

Author: Phil Michaels, Head of Legal, Friends of the Earth

**This guide covers the essential information you need to know about the Environmental Information Regulations 2004 and gives guidance on what you need to do in normal situations to apply it. It cannot, however, replace the need to take legal advice, as appropriate, on the proper application of the Act.**

### **Currency of the guide**

This guide is being published shortly before the EIR 2004 come into force on 1 January 2005. We hope that it will be useful over a two to three year period. However, many of the ambiguities in the regulations will probably be resolved over that period as a result of decisions by the Information Commissioner ('the commissioner'), the Information Tribunal ('the tribunal') or the courts. Local authorities should seek to keep abreast of those decisions. Up-to-date information should be available on the commissioner's website ([www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk))

This guide is based on the latest version of the regulations as laid before parliament on 28 October 2004.

**All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, or stored in a retrieval system of any nature, without the prior permission of the copyright holder.**

**Copyright Local Government Association November 2004  
Published by LGA Publications, the Local Government Association,  
Local Government House, Smith Square, London SW1P 3HZ.  
Tel 020 7664 3000, fax 020 7664 3030.**

**Price £20  
£10 to member local authorities**

**Copies can be purchased from LGconnect, LGA's information centre  
Tel 020 7664 3131, email [info@lga.gov.uk](mailto:info@lga.gov.uk), or on-line at [www.lga.gov.uk](http://www.lga.gov.uk)  
Please quote LGA code EN025 and send cheque (made payable to Local Government Association) with order.**

**LGA code EN025  
ISBN 1 84049 449 2**

## **preface**

This guide should be read alongside the LGA's earlier publication delivering freedom of information: a practical guide to the Freedom of Information Act 2000 ('the FOIA guide'). At the date of that guide the Environmental Information Regulations 2004 ('EIR 2004' or 'the regulations') had not been published so issues relating to 'environmental information' were only dealt with briefly. The publication of the regulations highlights the need for separate guidance.

This guide has been written in conjunction with Friends of the Earth. Friends of the Earth has over 200 local groups in England, Wales and Northern Ireland, and has long experience of requesting access to environmental information from local authorities and of some of the pitfalls for local authorities in responding to these requests.

The LGA would like to thank Phil Michaels, Head of Legal at Friends of the Earth for writing this guide, and to those who kindly commented on drafts, in particular Veronica Calderbank, Legal Services Unit Manager at Ellesmere Port and Neston Borough Council.

---

### **Purpose of the guide**

This guide aims to put local authorities in a better position to meet their various obligations under the EIR 2004. It should also help councils to use the regulations to request environmental information from others.

Most of the guide is intended to explain the regulations. We have also drawn on Friends of the Earth's experience in this area by including some of their suggestions as to good practice for local authorities to follow. These are identified as 'practical tips' in the guide.

This guide is not a substitute for official guidance being prepared by Defra and by the Information Commissioner's Office (ICO). It is also not a substitute for a careful reading of the regulations and the Freedom of Information Act.

**Local authorities should be aware that the regulations impose important new legal obligations on local authorities and that failure to comply with these may lead to legal and other sanctions by the Information Commissioner, the Information Tribunal and ultimately the courts.**

## foreword

Environmental protection is one of the most pressing concerns of our time. Safeguarding the environment is not something that should be left to governments, but is the responsibility of us all. It is therefore, vital that people have the opportunity to participate in decisions that effect the environment, not just on a global or national level, but also on a local level.

In order for participation to be effective, it is vital that those who wish to participate have access to accurate, up-to-date and complete environmental information. It is for this reason that the Environmental Information Regulations will create a statutory right to access environmental information.

This is not a new concept. In the UK, local authorities have been subject to Environmental Information Regulations since 1992. However, the new regulations expand the rights of applicants and increase the responsibilities, transparency and accountability of public authorities. By providing people with as much environmental information as possible, whether proactively or through requests, local authorities have the opportunity to engage people more fully in the decision-making process; this will enable better decisions to be made. Decisions that are made with the co-operation, understanding and assistance of local people will stand a much greater chance of achieving the stated aim successfully and effectively.

It is perhaps at a local level that most people will be concerned about their environment. This gives local authorities the potential to set the benchmark for others and demonstrate the advantages of disclosing environmental information and encouraging participation. Protection of the environment will increase and we will all reap the benefit.

As Information Commissioner, it is my responsibility to implement the enforcement and appeals procedures for both Freedom of Information and the Environmental Information

Regulations. However, I also have a wider responsibility to promote awareness and good practice both with public authorities and the public. In that context in particular, I welcome this guide.

I believe that it embraces the spirit of the regulations and captures the ideal of providing access to environmental information. I hope that authorities will utilise it and suggest that those who do will benefit through developing a good working relationship with those they serve and providing an improved environment for all.

**Richard Thomas**  
**Information Commissioner**

# contents

	<b>page</b>
<b>1 Introduction</b>	<b>7</b>
<b>2 Background to the regulations</b>	<b>8</b>
2.1 Overview	8
2.2 International	8
2.3 European	8
2.4 The FOI Act 2000	9
<b>3 A way through the legal maze</b>	<b>10</b>
3.1 A head-start for local authorities	10
3.2 Differences between the FOI Act and the EIR 2004	10
3.3 Differences between the EIR 1992 and the EIR 2004	12
<b>4 Responding to requests for environmental information</b>	<b>13</b>
4.1 Introduction	13
4.2 Initial receipt of requests	13
4.3 What information is 'environmental information'?	14
4.4 Advice and assistance	15
4.5 Quality of information	17
4.6 Time limits	17
4.7 Form and format of information	19
4.8 The exceptions	20
4.9 Regulation 12 exceptions	20
4.9.1 'stand-alone' exceptions (reg. 12(4))	21
4.9.2 'adverse effect' exceptions (reg. 12(5))	22
4.10 Personal data exception	25
4.11 Disapplication of other exceptions (reg. 5(6))	25
4.12 Public interest test	25
4.13 Transferring requests	26
4.14 Refusing to release information	27

	<b>page</b>	
4.15	Partial refusal and reduction of documents	28
4.16	Charging	28
4.17	Criminal offences	29
<b>5</b>	<b>Internal reviews and appeals</b>	<b>30</b>
5.1	Internal reviews	30
5.2	The information commissioner and beyond	32
<b>6</b>	<b>Duties to organise and disseminate environmental information</b>	<b>33</b>
<b>7</b>	<b>Local authorities as applicants for environmental information</b>	<b>35</b>
<b>8</b>	<b>Useful resources and links</b>	<b>36</b>
<b>9</b>	<b>Quick checklist for local authorities</b>	<b>38</b>

# 1 introduction

The Environmental Information Regulations 2004 were laid before parliament only at the end of October 2004 and are due to come into force on 1 January 2005 at the same time as the 'right to know' provisions of the Freedom of Information Act 2000. Whereas local authorities have had five years to prepare for the FOI Act they will only have had two months to prepare for the final version of the new regulations.

Whilst that may sound daunting there are at least two reasons why this task is easier than it might seem. The first is that authorities that have prepared thoroughly for the coming into force of the FOI Act, should already be very well placed for dealing with the requirements of the regulations which impose similar requirements. The second is that, whilst the FOI Act imposes entirely new obligations on public authorities, the regulations build on the obligations already imposed under the Environmental Information Regulations 1992 and with which local authorities should already be very familiar.

Nonetheless, there are some very important differences between the FOI Act and the regulations, and between the 2004 regulations and the old (1992) regulations. It is particularly important that local authorities understand those differences, and a particular focus of this guide is to explain them clearly.

