

The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7831 7477
Fax: 020 7831 7461
Email: admin@cfoi.demon.co.uk
Web: www.cfoi.org.uk



Response by the Campaign for Freedom of Information

Public consultation on new draft Environmental Information Regulations

10.10.02

Hon. President: Godfrey Bradman
Co-Chairs: James Cornford, Neil McIntosh
Director: Maurice Frankel

Parliamentary Co-Chairs: Helen Jackson MP
Archy Kirkwood MP
Richard Shepherd MP

Introduction

We welcome the draft Environmental Information Regulations (EIRs) as a substantial improvement on the existing regulations.¹ In many areas they are also a major advance on the Freedom of Information Act 2000. The main improvements are that (a) some of the Act's exemptions do not appear at all; (b) some of the Act's 'class exemptions' are replaced by 'harm tested' exemptions; (c) the right of access under the regulations overrides statutory restrictions on disclosure; (d) the public interest balancing test applies more widely, in particular to personal and confidential data; (e) there is no ministerial veto; (f) requests cannot be refused on the grounds that the cost exceeds a fixed limit; (g) authorities must respond to requests and deal with internal appeals within fixed time limits.² In addition, the draft regulations do not require request to be in writing, an oral request will be valid.

However, in some respects the draft regulations fall short of the Act: (a) the charging guidelines would not have statutory force, so the Information Commissioner may be unable to prevent authorities imposing excessive charges; (b) the proposed right of access does not apply to information held *on behalf* of public authorities; (c) applicants will have weaker rights to obtain information in their preferred format; (d) the exemption for 'internal communications' is considerably broader than the comparable FOI provisions; (e) applicants who fail to appeal promptly against a refusal will lose their rights; (f) the offence of deliberately altering or destroying a record to prevent its disclosure will not extend to all authorities.

Many documents held by public authorities are likely to contain both environmental information *and* other information and will be dealt with under *both* the FOI Act and the regulations. Discrepancies between the two regimes may therefore cause intense problems. In any event we believe that where the draft regulations provide weaker rights than the FOI Act they should be improved, particularly in light of the consultation document's statement that "there is no case for treating environmental information in any respect less favourably than other information".³

¹ The proposed regulations are required to comply with the UK's commitments under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, and a forthcoming EU Directive on Public Access to Environmental Information. They will replace the existing Environmental Information Regulations 1992.

² The FOI Act requires authorities to respond to requests within 20 working days, unless the Act's public interest test applies, in which case the response need only be made within an unspecified "reasonable" period.

³ Department for Environment, Food & Rural Affairs. Public Consultation Exercise. New Draft Environmental Information Regulations, July 2002, paragraph 3.4

Definition of ‘public authority’**[regulation 2]**

The definition of the “public authorities” subject to the new regulations relies to a large extent on the detailed list of authorities subject to the FOI Act. This removes many areas of uncertainty in the present EIRs. However, bodies not subject to the Act are covered by the unsatisfactory formulae set out in paragraphs (c) and (d) of the definition.⁴ These fail to provide the necessary clarity.

Our own experience of the EIRs has been that certain bodies advanced the most distorted accounts of their functions in order to circumvent the analogous definitions.⁵ This pattern is likely to continue, wherever the definition remains vague.

It is not sufficient for the Government to assert that bodies such as privatised water and power companies are “in our view” subject to the Regulations⁶, leaving it open to those bodies to advance a contrary view. This will merely store up time-consuming disputes which neither the Information Commissioner nor the Tribunal may be capable of settling, and will require decisions by the courts. The regulations should list the further bodies which are intended to be covered, leaving paragraphs (c) and (d) of the definition as a final backstop only.

Information held on behalf of the authority**[regulation 4(1)]**

A serious shortcoming of the regulations is that they apply only to information which a public authority itself holds and not to information held on *its behalf* by someone else. Data held by a contractor monitoring pollution levels on behalf of an authority would not be accessible under the regulations - an inexcusable loophole.

