# The Campaign for Freedom of Information

Free Word Centre
60 Farringdon Road
London EC1R 3GA
Email: admin@cfoi.org.uk
Web: www.cfoi.org.uk




## ENVIRONMENT BILL

## THE PROHIBITIONS ON DISCLOSURE

**(Clause 42)**

**Commons Report Stage, 26 January 2021**

**The Environment Bill contains significant prohibitions on the disclosure of information by the Office for Environmental Protection (OEP) and by public authorities investigated by it. These prohibitions would, on the face of it, override the right of access to environmental information under the Environmental Information Regulations (EIR). DEFRA suggests the bill will not have this effect – but nothing in the bill itself expressly guarantees that the right of access will continue.**

**It is important that this should be clarified. The easiest way of doing this would be by an amendment stating that the prohibitions do not prevent disclosure in accordance with the Aarhus Convention, to which the EIR give effect. The government should be asked whether it is prepared to do this.**

The Environment Bill would establish the OEP whose functions will include monitoring progress in environmental protection and investigating complaints of serious failure by public authorities to comply with environmental law. However, two prohibitions on disclosure appear to prevent either the OEP or authorities investigated by it from releasing information in accordance with the EIR.

**The OEP would be prohibited from releasing:**

(a) **information which it obtains from a body with public functions to assist it in carrying out its functions**.[1] Public bodies will be obliged to comply with an OEP request for information which the OEP seeks in connection with the exercise of its own functions. These include monitoring progress towards improving the environment, meeting environmental targets and implementing environmental legislation, as well as advising ministers and investigating suspected failures to comply with environmental law.[2] Under the prohibition, the OEP could not disclose information obtained for these purposes unless the supplier of the information consents.[3] In the absence of consent it would be kept secret indefinitely.

(b) **information relating to the OEP's enforcement activity.**[4] This would be kept secret until the OEP decides to take no further action[5] or a public body which has supplied that information to the OEP consents to its disclosure.[6] The EIR already protect investigations into possible breaches of the law but only if disclosure would *'adversely affect the course of justice'*[7] and if on balance disclosure is in the public interest. The prohibition would apply regardless of such factors.

In addition, authorities which are subject to investigation by the OEP would be prohibited from disclosing a more limited range of information under Clause 42(3).

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[1] Clause 42(1)(a) together with clause 26(1)
[2] Clauses 27(1), 28(1), 29(1) and 30(1).
[3] Clause 42(2)
[4] Several provisions of the bill contribute to this prohibition. Clause 42(1)(b) prohibits the release of an information notice or a decision notice or correspondence between the OEP and a public authority in relation to such a notice. Clause 42(1)(a) together with clause 34(3)(b) prohibits the release of information supplied to the OEP in response to an information notice. Finally, clause 42(1)(a) together with clause 26(1) prohibits the release of information supplied to the OEP at its request in connection with its functions (which include enforcement) by a body with public functions which has not consented to the disclosure.
[5] Clause 42(2)(h)
[6] Clause 42(2)(a)
[7] According to the Information Commissioner's Office the EIR exception allowing information to be withheld where disclosures would adversely affect the course of justice is *'very wide'* and would apply to information about 'law enforcement investigations or proceedings' and 'civil and criminal investigations and proceedings'. (ICO, The course of justice and inquiries exception (regulation 12(5)(b)), Environmental Information Regulations, Version: 1.1, paragraph 12)

**The bill waives the prohibitions for certain specified purposes. None of these permits disclosure for the purpose of answering an EIR request for environmental information.**[8]

However, the bill's Explanatory Notes provide a different explanation. They state that what is now clause 42:

> "deals with the circumstances in which the OEP and public authorities may or may not disclose information regarding an investigation whilst the OEP is carrying out enforcement proceedings. **The provisions have been designed to provide adequate protection of confidential information during those enforcement proceedings, whilst ensuring compliance with the pillar of the Aarhus Convention that is concerned with access to environmental information,** and with Council Directive 2003/4/EC on public access to environmental information. The Directive is implemented in England, Wales and Northern Ireland by the Environmental Information Regulations 2004 (EIR) and in Scotland by the Environmental Information (Scotland) Regulations 2004. **The only way in which the provisions affect the application of the EIR is in the manner set out in subsection (7): that is, that information mentioned in subsections (1) and (3) is capable of attracting the exception relating to the confidentiality of proceedings of a public authority where such confidentiality is provided for by law."**[9](emphasis added)

Thus, according to the Explanatory Notes, the prohibitions on disclosure do <u>not</u> prevent disclosure under the EIR. The most they do is establish some of the conditions needed for information to be refused under an EIR exception for the 'confidentiality of proceedings'.[10]

Two alternative explanations of these provisions are possible.