There is a common misconception that the regulations do no more than apply the provisions of the FOI Act to 'environmental information' (which itself is often misunderstood to mean little more than 'environmental data' such as water quality data). In fact, the differences between the FOI Act and the regulations are profound in a number of respects. The regulations impose legal obligations on local (and other) authorities which go considerably beyond those imposed by the FOI Act. In addition, the type of information to which the regulations apply (ie, 'environmental information') is very much broader than many would think.

Authorities that do not take the short time available to get to grips with the regulations are at serious risk. They are, in particular, at risk of censure by the Information Commissioner, the Information Tribunal or the courts (with associated costs). On the other hand, the regulations provide even greater opportunities than the FOI Act for authorities to enhance their reputation for openness and strengthen the trust given to them by their communities. They also provide powerful opportunities for proactively engaging citizens with environmental decision-making in their areas and therefore with reinventing local democracy.

Time is now short before the regulations come into force. There are a number of steps which authorities must take to ensure that they are ready to meet their obligations on 1 January 2005 and which are identified throughout this guide. We hope that this guide helps them to meet their obligations.

## 2 background to the regulations

### 2.1 overview

The regulations grow out of two roots. First, they implement the UK's international and European law obligations on access to environmental information. Second, they relate directly to the FOI Act. It is important to understand this.

Firstly, because the courts, the tribunal and the commissioner will interpret the regulations in accordance with their international and European background and so as to give effect to the UK's international obligations.

Secondly, it is important in understanding the particular nature of the 'public interest' test that authorities need to carry out when considering whether to refuse to release 'environmental' information.

### 2.2 international

In 1998, the UK signed the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The regulations indirectly implement the environmental information provisions of the Aarhus Convention.

The Aarhus Convention is built on three pillars:

- 1 access to environmental information;
- 2 public participation in environmental decision-making; and
- 3 access to justice (rights of redress) in environmental matters.

The convention recognises that access to information is essential to securing real and effective public participation in environmental decision-making, and sets out the following reasons for providing strong rights of access to environmental information:

- to acknowledge that public authorities hold environmental information in the public interest;

- to help members of the public assert their right to live in an environment adequate to their health and well-being;
- to enhance the quality and the implementation of environmental decisions;
- to contribute to public awareness of environmental issues;
- to further the accountability and transparency of decision-making by public authorities; and
- to strengthen public support for decisions on the environment.

Understanding these purposes is important when considering the public interest test.

### 2.3 european

The European Community is a signatory to the Aarhus Convention. The EC recently adopted a directive on public access to environmental information (Directive 2003/4/EC). The EIR 2004 are the UK's principal way of bringing this directive into law in this country. Information officers with responsibility for dealing with 'complex cases' need to be aware of the directive's existence because:

- individuals may rely on its provisions to secure their rights of access to environmental information even where these rights go beyond those provided in national law;
- the commissioner, tribunal or courts will interpret the regulations so as to give effect to the UK's obligations under the directive, so will pay particular regard to its provisions; and
- parts of the regulations have been directly 'copied out' from the directive, including the definition of 'environmental information'.

There are some areas where the regulations are not properly aligned with the directive, so local authorities would be wise to have particular regard to the terms of the directive. Some of these are flagged up in this guide.

## **2.4 the FOI Act 2000**

'Environmental information'<sup>1</sup> is one of the 'qualified exemptions' (that is, subject to the public interest test) under the FOI Act. This means, generally speaking, that an authority is not obliged to release environmental information under the FOI Act if it is obliged to release the information under the regulations, or would have to do so were it not for an exemption in the regulations. This exception simply transfers information requests from the FOI Act's scheme to the regulations. The advantage for applicants is that rights of access to information under the regulations are generally stronger than those for other information under the FOI Act.

For hybrid requests, that is for information which is partly 'environmental information' and partly not, the authority must consider the request in relation to both regimes (where it intends to refuse to release any information) and respond accordingly.

<sup>1</sup> section 39 (as amended by the regulations, reg. 20)



## 3 a way through the legal maze

### 3.1 a head-start for local authorities

1 January 2005 is a landmark day for access to information in this country. The 'right to know' provisions of the FOI Act come into force, giving members of the public a legally enforceable right to know what information is held by public authorities and to have it communicated to them. The cultural change needed to ensure that public bodies stay on the right side of the law will be significant.

Local authorities dealing with requests for environmental information have a head-start over other public authorities responding to different requests for information:

- councils are already subject to fairly extensive access to information obligations (including under the Local Government Act 2000); and
- the public has had a 'right to know' in relation to 'environmental information' for over 10 years under the Environmental Information Regulations 1992.

### 3.2 differences between the FOI Act and the EIR 2004

Councils, like all public authorities, will have spent considerable time preparing for the coming into force of the 'right to know' provisions of the FOI Act. Because of similarities between the FOI Act and EIR 2004 regimes, this preparation will help authorities in complying with the regulations.

However, there are also many differences between the two regimes. An assumption that the same provisions apply under the regulations for environmental information as for other types of information will lead to confusion, non-compliance and censure. Table 3.1 shows some important ways in which the two regimes differ. Many of these are dealt with in more detail later in the guide.

**Table 3.1**

issue	major differences between the FOI Act and the EIR 2004
<b>general</b>	
<b>background</b>	The regulations need to be interpreted in accordance with the UK's international law obligations under the European Directive and the Aarhus Convention.
<b>public authorities</b>	The regulations apply to all public authorities covered by the Act. They also cover a much larger class of bodies including utility companies which carry out 'functions of public administration'.
<b>vexatious or repeated requests</b>	There is no provision under the regulations for refusing to respond to 'vexatious or repeated requests'.
<b>information held on behalf of another person</b>	Information held on behalf of another person ( eg, a company or a consultant or another public authority) is not covered by the Act but is covered by the regulations.
<b>proactive dissemination</b>	
<b>proactive dissemination</b>	Under the regulations, public authorities must make environmental information that they hold progressively available to the public by easily accessible electronic means, and organise the information relevant to their functions with a view to its active and systematic dissemination to the public.
<b>dealing with requests</b>	
<b>requests in writing</b>	Requests under the Act must be in writing. Requests under the regulations need not be in writing but may be in any form.
<b>'duty to confirm or deny'</b>	The regulations include no explicit duty to confirm or deny, although such a duty is implicit in the duty to give reasons where a refusal is made.
<b>nature of exemptions</b>	The exemptions under the regulations are significantly different from under the Act.
<b>other prohibitions on disclosure</b>	Under the FOI Act, information is 'exempt information' where its disclosure is prohibited by another law. By contrast, under the regulations, any rule of law or enactment that would prevent the disclosure of environmental information is expressly disapplied.
<b>public interest</b>	There are no 'absolute' exemptions under the regulations; all exemptions are subject to the public interest test with an explicit presumption in favour of disclosure.
<b>transfers</b>	Under the regulations, public authorities have an explicit obligation to transfer requests to other authorities in certain situations. <sup>2</sup>
<b>time limits</b>	Even in the case of a complex and voluminous request there is an absolute limit of 40 working days to respond under the regulations. Under the Act there is no set time limit in cases where the authority requires longer to determine where the public interest lies.
<b>the 'appropriate limit'</b>	There is no 'appropriate limit' under the regulations. So, (subject to very limited exceptions) a public authority must deal with any request for environmental information regardless of the cost involved.
<b>charges</b>	The provisions relating to charging are different (though alignment should be possible). Charges under the regulations must always be 'reasonable'.
<b>'form' and 'format'</b>	The requirement to provide information in the 'form' and 'format' required is stronger than the equivalent provisions in the FOI Act
<b>complaints procedure</b>	The regulations give an explicit right to have a request reconsidered by the same public authority.

