests, the Commissioner explains that the public interest is an integral part of the consideration of whether a request is vexatious or unreasonable. In effect, the public authority is considering whether the public interest in transparency and accountability is outweighed by the public interest in ensuring the proper use of public resources.

Personal information

The only exception not set out at Regulation 12 instead appears at Regulation 5(3). This is the equivalent of the exemption at section 40(1) of FOIA, and has the effect of removing information relating to the applicant from the right of access. As with FOIA, the information remains available to the applicant not via the Regulations, but instead through making a subject access request under data protection law.

Where a request is for personal data relating to a third party, the exception at Regulation 12(3) will apply. Specifically, this indicates that personal data of data subjects other than the applicant should not be disclosed 'otherwise than in accordance with Regulation 13'. Regulation 13 effectively duplicates sections 40(2)-(4)

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FOIA, meaning that personal data cannot be disclosed if:

- the Data Protection Principles would be breached;
- an individual has exercised their right to object to the disclosure under data protection law, and the public interest in not disclosing outweighs that in disclosing it; or
- the information would be exempt from disclosure to the data subject if they made a subject access request.

In respect of the latter, and unlike under FOIA, this is also subject to a public interest test. Where the above applies to the confirmation of whether or not information is held, the authority may refuse to confirm or deny its existence.

Other class-type exceptions

These exceptions bear similarity to the exemptions designed to protect a 'safe space' in FOIA. The first of them, at Regulation 12(4)(d), protects 'material which is still in the course of completion...unfinished documents [and] incomplete data'. It is commonly compared to section 22 — the exemption that applies under FOIA to information intended for future publication.

The fact that a document forms part of a wider ongoing process does not mean that it falls under the exception. It is the status of the document itself that matters. Conversely, the fact that a final document has been published does not prevent drafts of the final publication from being covered by Regulation 12(4)(d). The Commissioner indicates that the need to protect a safe space around policy discussions will be a valid public interest argument in relation to this exception.

Given the emphasis on restrictive use of exceptions, the wording of Regulation 12(4)(e) is perhaps surprising. The term 'internal communications' could — and does — cover a multitude of sins (and doubtless

also virtues). It applies to email correspondence and letters, as well as minutes, notes and recordings of meetings and telephone calls. An early decision, *Friends of the Earth v IC and Export Credits Guarantee Department* (EA/2006/0073, 20th August 2007, established that 'internal' covered communications between, as well as within, government departments (including executive agencies). The Commissioner clarifies that this does not include so-called 'arms-length' bodies. It also won't include government correspondence with other public bodies, as DEFRA found when it tried to withhold communications with the Mayor of London about air quality (FER0272686 DEFRA). Communications with external consultants will not be considered an 'internal communication' unless they are 'embedded' within the organisation (*East Devon Councils v ICO*, EA/2014/0072, 5th May 2015). Whilst the exception is nonetheless broad, its effect is tempered by the public interest test, and it is often on this basis that decisions are overturned by the Information Commissioner and Tribunals.

Adverse effect

The equivalent of the prejudice-based FOIA exemptions can be found at Regulation 12(5) of the EIRs. Information can be refused 'to the extent that its disclosure would adversely affect' a series of listed circumstances. This is clearly different to the similar exemptions in FOIA, which are worded 'would or would be likely to prejudice'. This means that there is straight away a higher hurdle for these exceptions.

To understand the meaning of 'would adversely affect' though, we can turn to a familiar case from the world of FOIA, *Hogan v IC and Oxford City Council* (EA/2006/0026 and 0030, 17th October 2006). This case established the right approach to prejudice-based exemptions, and adverse affect can be understood as meaning the same as 'prejudice'. It also suggests how 'would' should be interpreted: in this context it means 'more likely than not'.

If we now turn to the individual exceptions listed at Regulation 12(5), the first (12(5)(a)) covers international relations, defence, national security and public safety. This covers broadly the same ground as the exemptions at sections 24, 26, 27 and 38 FOIA.

An illustration of the difficulty in successfully using these exceptions can be found in *Latimer v IC & DEFRA* (EA/2015/0112, October 2015), where the government tried to withhold correspondence with the European Commission on the grounds that relations with the Commission would be damaged. The Tribunal noted the Commission's emphasis on transparency, and concluded that this was unlikely.

In another case relating to DEFRA's badger cull plans, DEFRA and Natural England found their argument that property would be damaged by protesters fell foul of the First-Tier Tribunal's ('FTT') view that the exception would only apply where the safety of individuals was threatened (*DEFRA & Natural England v IC & Dale*, EA/2014/0094, 0160, 0234, 0311, para 80). Some public bodies may be mildly reassured that, just as with FOIA, national security concerns can be certified by a minister.