The omission is inexplicable given that some related provisions *do* apply to information held on behalf of the authority. These include the duty to transfer requests for information held by *or for* another authority;⁷ the duty to ensure that information held by *or for* the authority is readily reproducible and accessible electronically,⁸ and the duty to proactively disseminate information held by *or for* the authority.⁹

The Regulations should follow the FOI Act’s approach, and define, information held by another person “on behalf” of the authority as being held by the authority itself.¹⁰

⁴ The proposed regulation 2 defines ‘public authority’ as: “(a) any Minister of the Crown, government department or local authority; (b) any other person that is, from time to time, a ‘public authority’ within the meaning of section 3(1) of the 2000 Act; (c) any other person carrying out functions of public administration in relation to the environment pursuant to any enactment; and (d) any person with public responsibilities or functions of public administration in relation to the environment which does not fall within sub-paragraphs (a) and (b) above but is under the control of a person falling within those sub-paragraphs”

⁵ Campaign for Freedom of Information, ‘The Environmental Information Regulations and THORP’, December 1993, <http://www.cfoi.org.uk/envir.html>

⁶ Consultation document, paragraph 4.4

⁷ Regulation 4(11)

⁸ Regulation 4(14)

⁹ Regulation 10(1)

¹⁰ Freedom of Information Act 2000, section 3(2)(b)

Form in which access is given**[regulation 4(3)]**

The provisions dealing with the form in which information should be provided are considerably weaker than those in the FOI Act and should be brought into line with them.

- Regulation 4(3)(a) requires an authority to give access to information in the form requested by the applicant unless “it is reasonable” to provide it in another form. The onus should be reversed, requiring the authority to comply with the applicant’s preference unless it “it is unreasonable” to do so. This is the FOI Act’s approach.¹¹
- Regulation 4(3)(b) states that an authority need not provide information in the form or format requested by the applicant if it “is publicly available and easily accessible” in another form. This should state: “and easily accessible *to the applicant*”. This would reflect the approach of the section 21(2)(a) of the FOI Act, which recognises that information which may be easily accessible to some (e.g. by inspection by those living nearby) may be inaccessible to others.
- Regulation 4(13)(a) states that the regulations only require information to be made available “at such times and places as may be reasonable”. This suggests that authorities are not required to supply copies of documents to an applicant, and can meet their disclosure obligations by making records available for inspection – a wholly unacceptable constraint. If the purpose of this provision is to ensure that any duty to make records available for inspection is subject to a ‘reasonableness’ test, we question whether it is necessary given the reference to ‘reasonable’ in regulation 4(3)(a). If it is retained, it should be redrafted to make it clear that that *in those cases* where access is given by making material available for inspection, this need only be done at a reasonable time and place.
- Unlike the FOI Act, the regulations do not state that an applicant is entitled to be given access by *more than one* means, e.g. by inspecting records *and* being supplied with copies of them.¹² It would also be helpful to make clear that an applicant is entitled to insist on being given access by being supplied with an exact copy of a document (subject to any deletions necessary to protect exempt information).

Extended response period**[regulation 4(4)]**

The regulations provide a 20 working day period for responding to requests, which may be extended to 2 months where the volume or complexity of the information requires more time. However, the longer response period may be required only in relation to a small proportion of the requested information, for example, where prolonged consultation with a third party is needed over a small element of the request. In such cases, as much information as possible should be required to be supplied within the shorter time scale.

¹¹ See section 11(1) of the FOI Act, which requires the authority to give access in the applicant’s preferred form unless this is “not reasonably practicable”.

¹² See section 11(1) of the FOI Act.

Charges**[regulation 5]****(a) Enforcement**

We are concerned that because the specific charging arrangements will be set out in guidance, not the regulations themselves, that they may be unenforceable.

The consultation paper proposes that charges for information should reflect those under the FOI Act¹³. This should lead to relatively modest charges, of 10% the marginal costs of locating and retrieving the information plus disbursements.¹⁴

However, these provisions will be set out in *guidance*. The draft regulations themselves state that charges may reflect “the costs reasonably attributable to the supply of information”.¹⁵ Authorities may interpret this as allowing them to recover their reasonable costs *in full*, or at least a high proportion of them.