<sup>2</sup> Although the Act does not include an explicit requirement to transfer requests to another authority, an obligation to do so is probably implicit in the general 'advice and assistance' obligations under the Act (s.16).

### 3.3 differences between the EIR 1992 and the EIR 2004

Table 3.2, indicates some key ways in which the EIR 2004 are different from the 1992 regulations. Local authorities that already adopt best practice under the EIR 1992 should find the changes

easiest to deal with. Again, some of these are dealt with in more detail later in the guide. Although the regulations are new, case-law under the 1992 regulations will still be relevant.

**Table 3.2**

issue	major differences between the EIR 1992 and the EIR 2004	para. ref in this guide
<b>time limits</b>	Back-stop time limit for responding to requests has been reduced from 'two months' to 'twenty working days' (i.e., slightly less than one month). The general legal requirement to provide the information ' <i>as soon as possible</i> ' remains.	<b>4.6</b>
<b>what information is covered?</b>	Definition of 'environmental information' in the EIR 2004 is clarified and is arguably much broader than under the EIR 1992. For example the new definition explicitly includes 'cost benefit and other economic analyses and assumptions'; and the 'state of human health and safety' where these are or may be affected by environmental elements, factors or measures.	<b>4.3</b>
<b>who is covered?</b>	Classes of person covered by the 2004 regulations ('public authority') are much broader than in the 1992 regulations ('relevant person'). Whilst local authorities are covered by both, some bodies with whom authorities have contracts (eg, waste companies) are now included.	<b>not covered</b>
<b>advice and assistance</b>	New obligations to give advice and assistance to members of the public seeking to exercise their rights to access environmental information	<b>4.4</b>
<b>proactive dissemination</b>	New obligation to publish environmental information electronically.	<b>6</b>
<b>transfer of requests</b>	New obligation to transfer a request to another authority where information request is refused but information is held by another authority.	
<b>'up to date, accurate and comparable'</b>	The EIR 2004 set quality standards for environmental information disclosed (where compiled for or by the authority).	<b>4.5</b>
<b>environmental registers</b>	Information contained in statutory registers is not excluded from the EIR 2004.	<b>not covered</b>
<b>data protection</b>	The EIR 2004 make provision for the Data Protection Act 1998.	
<b>form /format</b>	The EIR 2004 include a general requirement to make information available in the form or format requested by the applicant.	<b>4.7</b>
<b>reasons</b>	The provision of reasons is given greater emphasis and detail.	<b>4.14</b>
<b>the exceptions</b>	The legal grounds for refusing to release information are significantly narrowed.	<b>4.8-4.9</b>
<b>appeals and enforcement</b>	The EIR 2004 give a number of levels of review and appeal where the applicant believes that a request has not been properly processed.	<b>5</b>
<b>the commissioner</b>	The EIR 2004 provide a role for the Information Commissioner which parallels the role under the FOI Act.	<b>5.2</b>
<b>criminal offences</b>	The EIR 2004 create criminal offences for any person who, amongst other things, destroys, defaces or conceals any environmental information requested.	<b>4.17</b>

## 4 responding to requests for environmental information

### 4.1 introduction

A local authority that holds environmental information is obliged to make it available on request, unless specific exceptions apply. The information must be released within specified time limits, and there are requirements as to the quality of information released. Further obligations apply if the request is refused. Authorities should be aware of Defra's draft guidance on 'handling requests for environmental information' (see section 8, useful resources and links).

### 4.2 initial receipt of requests

The advice given in the LGA's FOIA Guide (para. 5.3) remains useful and is not repeated here. Particular points relating to environmental information requests are:

- consider whether the information requested is environmental information (see 4.3) before deciding how to respond (other than for simple requests);
- ensure that requests are dealt with "as soon as possible" (see 4.6 );
- a request for environmental information does not need to be in writing. Staff need to be aware that a request giving rise to legal rights and obligations under the regulations may be made at any time and in any form (such as by phone, in person, or left as a voicemail message); and
- an applicant does not need to provide their name or address, and may request information anonymously.

#### ***practical tip***

*Authorities should consider requiring their staff to record all requests for information (including those that are not made in writing). For the reasons set out in the FOIA Guide (p.25) it is in their interests to do so.*

*Because it may not be immediately apparent to authority staff that the information requested is 'environmental information' (see 4.3) that requirement should apply to **all** requests.*

*Local authorities should ensure that the following information (at least) is recorded:*

- *date of request;*
- *person receiving request;*
- *precise nature of request for information - read this back to the applicant to check that they agree; and*
- *contact details (where provided).*

*In addition it would be sensible for the authority to record:*

- *any advice and assistance given or offered at the time of the call/visit; and*
- *how the request was dealt with (particularly if it was forwarded to another person within the authority).*

*If a request is made in person or by phone and a refusal to release the information is given at that time, the refusal must nonetheless be made in writing and comply with all of the requirements of regulation 14 (see 4.14).*

### 4.3 what information is 'environmental information'?

The regulations only cover 'environmental information'. The definition of 'environmental information' is very broad, and is much wider than under the EIR 1992. Public authorities will need to be very careful to ensure that they consider whether the information requested (or any of it) should be dealt with under the EIR 2004 as it may not immediately be apparent.

#### **definition of environmental information** (regulation 2):

'environmental information' has the same meaning as in Article 2(1) of the directive, namely any information in written, visual, aural, electronic or any other material form on:

- (a) the state of 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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

A large proportion of information held by local authorities relating to many of its areas of work (for example, transport, traffic, land use, environmental health, planning, green spaces, housing, energy, construction, waste and health) will clearly be environmental information. Other information held in relation to other functions will

also be environmental information (including, for example, school premises, aspects of tourism).

Defra has provided some guidance (currently in draft) on the interpretation of 'environmental information'. Local authorities should consider it carefully. Some points to note are:

- domestic and European courts have interpreted the definition of 'environmental information' under the 1990 directive very broadly;
- information relating to the way information was obtained by the authority, and guidance about its potential accuracy or potential to mislead, is included; and
- information held by or on behalf of the authority falls within the EIR 2004 regardless of whether it was obtained as a result of that authority's environmental responsibilities. It includes information held on behalf of another person, such as a company or a consultant. An important difference from the FOI Act is that information is covered by the regulations even if it is held for another person.

Whether information is 'environmental information' must be decided objectively, and decisions are reviewable by the commissioner and the courts. It does *not* depend on:

- any label given to the information by the applicant or the authority; or
- how the information is filed or held by the authority.

Even if an applicant states that the information is requested under the FOI Act, the request must be dealt with under the EIR 2004 to the extent that the information requested is 'environmental information'.

#### ***practical tip***

*Requests may often be made for information that falls to be dealt with under both the FOI Act and the regulations (hybrid requests). In such cases the law requires authorities to apply the appropriate regulations to the corresponding information ie, environmental information must be disclosed or withheld in accordance with the provisions of the regulations. However, in the case of many hybrid requests a good starting point would be to consider applying the regime that is most favourable to applicants, unless there is good legal reason for doing otherwise (eg, the protection of third party rights as protected by law).*

#### **4.4 advice and assistance**

Both the FOI Act and the regulations require public authorities to give reasonable 'advice and assistance'<sup>3</sup> to applicants and prospective applicants.

The regulations state that an authority will be taken to have met this obligation if it conforms with the relevant code of practice in relation to provision of advice and assistance. A draft code of practice has been published by Defra<sup>4</sup>, which includes the following suggestions:

- public authorities should publish their procedures for dealing with information requests;
- staff in public authorities may need to draw the legislation to the attention of potential applicants who appear unaware of their rights; and
- authorities should consider providing an outline of different kinds of information that might meet the request.

