

When is information environmental?

The purpose of this guidance

This guidance has been produced by Defra. It is intended to assist those handling requests for information to identify whether the request is for environmental information and should therefore be handled under the Environmental Information Regulations (EIRs) rather than the Freedom of Information Act (FOIA).

This guidance:

- Introduces the EIRs and the concept of “environmental information”
- Shows you how the definition of “environmental information” should be applied in order to achieve a consistent approach

Requests should only be handled under the EIRs where they clearly fall within the definition of environmental information in the EIRs. Anything that does not must be handled under the FOIA. Please note, however, that there will be circumstances where requests can be handled as routine correspondence.

What are the EIRs?

The EIRs are derived from EU legislation and a UN convention. They provide access to public information on the “state of the elements of the environment”.

The definition of environmental information

The definition of environmental information is broad. It includes subjects which may not be considered environmental at first glance, such as “conditions of human life”. While the concept of information relating to the environment is a broad one, it was not intended to give an unlimited right of access to information held by public authorities which has a connection, however minimal, with the environment.

The primary focus¹ of the EIRs is to provide access to public information on the “state of the elements of the environment” and, as such, the definition in regulation 2(1) opens by providing that “environmental information” means any information on:

“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;”

For example, information relating to building projects would fall under the EIRs for most of the planning and construction phase. This is because the construction of the building is likely to have an effect on the land (which is an element of the environment), while many of the contractual arrangements (e.g. pricing, etc.) would fall under FOIA as they have no effect on the state of the environment.

To consider whether the information requested falls under the EIRs, you will need to check the definition and test your information against it. Please see the annex for a useful flowchart.

How to use the definition

The definition of environmental information consists of a number of “limbs” with a degree of cross-reference. Where one limb refers back to another, both parts must be met in order for the information to fall within the definition. This means that information on the factors covered in regulation 2(1)(b) will only bring information within the definition where those factors affect or are likely to affect the elements listed in regulation 2(1)(a).

Regulation 2(1)(a)

(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

This limb represents the primary focus of the legislation. The information must be on the state of the environment in order for the EIRs to apply. The elements identified in the limb are only examples of what is considered to be an element of the environment, and as such it is a non-exhaustive list of examples.

¹ Hughes J in *Uttlesford*, EA/2011/0269&0285 -

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i775/20120606%20Decision%20EA20110269%20%26%200285.pdf>

Regulation 2(1)(b)

(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)

Information on the factors listed in regulation 2(1)(b), which are products and by-products of human activity or ingenuity, is only environmental information to the extent that those factors affect or are likely to affect the elements of the environment referred to in regulation 2(1)(a). If the noise, waste or emission is contained, e.g. through taking place within an appropriately insulated facility or building, there will be no discharge to the environment and hence the state of the environment will not be affected. Information about such matters will consequently not fall to be disclosed under the EIRs.

Regulation 2(1)(c)

(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

The measures, policies, legislation, plans, activities etc. referred to in regulation 2(1)(c) are within the scope of the definition only to the extent that they affect or are likely to affect the elements referred to in 2(1)(a), whether directly or through the factors in 2(1)(b). The definition includes measures designed to protect the elements of the environment.

Regulation 2(1)(d)

(d) reports on the implementation of environmental legislation

This sub-paragraph will include, for instance, information on reports reviewing or monitoring the operation, performance, success or failure of environmental legislation.

Regulation 2(1)(e)

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)

The information on “cost-benefit and other economic analyses and assumptions” must be used within the framework of a measure at 2(1)(c) which in turn affects or is likely to affect a factor in 2(1)(b) which in its turn affects or is likely to affect the elements in 2(1)(a). A cost-benefit analysis can generally be defined as a process by which expected costs are weighed against expected benefits to determine the best course of action. However, the phrase “other economic analyses” is wider and includes financial analyses and assessments of economic assumptions.

Regulation 2(1)(f)

(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)

The part of the definition in regulation 2(1)(f) applies slightly differently. The limbs at 2(1)(b) and (c) provide for information to be considered environmental because of the effect (or likely effect) those factors and measures will have on the state of the elements of the environment. By contrast, the limb at regulation 2(1)(f) provides that information will be environmental due to the effect (or likely effect) the elements will have on, for example, human health and safety or the built environment. The information therefore needs to be on the state of human health and safety as affected by the environment in order to be environmental information for the purposes of the EIRs.

Likelihood

Where the definition refers to the likelihood of the effect, the EIRs require a public authority to judge whether or not the factor, measure, activity, policy etc. to which the information relates would be likely to have an effect on the state of the elements of the environment. This is, at least in part, a judgement call requiring a subjective test of probability, but it is important not to speculate too widely on the remote repercussions of measures that have not yet taken place or may never take place.

Please note also that the size of the effect is irrelevant here – you can only take the likelihood into account.

Examples of helpful case-law

It is essential to guard against interpreting “information ... on” too broadly. There is currently very little EIR case-law to assist public authorities in understanding the proper interpretation of the definition. However, the following cases demonstrate that there needs to be more than an environmental context for the information to be handled under the EIRs:

- In *Uttlesford*² the First-tier Tribunal agreed that emails concerning the voting decisions of councillors in a planning application were not environmental information as they related to the Members Code of Conduct under the Local Government Act 2000; they should therefore have been considered under the FOIA
- The ICO³ agreed that, while information on compensation to farmers is environmental in context, information relating to the amount paid to certain camelid owners did not constitute information on any of the matters set out in the definition
- In a case on flood insurance the ICO⁴ agreed that a flood would have an effect on the environment regardless of whether flood insurance was in place or not. The information on flood insurance would therefore not fall under the definition of environmental information as set out in regulation 2
- In *UK Coal v ICO*⁵ the Upper Tribunal agreed with the First-tier Tribunal's decision that information contained in a schedule to a waste management contract did not in itself amount to environmental information as it was simply information relating to prospective commercial leasing arrangements. Accordingly, the disputed information fell to be considered under FOIA rather than the EIRs.

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² EA/2011/0269&0285 -

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i775/20120606%20Decision%20EA20110269%20%26%200285.pdf>

³ http://ico.org.uk/~media/documents/decisionnotices/2011/fs_50312994.pdf

⁴ http://ico.org.uk/~media/documents/decisionnotices/2013/fs_50492408.pdf

⁵ [2012] UKUT 212 (AAC) - <http://www.osscsc.gov.uk/Aspx/view.aspx?id=3510>

Annex 1 – flowchart showing how the limbs cross-refer