If authorities charge more than the guidance recommends, the Commissioner may be powerless to intervene, unless the guidance is clearly describing what the Convention or Directive require. If the guidance merely describes ‘desirable’ practice, under regulation 11, rather than a requirement under international law, it will be unenforceable. The Commissioner’s only power in cases of non-compliance will be to issue a non-binding ‘practice recommendation’.¹⁶

The FOI charging arrangements are set out in regulations, which the Commissioner will be able to enforce. Unless this is done for environmental information, the Commissioner may be unable to take action against excessive fees.

(b) Other implications

We welcome the fact that the regulations (unlike the FOI Act) will not permit requests to be refused if the cost of meeting them exceeds the Act’s “appropriate limit”.¹⁷ It should be made clear that this cost threshold must not be applied indirectly, for example, by treating requests which exceed this limit as “manifestly unreasonable”.

¹³ Consultation document, paragraph 4.19. But unlike the Act the proposed regulations do not permit information to be refused above a particular cost threshold

¹⁴ These charging arrangements are set out in the draft Freedom of Information (Fees and Appropriate Limit) Regulations.

¹⁵ Regulation 5(a)

¹⁶ Regulation 13(1)

¹⁷ Consultation paper para 4.19

Duty to advise and assist**[regulation 6]**

In addition to the general duty to advise and assist applicants, an authority will be required to provide specific assistance in reformulating a request which has been refused as “too general”.¹⁸ But this specific duty does not apply to requests refused as “manifestly unreasonable”.¹⁹

The distinction between a “too general” and a “manifestly unreasonable” request may be artificial in many cases. Any request that is too general to be answered could by definition be regarded as unreasonable. The distinction could lead to authorities discriminating on the basis of what they take to be the applicant’s motives (naïve requesters who “deserve” to be helped may be deemed to make “too general” requests whereas troublesome requesters may be deemed to make “unreasonable” requests). The specific duty to assist should apply to both, with an exception made for repeat applicants who continue to make unmanageably large requests despite previous offers of advice and assistance.

EXEMPTIONS**Internal communications****[regulation 7(3)(a)(i)]**

We are concerned at the scope of the exemption for “internal communications”. Although this exemption is subject to the public interest balancing test in regulation 7(3)(b), we question why it is needed at all:

- it applies to any type of information, including purely factual or statistical information;
- it lacks even the timid hint in favour of releasing factual background information found in section 35(4) of the FOI Act;
- unlike almost all other exemptions it applies regardless of whether disclosure would have any ‘adverse effect’, for example on the frankness of internal exchanges;
- any internal communication on any subject could be covered. An internal circular advising staff of the hours during which a public register of environmental information should be open could be exempt under this provision;
- the interests that the exemption might protect are already catered for by the separate exemption for disclosures which would ‘adversely affect the confidentiality of the deliberations’ of a public authority.²⁰

In our view this exemption is redundant and should be omitted altogether.

¹⁸ Regulation 6(2)

¹⁹ Regulation 7(1)(b)

²⁰ Regulation 7(4)(a)(i)

Failing that, a harm test should be inserted along the lines of that in section 36(2)(b) of FOI Act, for information whose disclosure would be “likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation”. (However, the subjective element of that provision, represented by “in the reasonable opinion of a qualified person” should not be repeated.)

At the very least, we believe that purely factual information should be excluded from the exemption’s scope.

Confidentiality of deliberations

[regulation 7(4)(a)(i)]

This exemption should not be capable of applying to purely factual information. The regulations should follow the approach of the Irish Freedom of Information Act 1997, which exempts records relating to an authority’s deliberative processes, subject to a public interest test, but excludes from the exemption. “factual (including statistical) information and analyses thereof” and any “report, study or analysis of a scientific or technical expert”.²¹ A similar approach is found in the Australian FOI Act.²²

Personal information

[regulation 7(4)(a)(v)]

We welcome the fact that this exemption – unlike the corresponding FOI exemption – is subject to an explicit public interest test.