<sup>3</sup> section 16 of the FOI Act and reg. 9 of the EIR 2004

<sup>4</sup> <http://www.defra.gov.uk/corporate/consult/envinfo/annexa.pdf>

**practical tip**

*So that staff can meet best practice, local authorities should ensure that they are properly trained. Unless staff members know what types of information are available to the public or how to guide them to a central resource within the authority, they will not be able to provide proper advice and assistance to those seeking information.*

*Local authorities should consider:*

- *regularly updating their internal guidance and training to take account of experiences in giving such advice and assistance;*
- *requesting feedback from those to whom advice and assistance is given;*
- *engaging proactively with potential applicants (local environmental groups, active citizens etc) for help in designing advice and assistance procedures; and*
- *designating one or more members of staff as a central resource for access to information (including environmental information).*

*At the initial stages, providing advice and assistance requires staff to engage actively with applicants to help them frame their requests for information. Staff should ensure that they do not inadvertently guide applicants towards information which it is easy to locate, as against information which might take more time. Where requests may be met in different ways, staff should present the options clearly and systematically. Remember that the purpose of providing advice and assistance is to help members of the public obtain access to environmental information and to understand it.*

*Local authorities should not assume that advice and assistance is a one-off requirement. Subject to the 'reasonableness' test, authorities should be prepared to give advice and assistance over a period of time whilst the applicant investigates their area of concern.*

*Advice and assistance should include helping the public to understand any information that is made available under the EIR 2004 where it is appropriate to do so, for example where the information is technical data and the applicant is clearly not an expert. Where a summary or digest of the information is requested the authority should provide this where reasonably practicable to do so. Best practice would also involve directing members of the public to organisations that might be able to assist them to interpret the information provided.*

The EIR 2004 also includes a specific duty to provide advice and assistance when a request has been formulated in too general a manner. An authority may only refuse to disclose information on the basis that a request is too general<sup>5</sup> if advice and assistance has been provided. It must be given **as soon as possible and in any event no later than 20 working days** after the request was made.

<sup>5</sup> reg. 9(2) and reg. 12(4)(c)

#### 4.5 quality of information

A novel feature of the EIR 2004<sup>6</sup> is the obligation on public authorities to ensure that where information to be released has been compiled by or for the public authority then, so far as the

public authority reasonably believes, it is "up to date, accurate and comparable." This important obligation does not exist in the FOI Act and did not exist under the EIR 1992.

##### ***practical tip***

*In order to avoid censure local authorities would be wise to give this requirement a broad interpretation.*

*Authorities should take steps to ensure that all environmental information which they hold and which has been compiled by or for them is up-to-date, accurate and comparable. This will help to avoid problems when responding to requests.*

*If, when releasing **any** environmental information, a local authority has any reason to believe that the information is not up-to-date or accurate then this, and the reasons why, should be explained to the applicant.*

#### 4.6 time limits

There are some important differences between the time limits under the FOI Act and the EIR 2004. These are highlighted below.

Information requested under the regulations must be provided "as soon as possible"<sup>7</sup>. There is a

'backstop' requirement that information be provided within 20 working days of the request, but waiting to respond until the end of the 20 day period will not be acting "as soon as possible", and may therefore be unlawful. In many cases it should be possible to provide the information requested quicker than the 20 day limit.

##### ***practical tip***

*Local authorities should consider expediting requests for access to environmental information so as to ensure that they are not at risk of censure by the commissioner or the courts.*

*Authorities should consider setting themselves internal targets for making information available. Targets should be ambitious and based on the legal requirement to provide information "as soon as possible". They should be clearly published, and where a request is made orally should be communicated to the applicant at that time.*

<sup>6</sup> reg. 5(4)

<sup>7</sup> reg. 5(2)



In some limited cases it is possible to extend the 'backstop' period from 20 to 40 working days<sup>8</sup>. This is only available in cases where both the complexity *and* the volume justify doing so.

The FOI Act does not limit the extension of time where an authority requires more time to satisfy itself as to the 'public interest' test. By contrast, under the EIR 2004, it is never permissible to extend the time limit for responding to a request beyond 40 working days.

Even where the time limit has been extended to 40 working days the authority must still respond as soon as possible within that timeframe.

Notification that the case is complex and voluminous is not a licence to respond at a late stage within the 40 day period.

Where a local authority considers that an extension is justified in accordance with regulation 7(1) (volume *and* complexity) it must notify the applicant of that fact "as soon as possible" and no later than 20 working days from receipt of the request.

***practical tip***

*As a matter of good practice, an authority seeking to extend time to comply with a request should notify the applicant in writing, and explain clearly the basis for doing so.*

*An authority should formulate a clear policy on types of situations when it would be appropriate to extend time for dealing with a request. That policy must be based on the legal requirement that extension is only possible in situations where the information requested is both voluminous and complex. That policy must be publicly available. It would normally be appropriate for an extension to be granted only when it has been considered by a central FOI/EIR resource or staff member.*

*Authorities should remember that an extension of time for responding to a request negatively affects a citizen's rights of access to information and should be treated as a serious and exceptional matter.*

*The European directive explicitly requires authorities to have 'regard to any timescale specified by the applicant'<sup>9</sup> when responding to a request for information. This additional requirement is not set out in the regulations. Applicants may state that they require the information within a certain period. Local authorities must have regard to that timescale when responding to the request and should, so far as possible, seek to meet it.*

<sup>8</sup> reg. 7

<sup>9</sup> Art. 3(2)

#### 4.7 form and format of information

A public authority must make environmental information available in the particular form or format requested, unless either<sup>10</sup>:

- it is reasonable to make the information available in another form or format; or
- the information is already publicly available and easily accessible to the applicant in another form or format.

Where an authority does not make the information available in the form or format requested then it must:

- explain why ("as soon as possible" and in any event within 20 working days); and
- inform the applicant of his/her opportunity for internal review and the right to appeal to the commissioner.

Whether it is reasonable to make the information available in another form or format will depend on all of the circumstances but will be reviewable by the commissioner (and the court). If an authority proposes to release information in a different form or format than requested on the basis that it is 'reasonable' to do so, it should take into account the purposes of the directive and of the Aarhus Convention.

If an authority proposes to make information available in a different form or format than requested on the grounds that it is already publicly available and easily accessible to the applicant in another form or format, it must consider the individual applicant's circumstances. For instance, if the information is on a public register held in one particular building then it is unlikely to be 'easily accessible to *the* applicant' (emphasis added) who lives a long way away from that building or for whom travel is otherwise difficult because of their personal circumstances.

#### **practical tip**

*An authority proposing to make a decision on this basis should consider contacting the applicant to explain how the information is available and to ask whether, in the applicant's view, that information is 'easily accessible' to him or her. If the applicant states that it is not easily accessible to him/her then the authority will probably not be able to rely on this provision.*

*This is an important requirement. Although the regulations apply to 'information' rather than to 'documents' this regulation effectively requires authorities to provide the 'document' where the 'document' is requested (subject to redaction of any exempted material) - ie, the 'form' requirement. It also, effectively, requires authorities to provide the information in a specific type of electronic (eg, CD Rom or email) format where requested. Applicants may want to use certain types of data to carry out their own data analysis. In such a case being provided with the data electronically and in a particular electronic format will be particularly important to them.*

<sup>10</sup> reg. 6

#### 4.8 the exceptions

Environmental information must always be released on request unless one of the exceptions applies. Exceptions relating to personal data are contained in regulation 13. All of the other exceptions are contained in regulation 12 ('the regulation 12 exceptions').

When in doubt, a local authority should take legal advice about the scope of the exceptions. However, taking legal advice does not 'stop the clock' and authorities must still respond "as soon as possible", and within any other stated time limits. The following is an outline of the exemptions only and is intended to highlight some important points. It is not exhaustive.