Regulation 12(5)(b) covers:

'the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.'

This exception is widely recognised as encompassing legal advice and criminal proceedings. However, it can also cover disciplinary matters (see *Ben Turner v IC & Cheshire East Borough Council*, EA/2014/0009, November 2014). In the case described above involving the European Commission, the FTT eventually ruled that the correspondence could be withheld under Regulation 12(5)(b) on the grounds that disclosure would reveal the UK government's position in a case where its compliance with European legislation was in question.

There are very few examples of the exception for intellectual property at 12(5)(c) being successfully utilised. The Commissioner's common view is that intellectual property rights can best be protected by enforcing those rights. The Scottish Information Commissioner ('SIC') usefully explored its appropriate use in *Mr V Jordan v Scottish Environment Protection Agency*, (049/2016, 3rd March 2016). The SIC set out the following test:

- is the material protected by intellectual property rights?
- would the intellectual property right holder suffer prejudice as a result of disclosure? (Note that infringement of intellectual property rights alone is not enough to satisfy this.)
- could the potential harm be prevented by enforcement of intellectual property rights?

In *Jordan*, the Ordnance Survey and the Centre for Ecology and Hydrology had provided data that formed part of the basis of the requested dataset, and successfully demonstrated that they would suffer financially if the data were released by the Agency outside of their licence conditions. They argued that it would be impractical to enforce their rights, as disclosure through the EIRs would result in wide-ranging infringement.

The exception for confidential proceedings at Regulation 12(5)(d) will only cover the most formal proceedings of public bodies, such as closed council committee meetings. More commonly used is the exception protecting 'the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.' (Regulation 12(5)(e)). This is usually seen as the equivalent of section 43 FOIA (trade secrets/prejudice to commercial interests), though it also covers similar ground to section 41 (information provided in confidence). The established test (see, for example *Higham v IC & Cornwall Council* (EA/2015/0078), 27th September 2016) for this exception is:

- is the interest commercial or industrial?
- is the confidentiality protected in law? (this might be through a

contract, statute or common law)

- is a legitimate economic interest being protected?
- would disclosure (more likely than not) adversely affect the economic interest?
- does the public interest in withholding the information outweigh the public interest in disclosing it?

In recent years, public bodies have been reminded that the exception cannot be applied blanket-like to documents. In *Borough of Southwark v IC & Lend Lease* (Elephant & Castle) Ltd (EA/2013/0162) and several subsequent cases, the FTT has refused to accept that 'viability assessments' provided by housing developers – their justification for departing from affordable housing quotas – can be completely withheld on the basis of Regulation 12(5)(e). Some authorities have even moved to proactively publishing such assessments routinely. The lesson, as so often with both FOIA and EIRs, is that a line by line analysis of these documents will be necessary.

Very often, in circumstances where Regulation 12(5)(e) applies, the following exception at 12(5)(f) will also apply. This is designed to protect the interests of a person who provided information, but only where they were not under any legal obligation to provide it, the authority is not otherwise entitled to disclose it, and the disclosure would adversely affect the interests of the provider. Its aim is to avoid individuals and others from being inhibited in responding to public consultations and such like, but it can also apply to commercial arrangements.

Finally, where disclosure of information would itself harm the environment, there is, as might be expected, protection for it. Regulation 12(5)(g) can be brought to bear in circumstances where, for instance, the revelation of the location of a protected species' habitat would put that species at risk.

Emissions

The last four of these exceptions are further restricted. They will not apply where the information relates to emissions. The Information Commissioner

explains that emissions are an uncontrolled by-product of an activity, impacting on an element of the environment. For example, in *G.M. Freeze v Information Commissioner and DEFRA* (EA/2010/0112, 8th March 2011), the FTT found that the sowing of genetically modified crops did not count as an emission as it was a deliberate act.

Conclusion

Over the course of this series, we have explored the scope and application of the EIRs. We have found that whilst they share much with the thinking and approach behind FOIA, there is also plenty which is unique to the Regulations. The exceptions in particular illustrate that the Regulations are their own peculiar creature, and not to be subsumed by the expectations that FOIA has fostered.

Exceptions in the EIRs need to be interpreted restrictively. It is reasonable to conclude, as many have done before, that they are, if anything, harder to successfully apply than their FOIA equivalents. They should be understood and applied with a thorough understanding of the relevant factors. An understanding of FOIA's application is helpful in interpreting the EIRs, but practitioners should always refer to the Commissioner's guidance and other sources of assistance when handling requests for environmental information.

Finally, it is worth noting once more that the EIRs are important because their subject matter affects everyone. Whether the information relates to planning applications by a neighbour or the redevelopment of an entire town, ensuring people can access it is a key part of managing our impact on the environment in which we live.

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