**1. The government's implicit interpretation**

The Explanatory Notes suggests that the prohibition will not affect the EIR, except by making it more likely that information could be withheld under the 'confidentiality of proceedings' exception. The implication is that the EIR right of access will be maintained by the UK's obligations under the Aarhus Convention. This international treaty, to which the UK is a signatory, requires States to provide a right of access to environmental information, subject to specific exceptions.

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[8] Clauses 42(2) and 42(4)
[9] Paragraph 347
[10] The exception, in EIR regulation 12(5)(d) allows information to be withheld where disclosure would '"*adversely the affect the confidentiality the proceedings of that or any other public authority where such confidentiality is provided by law".* The Information Commissioner's guidance on this regulation states that '*proceedings'* include things such as formal meetings to consider matters within an authority's jurisdiction, the exercise of its statutory decision-making powers and legal proceedings. Clause 42(7) would establish that information covered by the prohibitions was (a) held in connection with 'proceedings' (b) that the proceedings were confidential and (c) that the confidentiality was provided by law. It would still have to be shown that disclosure would 'adversely affect' the confidentiality - which is unlikely to be difficult. Such information could nevertheless still be disclosed under the EIR on public interest grounds.

**However, if the government intends the EIR right of access to continue why is this not set out on the face of the bill? It would be a simple matter for the bill itself to make clear that the EIR right of access overrides the prohibitions.**

Moreover, if the prohibitions do *not* override the EIR why are they there at all? The most likely explanation is to prevent the OEP and authorities from disclosing information *voluntarily* in the absence of an EIR request. But why should the OEP, in particular, need to be restrained by law from voluntarily publishing sensitive information that might damage its work?

**In any case, the prohibitions are unlikely to prevent the OEP releasing information voluntarily, if that is what it chooses to do.** The OEP would merely need to suggest to anyone with an interest that they *ask* for the information. Any written or spoken request for environmental information is a valid EIR request even if it does not mention the EIR.[11] In addition, the exceptions to the EIR right of access are (with one exception) *discretionary* not mandatory so an authority is not *required* to invoke them.[12] So if the OEP or an authority wanted to release particular 'prohibited' information, all it would need to do is suggest to someone that they *ask* for it. The OEP would then be obliged to deal with that request under the EIR. If, as the Explanatory Notes claim, the EIR right overrides the prohibitions, the OEP could then simply hand the information over regardless of the prohibitions. In light of this, it is difficult to see why the prohibitions exist at all.

## 2. Alternative explanation

It is worth considering whether there is an alternative explanation of how these provision would operate. One option is that they would:

- **prohibit** the OEP or a public authority disclosing the specified information under the EIR until the relevant prohibition is lifted – if it ever is[13]

- **thereafter** allow requests to be dealt with under the EIR, subject to the normal EIR exceptions including the extended 'confidentiality of proceedings' exception.

[11] The ICO's guidance states: 'Anyone has a right to request environmental information from a public authority. *An individual does not have to mention the Environmental Information Regulations* when making a request and the request does not have to be directed to a specific member of staff. Under the Regulations, *requests can be made verbally or in writing*.' (emphasis added) https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/receiving-a-request/

[12] The exception is for personal data whose disclosure would breach data protection legislation - this must not be disclosed. (EIR regulation 13)

[13] The prohibitions would be lifted (a) when the body which has provided information to assist the OEP in its functions consents to disclosure, but in the absence of consent the prohibition will continue indefinitely or (b) when the OEP decides to take no further action in relation to an actual or suspected failure to comply with environmental law.

Under this scenario, *both* the prohibition *and* the extended exception would apply, severely restricting the public's right to information. The OEP would be freed from the level of scrutiny that applies to all public authorities, from ministers to parish councils. These provisions would be likely to breach the Aarhus Convention, which does not permit blanket prohibitions on disclosure.

However, as the government's (now retracted) proposal to amend the Internal Markets Bill demonstrated, it is not inconceivable that the government might intend to breach an international treaty obligation.

The simplest way of resolving this issue would be for the bill to expressly state that the prohibition has no effect on the operation of the EIR, other than to extend the scope of the 'confidentiality of proceedings' exception. That could be done by adding to the list of permitted disclosures in clauses 40(2) and 40(4) a statement that each prohibition:

> "does not apply to a disclosure made…for the purpose of complying with a requirement under the Aarhus Convention"

**This would give statutory force to the position which the Explanatory Notes suggest is intended. It would avoid drawn out legal battles caused by the OEP claiming to be prohibited from disclosing information and requiring the case for access to be argued through prolonged, expensive and unnecessary tribunal and court appeals.**

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*24.1.2021*