The consultation document states that the intention is to also ensure compliance with the European data protection directive. We hope that some of the problems associated with this directive can be avoided. The European Ombudsman has recently referred to these, warning that EU data protection rules are “being used to undermine the principle of openness in public activities”.²³

It should be explicit that the ‘confidentiality of personal information’ is *not* breached by:

- disclosing environmental information about a sole trader in circumstances where the same disclosure about a corporate body would raise no question of personal privacy. For example, someone who in the course of an unincorporated business burns tyres in his yard should not be protected either in relation to information about the pollution or his identity as the person responsible for it;
- identifying a public official acting in his or her public capacity. The identity of the inspector who has inspected a premises on behalf of an authority should not be capable of being protected under this provision, regardless of the inspector’s consent (unless his or her safety is threatened). The same should be true for the identity of someone investigating pollution in a professional capacity, such as the identity of a surveyor or engineer, whether or not acting for the authority.

²¹ Freedom of Information Act 1997 [Ireland], sections 20(2)(b) and (e)

²² Freedom of Information Act 1982 [Australia], sections 36(5) and 36(6)(a)

²³ <http://www.euro-ombudsman.eu.int/letters/en/20020925-1.htm>

- identifying someone acting in a purely representative capacity. The identity of a person making submissions about policy to an authority, for example on behalf of a business, trade organisation or environmental group, should not be capable of being withheld, unless the submission contains some other personal information - e.g. about the writer's health. (One of the cases which has concerned the European Ombudsman involves the withholding of the identities of business representatives lobbying the European Commission in connection with the investigation of a complaint.)

Volunteered information

[regulation 7(4)(a)(vi)]

Although this exemption operates by reference to the interests of a person *supplying* information to an authority, it also involves a test of whether the authority could legally require it to be supplied. This suggests that the underlying purpose of the exemption is to protect the *authority's ability to obtain* that information.

There are other circumstances in which disclosure would not prejudice the flow of information to the authority, which we suggest be incorporated into the exemption. These include cases where:

- the information would be available to the authority from sources other than the person who supplied it;
- the information was supplied for the purpose of securing some material benefit, and for that reason would continue to be supplied in future even if it were disclosed.

The possible benefits that should be taken into account should include (a) obtaining some form of license from the authority (b) persuading the authority not to take enforcement action for a pollution incident (e.g. by 'voluntarily' providing information to show what has been done to prevent a recurrence, (c) securing a contract or (d) influencing the policy of the authority.

The last point is particularly important. Organisations lobbying for a change in policy or legislation favourable to their interests should not be entitled to act in secrecy. Such lobbying will continue, whether or not information is disclosed, since the organisation is acting to promote its own interests. Many of the organisations involved, such as representative bodies, exist in order to lobby and will not abandon that function because of the prospect of disclosure. Where submissions contain genuinely sensitive information, other exemptions (e.g. for personal information or commercial confidentiality) will provide the necessary protection.

Emissions data and the public interest**[regulation 7(5)]**

Emissions data which is ‘relevant for the protection of the environment’ cannot be withheld under the exemption for commercial or industrial confidentiality.²⁴ However, such data could be withheld under many other exemptions, including those for internal communications, incomplete documents, the confidentiality of deliberations, criminal investigations (e.g. relating to a possible pollution offence), intellectual property rights, information supplied voluntarily and even (in the case sole traders) personal information.

If the importance of allowing access to this data must *always* override commercial confidentiality, we question the logic of allowing it to be withheld under these grounds, particularly as in many of them the potential for actual harm seems weaker.

We think emissions data should either:

- (a) be excluded from the scope of the remaining exemptions altogether; or
- (b) be subject to a stronger presumption of disclosure in the public interest test. For the purpose of regulation 7(4)(b), the public interest in disclosing emissions data should be regarded as outweighing the public interest in refusing a request unless the consequence of disclosure would be “exceptionally severe”.

Presumption in favour of openness**[regulation 7(6)]**

We strongly support this proposed provision.

Separation of exempt information**[regulation 7(8)]**

Regulation 7(8) requires authorities to separate exempt from associated non-exempt information, and disclose the latter. This point could be reinforced in the exemptions themselves, by substituting “insofar as” for “where”. Thus Regulation 7(4)(a)(i) would become:

“A public authority may refuse a request for environmental information *insofar as* the disclosure of the information would adversely affect the confidentiality of the deliberations of a public authority”.