#### Box 4.1

##### general points to remember about the exceptions in the regulations:

- all exceptions must be "interpreted in a restrictive way" (Directive, Art. 4(2));
- unlike the FOI Act all of the exceptions may **only** be relied on where the public interest in relying on the exception outweighs the public interest in disclosing the information (reg. 12(1)(b));
- there are no 'mandatory' exceptions (unlike under the EIR 1992). In other words none of the exceptions oblige the authorities to refuse to release information - they simply provide a discretion;
- there is an explicit presumption in favour of disclosure (reg. 12(2));
- refusals may only be made 'to the extent that' the exceptions are relevant in each case (reg. 12(4) & (5));
- in the case of some exceptions information that 'relates to emissions' may not be withheld (reg. 12(8)); and
- where a document contains some information which may lawfully be withheld, then all other information in the document must be released unless it is impossible to separate it (eg, by black lining etc) (reg. 12(10)).

Local authorities should also have regard to the Defra guidance and code of practice.

Therefore, in contrast to the FOI Act, there are no 'absolute exceptions' under the regulations.

#### 4.9 regulation 12 exceptions

For all of the regulation 12 exceptions, information may only be withheld where:

Nonetheless, there are still two types of exception to be considered: 'stand alone,' exceptions<sup>11</sup> and 'adverse impact' exceptions<sup>12</sup>.

- the authority can satisfy the terms of the particular exception **and**
- "in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information."

<sup>11</sup> reg. 12 (4)

<sup>12</sup> reg. 12(5)

#### 4.9.1 'stand alone' exceptions (reg. 12(4))

Where one of the five 'stand alone' exceptions applies a local authority may choose to withhold

information, if it is satisfied that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

#### Box 4.2

##### the 'stand alone' exceptions

**subject to the public interest test, authorities may refuse to disclose information to the extent that:**

- the information requested is not held by or for the authority at the time when the request is received;
- the request is manifestly unreasonable;
- the request is formulated in too general a manner and the authority has complied with its duty to assist the applicant to reformulate the request (see para 4.4);
- the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
- the request involves the disclosure of internal communications.

#### - does not hold the information (reg. 12(4)(a))

This exception only applies where the authority does not hold the information at the time the request is received. It is a criminal offence to destroy information or alter it with the intention of preventing disclosure following receipt of request.

Information which is held for (but not physically 'by') the authority must still be released. Similarly, information which is held by the authority for another person must also be released (unless another exception applies).

Information is 'held' by an authority if it is in its possession or control. It is irrelevant whether the information is legally 'owned' by the authority

#### - the request is manifestly unreasonable (reg. 12(4)(b))

The word 'manifestly' imposes a very high threshold. It implies that no reasonable person would consider the request to be reasonable. To request 'all of the information you hold on the environment' would be manifestly unreasonable. However, this exception should be used very sparingly. The authority must offer advice and assistance to any applicants or potential applicants, and should seek to provide appropriate advice and assistance before refusing a request on this basis.

#### - the request is formulated in too general a manner (reg. 12(4)(c))

In this situation, an authority *must* first have complied with its obligation to provide advice and assistance under regulation 9. In particular, the authority must have taken appropriate steps to help the applicant reformulate the request and identify the information sought. Regard should be had to the Defra code of practice.

*The following two stand-alone exceptions are quasi-adverse impact. Whilst they do not explicitly depend upon an 'adverse effect' to a particular interest, the public interest test requires careful consideration of whether release of the information would harm the public interests protected by the exception.*

**- material in the course of completion, unfinished documents or incomplete data (reg. 12(4)(d))**

This exception prevents authorities from having to release every single draft of a document before a final version is completed. In many cases however, the public interest in releasing unfinished documents will be stronger than the public interests engaged by this exception. This is particularly likely where there is current public debate about an issue. Some points to bear in mind include:

- the fact that a document is stated to be 'in draft' does not make it subject to this exception. A document on which work has stopped indefinitely will not be 'material in the course of completion';
- the fact that a document is 'in the course of completion' does not mean that particular information contained within it is itself covered by the exception;
- when looking at the public interest, authorities should consider whether the information is going to be published (and how soon). If publication is a long way off, the public interest in upholding the exception may be weaker;
- as with all of the exceptions, authorities should also carefully consider whether any public interest would be harmed by disclosing the information requested; and
- earlier drafts of a document that has been completed or published will not be protected under this exception.

**- disclosure of internal communications (reg. 12(4)(e))**

An authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. This exception is to allow an authority to 'think in private'. It does not protect communications between a public authority and any other person or authority. The public interest in maintaining this exception will vary with circumstances and the time at which a request is made in relation to the internal communication to be protected.

**4.9.2 'adverse effect' exceptions (reg. 12(5))**

Where one of the seven 'adverse effect' exceptions applies, a local authority may choose to withhold information requested only where it is satisfied that disclosing the information would 'adversely affect' the interest protected, and where the authority is also satisfied that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Authorities must therefore be clear as to how that interest would be 'adversely affected' and be able to explain that in its reasons for refusal.

**- international relations, defence, national security or public safety (reg. 12(5)(b))**

The exception only applies where the disclosure would adversely affect international relations, defence, national security or public safety. In these cases, and subject to a public interest test, authorities are not required to confirm or deny whether the information requested exists or is held by them<sup>13</sup>.

<sup>13</sup> reg. 12(6)

### Box 4.3

**subject to the public interest test, authorities may refuse to disclose information to the extent that its disclosure would adversely affect:**

- international relations, defence, national security or public safety;
- 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;
- intellectual property rights;
- 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-
  1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority,
  2. did not supply it in circumstances such that that or any other public authority is entitled apart from these regulations to disclose it, and
  3. has not consented to its disclosure.
- the protection of the environment to which the information relates.

**- the course of justice etc (reg. 12(5)(b))**

An authority must be clear that disclosure would adversely affect the course of justice, or 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 rather narrower than the related exemptions in the FOI Act both in terms of the types of proceedings it covers, and of the likelihood of affecting the protected interest.

There is a strong public interest in not adversely affecting the course of justice or the right of a person to receive a fair trial. The main question for an authority will be whether releasing the information requested would actually have that effect. It is not enough to think that its release 'might' have such an effect.

#### **- intellectual property rights (reg. 12(5)(c))**

A local authority may refuse to disclose information that would adversely affect intellectual property rights (for example, patents). Of course, the fact that copyright in the information (document) may be held by a third party does not create an exception.

*The following four exceptions are also 'adverse effect' exceptions. They are distinguished because they may not be relied upon by public authorities to refuse to disclose information which "relates to information on emissions" (reg. 12(8)). This means that even where these exceptions apply, the information must still be released to the extent that it "relates to information on emissions". There is no need for further consideration of the public interest in respect of that information. Importantly, information that "relates to information on emissions" is broader than emissions data itself. See box 4.4.*

#### **- confidentiality of the proceedings of a public authority (reg. 12(5)(d))**

A local authority may refuse to disclose information where disclosure would adversely affect the confidentiality of proceedings of that or any other public authority, where such confidentiality "is protected by law".

The confidentiality to be protected must already be protected by law. Authorities may not therefore simply declare documents 'confidential' and then seek to rely on this exception; there must already exist a legally protected confidentiality right.

#### **- commercial confidentiality (reg. 12(5)(e))**

A local authority may refuse to disclose information where disclosure would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is already provided by law to protect a legitimate economic interest.

Importantly, this exception applies only to information whose confidentiality is already provided by law to protect a legitimate economic interest. Disclosure may only be refused where the commercial confidentiality would actually be adversely affected. In most cases this will require demonstrating that the person whose interests are protected would suffer a real commercial / competitive disadvantage by the release of the information<sup>14</sup>.

This exception has caused particular problems to public authorities under the EIR 1992. There has been a tendency by authorities to interpret this exception in an overly broad way - possibly for fear of legal action by those whose commercial interests may be affected. As a result, this is one of the few areas which have been tested by the courts under the EIR 1992<sup>15</sup>. Some relevant findings in that case (which concerned the confidentiality of a contract) include:

- reference to commercial and industrial confidentiality must mean specific information which an enterprise needs to keep confidential in order to protect its competitive position;
- what is or is not confidential is an 'objective' question;
- a number of provisions of the contract in question were clearly not commercially confidential whilst specific provisions might be; and
- the confidentiality of a contract would depend on the time at which a request was made.

One particular area in which commercial confidentiality may be relevant concerns contracts entered into between the authority and a private contractor (as did the above case). The Defra draft code provides helpful guidance on this subject (at part VII) including:

- that authorities should resist attempts by contractors to include confidentiality clauses in contracts;

<sup>14</sup> R v. Secretary of State for the Environment, Transport etc & Midland Expressway Ltd ex p. Alliance Against the Birmingham Northern Relief Road & Ors [1999] Env. LR, 447  
<sup>15</sup> *ibid.*

- that any such clauses may be overridden by the provisions of the regulations; and
- authorities cannot 'contract out' of their obligations under the regulations.

**- voluntary supply (reg. 12(5)(f))**

A local authority may refuse to disclose information where disclosure would adversely affect the interests of the person who supplied it voluntarily and who has not consented to its disclosure.

The purpose of this exception is to protect the supply to public authorities of information that might not otherwise be made available to the

authority (in particular, whistleblowers). Its purpose is not to except from disclosure information supplied in order to obtain a permit or licence. In any event, the public interest in disclosing information supplied as part of such an application is likely to be very high.

**- protection of the environment (reg. 12(5)(g))**

A local authority may refuse to disclose information to the extent that its disclosure would adversely affect the protection of the environment to which the information relates. The directive gives as an example the protection of wild birds, where disclosing information about the location of wild birds' nests might result in egg theft.

**Box 4.4**

**the following exceptions may not be relied upon to refuse to disclose information which "relates to information on emissions" (regulation 12(8)):**

- the confidentiality of the proceedings of a public authority (reg. 12(5)(d));
- commercial or industrial confidentiality (reg. 12(5)(e));
- voluntary supply (reg. 12(5)(f)); and
- protection of the environment (reg. 12(5)(g)).

note: information which "relates to information on emissions" includes information other than emissions data itself.

**4.10 personal data exception**

Where information requested is personal data of which the applicant is not the data subject then those data must not be disclosed other than in accordance with regulation 13. The provisions of reg. 13 are broadly similar to the provisions of s.40 of the FOI Act (except that the public interest test must always be applied).

**4.11 disapplication of other exceptions (reg. 5(6))**

This says that any other law that would prevent the disclosure of environmental information shall

not apply. This means that authorities are not allowed to refuse access to environmental information for any reason other than the exceptions contained in the regulations.

**4.12 public interest test**

Where any of the exceptions applies to a request for environmental information then the authority must still release the information unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In every case where one of the exceptions applies a local



authority will need to make a judgment about competing public interests and where the balance lies.

The regulations explicitly require a public authority to apply a presumption in favour of disclosure. The starting point is that the public interest in disclosure is greater than the public interest in maintaining the exception, and that an authority proposing to withhold information must clearly demonstrate how it has balanced the public interest against disclosure in the particular case.

Unlike under the FOI Act, the clock does not stop when the public interest has to be considered and time continues to run.

Some useful reference materials for authorities to consult when considering the public interest are listed in part 8 of this guide. In particular, authorities should have regard to the information commissioner's awareness raising guide on 'The Public Interest Test' under the FOI Act. The LGA guide lists a number of recognised elements of the public interest in disclosing information, which are all relevant to considering the public interest under the regulations. However, there are additional public interest factors that are specific to environmental information (see box 4.5).

#### **Box 4.5**

##### **some additional public interests in disclosure of environmental information:**

- both principle 10 of the Rio Declaration and the Aarhus Convention recognise that environmental decisions are best made with full and effective participation of the public;
- the Aarhus Convention recognises that for citizens to be able to assert their right to live in an environment adequate to their well-being and health, they must have full access to information on the environment;
- the Aarhus Convention recognises that improved access to information in environmental decision-making enhances the quality and the implementation of decisions;
- the Aarhus Convention recognises the important and particular roles that individual citizens and non-governmental organisations have in environmental protection; and
- the Aarhus Convention recognises that environmental education (which requires wide access to environmental information) has a key role to play in environmental protection.

#### **4.13 transferring requests**

Where an authority receives a request for information which it does not hold it must consider whether it believes that another public authority holds the information requested. Where that is the case then at the same time that the authority refuses to release the information it must either:

- transfer the request to the other authority; or
- supply the applicant with the name and address of that authority.

It must inform the applicant which of the above steps it has taken at the time of the refusal letter.

***practical tip***

*Where there is any doubt whether another authority holds the information then the first authority should not transfer the request without checking with the second authority whether or not it does hold the information. In checking it should not transmit the name of the applicant unless the applicant has agreed that it may do so.*

**4.14 refusing to release information**

Where one of the exceptions applies, **and** the public interest in maintaining the exception outweighs the public interest in disclosing the information then authorities may decide to refuse to release information.

When refusing to release information there are a number of steps that an authority must take. This applies regardless of whether the refusal relates to all of the information requested or only to part of it.

**Box 4.6**

**a refusal to release environmental information must (reg. 14):**

- be made in writing (irrespective of whether the request was in writing);
- be made as soon as possible and in any event within 20 working days after receipt of the request (subject only to an extension of time to 40 working days);
- specify the exception relied upon;
- specify the matters that the authority considered in reaching its decision on the question of the public interest;
- inform the applicant of his or her right to make representations to the same authority for a reconsideration; and
- inform the applicant of the enforcement and appeal provisions of the Act (including the right to apply to the commissioner).

### ***practical tip***

*A refusal which merely paraphrases or repeats the terms of the exception relied upon will not be sufficient. Authorities should give a clear and thorough explanation of their reasons for refusing to release information. The information given should be sufficiently clear and detailed to allow an applicant to understand the reasons and to decide whether or not to seek a reconsideration.*

*Where public authorities rely on one of the 'adverse effect' exceptions (see 4.9.2) they will need to set out clearly how the release of the information would adversely affect the interest protected by the exception. It will not be enough simply to state that the interest will be adversely affected.*

*In each case, authorities must set out clearly the competing public interests which they have taken into account, and the reasons that they have decided that the public interest in maintaining the exception outweighs the public interest in releasing the information. Not only is this a legal requirement but it will assist authorities to ensure that they are only refusing to release information where they are entitled to do so.*

*Any request that is to be refused should be forwarded to a central FOI/EIR officer within the authority to ensure consistency of decision-making and to ensure that requests are only being refused on legally robust grounds.*

#### **4.15 partial refusal and redaction of documents**

Like the FOI Act, the regulations provide a right of access to information rather than to documents or records. The exceptions apply also to information, and not to entire documents or records.

Where a document contains some information which may properly be refused, then the authority is not entitled to withhold the whole document/record. Rather, it must remove or redact (blank out) the legitimately withheld information and disclose the remainder.

The information redacted or removed is information which is 'refused' and full reasons must be given in accordance with regulation 14 (see box 4.6).