Internal review**[regulation 8]**

The first stage of any appeal by an applicant is to ask the authority to reconsider its original decision. However, it is unreasonable to require the applicant to make representations within two months of the decision concerned.²⁵

²⁴ Regulation 7(5)

²⁵ Regulation 8(1)

No such time limit applies either under the FOI Act or under the Code of Practice on Access to Government Information, so in this respect environmental information will be available on less favourable terms than other information.

In our experience it is common for people who have been refused information to assume either that the authority knows the legislation better than they do, and is correct in withholding the information - or that any internal review will be biased and not worth pursuing. They may not appreciate that they have valid grounds for an appeal until some much later stage.

Authorities themselves are also subject to a two-month limit, both for providing information and completing the internal review. But it would be wrong to assume that imposing the same limit on applicants is merely even-handed.

- authorities which exceed their two month deadlines will suffer no detriment, whereas applicants who fail to appeal within their two month limit forfeit their right of appeal – a harsh penalty;²⁶
- applicants will be penalised even if the authority has failed to notify them of their appeal rights, or of the time limit, in contravention of regulation 4(10).
- applicants may even be penalised where the authority has not replied to their request at all and they have failed to appeal against the non-disclosure within two months of the date on which the authority should have responded. Regulation 9(a) appears to deprive applicants of a right of complaint to the Commissioner in such circumstances.

The two month limit for making representations should be omitted altogether.

Enforcement provisions

[regulation 9]

The reference, in regulation 9(c)(i) to “regulation 8(3)(c)” should refer to “regulation 8(2)(c)”.

Proactive dissemination

[regulation 10]

The regulations do not incorporate two important provisions of the Aarhus Convention, which should be added. These are the requirements to publish proactively:

- *the facts and analysis of facts underlying major environmental policy proposals.*²⁷ This is currently a requirement under the UK open government code,²⁸ which central government bodies have been advised to include in their FOI publication schemes in

²⁶ The right to complain to the Commissioner is only available to a person who has made representations to the authority within the two month period [Regulation 9(a)]

²⁷ Aarhus Convention, Article 5(7)(a)

²⁸ Code of Practice on Access to Government Information, 2nd Edition (1997), Part 1, paragraph 3

guidance from the Lord Chancellor's Department.²⁹ The draft regulations require the proactive publication of *policies* relating to the environment, but not the facts and analysis on which they are based.

- *explanatory material on the authority's dealings with the public.*³⁰ This provision is clearly based on the UK open government code (which uses the identical phrase), but the code makes clear states that the explanatory material to be published must include the internal guidance used by officials.³¹ This has also been incorporated in the LCD's publication schemes guidance.³² Local authorities have been advised to publish such material by their associations since 1995.³³ The regulations should require the proactive dissemination of such internal guidance.

Destruction of records

[regulation 16]

The FOI Act's offence of deliberately altering or destroying a requested record in order to prevent its disclosure will be extended to records requested under the regulations. However, the proposed amendment to the FOI Act, only applies to bodies which fall within the Act's definition of a "public authority". Bodies which are covered by the regulation, but are not subject to the FOI Act - such as water companies - would be able to shred requested records with impunity.

This requires either that the definition of "public authority" in section 77 of the FOI Act should be expanded to include any body which is a public authority for the purpose of the regulations, or that the offence should be incorporated directly into the regulations themselves.

²⁹ Lord Chancellor's Department. Guidance on Publication Schemes under the Freedom of Information Act 2000 for Central Government and Non Departmental Public Bodies, July 2002, paragraph 7(2)

³⁰ Aarhus Convention, Article 5(7)(b)

³¹ Paragraph 3(ii) of Part 1 of the code requires authorities to "publish or otherwise make available, as soon as practicable after the Code becomes operational, explanatory material on departments' dealings with the public (including such rules, procedures, internal guidance to officials, and similar administrative manuals as will assist better understanding of departmental action in dealing with the public) except where publication could prejudice any matter which should properly be kept confidential under Part II of the Code".

³² Paragraph 7.1

³³ Association of County Councils, Association of District Councils, Association of Metropolitan Authorities. "Open Government. A Good Practice Note on Access to Information". June 1995, paragraph 1.1.