The authority should clearly set out the reasons why any part/s of a document have been redacted. This should be done so as to allow the applicant to apply for a reconsideration if he/she wishes to do so.

#### **4.16 charging**

Authorities are entitled to charge for complying with information requests as long as this does not exceed a 'reasonable amount'. In many cases, the process of levying charges may be more costly than complying with the request for free and in such cases authorities may not wish to levy charges.

Authorities may not make any charge<sup>16</sup> for allowing an applicant:

- to access any public register or list of environmental information; or
- to examine the information requested at the place which the public authority makes available for that purpose.

The situation in which charges may be made are therefore fairly limited.

The directive<sup>17</sup> states that "as a general rule, charges may not exceed actual costs of producing

<sup>16</sup> reg. 8(2)  
<sup>17</sup> recital 18

the material in question." The draft Defra guidance states that "the charge must not exceed the cost of producing the information unless that public authority is entitled to levy a market based charge for the information." The right to levy a market based charge for information is unlikely to apply to local authorities for most of their functions.

The regulations require authorities to publish a schedule of charges together with information on the circumstances in which a charge may be waived or levied.

Whether a charge is 'reasonable' is an objective question which may be considered by the commissioner, the tribunal or the court. The European Court of Justice has considered what was 'reasonable' for a public authority to charge for releasing environmental information.

**The European Court of Justice has held that<sup>18</sup> :**

- any interpretation of 'a reasonable cost' which may dissuade people from seeking to obtain information or which may restrict their right of access to information is wrong; and
- the term 'reasonable' means that authorities are not entitled to pass on to those seeking information the entire amount of the costs, in particular indirect costs which are incurred by the authority in conducting an information search.

An authority may require advance payment of a charge. Such a payment must be in accordance with the authority's published schedule of charges, and the authority must notify the applicant of the amount.

The charging provisions of EIR 2004 are not currently aligned with the FOI Act. However, an announcement on this subject is expected shortly.

***practical tip***

*Where a request is made which may involve costs, the authority should advise the applicant of any of the information requested which may be available free of charge. The authority should also advise the applicant that no charge will be levied to inspect the information on-site.*

**4.17 criminal offences<sup>19</sup>**

It is a criminal offence to alter, deface, block, erase, destroy or conceal any record held by a public authority following a request for access to environmental information to which the applicant would have been entitled.

The offence applies to the authority, its employees and officers. Information training for staff should make clear the serious nature of this offence.

<sup>18</sup> Commission v. Germany (C-217/97)  
<sup>19</sup> reg. 19

## 5 internal reviews and appeals

### 5.1 internal reviews

An applicant has a right to require an internal review by the local authority of an information decision with which he/she disagrees<sup>20</sup>. This is a new right, not provided for under the FOI Act or under the EIR 1992. An authority must inform an applicant of this right whenever it refuses to disclose any information<sup>21</sup>.

The right to a review may also be invoked whenever an applicant believes that the authority has failed to comply with a requirement of the regulations in relation to a request (see box 5.1)

#### Box 5.1

**the following local authority actions are subject to internal review under regulation 11:**

- refusal to disclose information (reg. 14);
- failing to respond 'as soon as possible' (reg. 5(2));
- responding outside the time limit (reg. 5(2));
- failing to respond at all (reg. 5);
- unreasonably extending the time limit (reg. 7);
- providing information which is not 'up to date, accurate and comparable' (reg. 5(4));
- unreasonable (or unlawful) charges (reg. 8);
- failing to provide a schedule of charges (reg. 8);
- failing to provide adequate advice and assistance (reg. 9);
- failing to provide the information in the form or format requested (reg. 6);
- failing to provide reasons where reasons are required (reg. 6, reg. 14);
- failing to put a refusal in writing and in terms required (reg. 14); and

This list is not intended to be exhaustive.

<sup>20</sup> reg. 11

<sup>21</sup> reg. 14

Regulation 11 allows dissatisfied applicants to make 'representations' to the authority. There are no specific requirements, except that representations must be in writing and must be made within 40 working days of the failure complained about. Therefore, any written complaint, representation or expression of dissatisfaction in relation to a request by an applicant should be treated as a request under this regulation.

On receiving representations an authority has a number of obligations (see box 5.2)

**Box 5.2**

**requirements in dealing with a request for reconsideration (reg. 11):**

- the authority must consider the representations and any evidence supplied;
- the authority must decide whether or not it had complied with the requirement complained about;
- the authority must make its decision "as soon as possible" and, in any event, not later than 40 working days from the date of the receipt of the representations;
- the authority must notify the applicant of its decision;
- where the authority considers that it had acted unlawfully the notification must include a statement of:
  - the failure to comply
  - the action the authority has decided to take to comply
  - the period within which that action is to be taken
- the authority is not allowed to charge for this reconsideration.

**practical tip**

- *Local authorities should establish a clear, quick, non-bureaucratic and efficient procedure for dealing with representations under the EIR 2004 (and under the FOI Act) and ensure that this is in place before 1 January 2005.*
- *The review process must deal with regulation 11 reconsiderations "as soon as possible." Authorities are advised to establish targets for dealing them within 15 working days, and should consider notifying applicants if they require more time.*
- *Authorities should acknowledge receipt of any regulation 11 communications and state that they will be dealt with "as soon as possible" and within the target time.*
- *The person charged with reviewing and reconsidering a decision or action should be different from the person who made the original decision(s). The views of those who made the original decision should be sought.*
- *Any decision should be in writing, and if it reconfirms the authority's earlier decision it should make clear whether the new decision is for the same reasons as given originally, or for different reasons (and state those reasons).*
- *Where the authority decides to uphold the original decision, the applicant should be clearly advised of his/her right to apply to the commissioner and be provided with details of how to apply.*
- *Complaints procedures should be clearly advertised and explained to applicants.*
- *Authorities should apologise where they discover that they have acted incorrectly.*
- *Authorities should take steps to ensure that mistakes are not repeated.*

**5.2 the information commissioner and beyond**

The enforcement and appeal mechanisms of the FOI Act are incorporated into the EIR 2004<sup>22</sup>. Applicants dissatisfied with the way in which their request has been handled (and not satisfied following the internal review procedure) may apply to the commissioner on the same basis as under the FOI Act. The procedure for appeals to the tribunal and the courts has also been incorporated into the regulations. No further detail is given in this guide as to that process.

In summary, there are four tiers of review of any of the matters listed in box 5.1:

- internal review under regulation 11;
- appeal to the Information Commissioner;
- appeal to the Information Tribunal; and
- appeal (on a point of law only) to the High Court.

## 6 duties to organise and to disseminate environmental information

The regulations contain important new obligations on authorities to organise and to disseminate environmental information that they hold. These are quite separate from the obligation to provide information on request and go considerably beyond the FOI Act. Local authorities that already adopt best practice (particularly where they follow the FOI Act codes) may find that they have already carried out much of the groundwork necessary to meet the organisation and dissemination obligation of the regulations.

Other authorities (particularly those who do not make full and effective use of the internet) may find that the regulations impose a significant new burden.

All authorities should take early steps to ensure that they comply with these new obligations. An authority that proactively disseminates information is likely to benefit when responding to requests because:

- in many cases the authority will be able to point people to a published resource (eg a website) to answer requests;
- it will be much easier to provide advice and assistance where information has been well organised and disseminated;
- the resources invested in organising information in the way required should result in considerable time savings searching for information requested;

### Box 6.1

**environmental information which (as a *minimum*) authorities must proactively disseminate by easily accessible electronic means where it is held by them<sup>23</sup>:**

- a) texts of international treaties, conventions or agreements, and of community, national, regional or local legislation, on the environment or relating to it;
- b) policies, plans and programmes relating to the environment;
- c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form;
- d) regional and local reports on the state of the environment which are required to be published at regular intervals not exceeding four years and which include information on the quality of, and pressures on, the environment;
- e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;
- f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found;
- g) environmental impact studies and risk assessments or a reference to the place where the information can be requested or found; and
- h) facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.

note: The duties to organise and disseminate apply to all environmental information held by the authority (not just those set out above).

<sup>23</sup> reg. 4(4)



- much of the legal analysis concerning disclosure will already have been carried out before information requests are received - although this does not remove the obligation to consider each request on a case by case basis.

There are two distinct obligations<sup>24</sup>. They are:

- to progressively publish environmental information which the authority holds by easily accessible electronic means (the **dissemination obligation**); and
- to take reasonable steps to organise the information relevant to the authority's functions with a view to publication (the **organisation obligation**).

The two obligations apply to *all* environmental information held (other than information which

the authority would not be required to disclose in response to a request). However, *as a minimum*, authorities are required to disseminate the information set out in box 6.1.

Authorities are not required to use electronic means to publish information that was not held electronically at the date when the directive came into force<sup>25</sup>.

Local authorities should have regard to the Lord Chancellor's Code on Records Management as well as the National Archive 'model action plan' for records management designed specifically for local authorities.

Local authorities should also have regard to the Defra guidance (chapter 5).

#### ***practical tip***

*Local authorities would do well to harness the power of the internet to engage citizens actively in environmental decision-making and beyond that in other areas of democratic life.*

*Authorities should put in place a comprehensive programme to meet its dissemination and organisation obligations. That programme should be made available to the public.*

<sup>24</sup> reg. 4

<sup>25</sup> Although the regulations allow authorities not to disseminate electronically information which was not held electronically before 1 January 2005, the directive only allows this exception for information which was not held electronically before 28 January 2003. Authorities should seriously consider taking the necessary steps to ensure that all information received after that date is subjected to the same obligation.

## 7 local authorities as applicants for environmental information

The regulations give local authorities the same rights to request information as any other person. This right may be particularly useful to councils wishing to obtain environmental information from certain companies or from other public authorities.

Companies that are deemed to be 'public authorities' and are subject to the EIR 2004 include those which:

- "carry out functions of public administration" (regardless of whether they are environmental functions);
- have public responsibilities or provide public services, in relation to the environment and which are under the control (whether by contract, licence or ownership) of a 'conventional' public authority.

So, for example, water, sewerage and electricity companies, as well as many waste disposal companies and other waste contractors<sup>26</sup> are subject to the same environmental information obligations as are local authorities.

Local authorities wanting to obtain environmental information from any of these companies (regardless of whether they have a relationship with them) have a legal right to obtain that information (subject to exemptions applying), and to appeal to the commissioner where the information is not provided.

There are many situations in which local authorities may want to obtain information from such companies, for example to assist the authority to discharge its functions but where the companies may be reluctant to provide the information requested.

For example, local authorities might wish to have environmental information on the following:

- from major utility landowners for developing biodiversity action plans;
  - waste issues from their contractors (and other waste companies); and
  - from train operating companies and other rail entities on noise for planning purposes.
- air quality for developing action plans;
  - emissions from power stations;
  - water and sewerage from water and sewerage undertakers;

<sup>26</sup> These types of companies are examples only. There are many other types of 'private' entities that will be subject to the obligations in the regulations. These must be considered on a case by case basis.

## 8 useful resources and links

### **The Aarhus Convention**

The Aarhus Convention can be found at <http://www.unece.org/env/pp/documents/cep43e.pdf>

*The Implementation Guide to the Convention* is at <http://www.unece.org/env/pp/acig.pdf>

The guide provides a detailed and excellent explanation of the convention and is a highly authoritative resource in interpreting the law in this area.

The Aarhus 'Clearing House' provides examples of good practice and guidance on all aspects of Aarhus, including access to information, and can be found <http://aarhusclearinghouse.unece.org/>

### **European law**

Information about the European Commission's implementation of Aarhus is at <http://europa.eu.int/comm/environment/aarhus/index.htm>

The European Directive (2003/4/EC) is at [http://europa.eu.int/lex/pri/en/oj/dat/2003/l\\_041/l\\_04120030214en00260032.pdf](http://europa.eu.int/lex/pri/en/oj/dat/2003/l_041/l_04120030214en00260032.pdf)

### **The regulations**

The regulations as laid before parliament on 28 October 2004 can be found at <http://www.defra.gov.uk/corporate/consult/envinfo/annexc.pdf> They will soon be available on [www.hms.gov.uk](http://www.hms.gov.uk)

### **The Freedom of Information Act 2000**

The FOI Act is best accessed through the website of the Campaign for Freedom of Information where it can be downloaded as a single document: <http://www.cfoi.org.uk/foiact2000.html>

### **UK codes, guidance and awareness**

Defra is publishing a code of practice and guidance notes on various aspects of the Regulations. At the date of this guide going to press those are available only in draft form (for

consultation). They can be found at <http://www.defra.gov.uk/corporate/consult/envinfo/index.htm>.

The Information Commissioner has published a series of awareness guidance (for FOIA 2000) notes on-line at <http://www.informationcommissioner.gov.uk/eventual.aspx?id=77>.

The commissioner has published a small amount of information about the EIR 2004 on-line at <http://www.informationcommissioner.gov.uk/eventual.aspx?id=36>.

### **Court cases**

A number of issues under the EIR 1992 and under the old Directive (90/313/EEC) have been addressed by the High Court in this country or by the European Court of Justice. Those cases will still be of some relevance in interpreting the new law.

### **Domestic cases**

R v. Secretary of State for the Environment and Midland Expressway Ltd ex parte Alliance against the Birmingham Northern Relief Road dealt principally with issues of commercial confidentiality; breach of confidence; voluntary supply and redaction. The case can be found on-line at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/1998/797.html&query=birmingham+northern+relief&method=all>

R v British Coal Corporation ex parte Istock Building Products Ltd. [1995] Env. LR 277. (not available online)

### **European cases**

Case C-321/96 Wilhelm Mecklenburg v Kreis Pinneberg which dealt mainly with the scope of the definition of environmental information. [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996J0321](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996J0321)

Commission v Germany (Case C-217/97) dealing in particular with the issue of 'reasonable charge' for environmental information  
[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997J0217](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997J0217)

## 9 quick checklists for local authorities

### **general legal obligations:**

- organise environmental information with a view to active dissemination;
- disseminate environmental information electronically;
- provide advice and assistance;
- make environmental information available on request; and
- put in place an internal review process for reconsidering requests.

### **key legal obligations when handling requests:**

- if request is 'too general' then must offer 'advice and assistance';
- offer and provide 'advice and assistance' as appropriate;
- must deal with every request "as soon as possible";
- must deal with every request within 20 working days;
- make sure that information released is "up to date, accurate and comparable" in some circumstances;
- provide information in form and format requested unless permitted not to do so;
- extension of time only when necessary due to complexity and volume - notify applicant;
- charges must be no more than "reasonable" and in accordance with published schedule;
- apply the 'public interest' test in every situation involving a potential refusal;
- apply the "presumption in favour of disclosure" in every case;

- interpret all exceptions "in a restrictive way";
- any refusal must be in writing with full reasons and information about appeals; and
- transfer request where information is held by another authority (but not by you).

### **dealing with requests for reconsideration**

- establish an appropriate (and free) structure for internal review and reconsideration;
- consider any representations and supporting evidence;
- make decision "as soon as possible" and in any event no later than 40 working days;
- notify applicant of decision; and
- if original decision overturned then include statement of failure to comply, action to be taken and time frame to take it.