

May 2020



# Briefing

## Your Right to Know – Part 2

**Information requests: refusals, exemptions and appeals**

## Your Right to Know Part 2

Part 1 of the “Your Right to Know” briefing explained what your information rights are and how to make an information request. This briefing explains what you should do if your information request is refused.

### Refusal Notices

If a public authority decides not to send you the information you have requested, then they must send you a refusal notice in writing within 20 working days and explain clearly why they are withholding the requested information. They are also legally required to assist and advise you on your request, so far as it would be reasonable to do so.

In particular they must explain:

- what information they hold covered by the request (unless an exemption applies)
- which exemption applies to the information
- why/ how that particular exemption applies (if it’s not obvious) and
- how they have applied the public interest test (if it applies – see below for more information about this)
- your right to appeal.

However, the public authority may elect to respond by neither confirming nor denying that they hold this information or that it exists, if the information concerns personal data, national security, international relations, defence or public safety.<sup>1</sup> In relation to national security, international relations, defence and public safety, a public authority can only do this if the confirmation or denial would involve the disclosure of information which would adversely affect these interests and would not be in the public interest.

Where a document contains only some information that falls within an exemption, the authority is not entitled to withhold the whole document or record. They should remove the information covered by the exemption, but still disclose everything else. This process is known as redacting (disclosing a document once the information covered by an exemption has been blacked out). For example, it’s common for personal information about named or identifiable individuals to be blacked out before a document is disclosed.

The Environmental Information Regulations 2004 (“EIRs”) and the Freedom of Information Act 2000 (“FOIA”) have different rules about refusing information requests. The refusal notice must make clear which sets of rules have been applied to your request.

### Refusing requests for environmental information under the EIRs

The EIRs require public authorities to “apply a presumption in favour of disclosure”.

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<sup>1</sup> By contrast, under FOIA, all exemptions expressly permit public authorities to “neither confirm nor deny” that they hold the information.

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This means that they should disclose environmental information **unless**:

- 1) the information falls within one of the exemptions specified in the EIRs and
- 2) the public interest in maintaining the exemption still outweighs the public interest in disclosing the information.

You can find a full list of the EIRs exemptions in Annex 1 at the end of this briefing. Here are some important points to remember about the EIRs exemptions:

### Important points to remember about the EIRs exemptions

- All the exemptions must be “interpreted in a restrictive way”.<sup>2</sup>
- Some of the exemptions cannot be applied to information that “relates to emissions” (see Annex 1).
- All exemptions are subject to the public interest test under EIR (further information below), except for requests regarding personal data.
- Exemptions must always be applied on a case-by-case basis.
- Where an exemption only applies where disclosure “would adversely affect” a specified interest, the authority has to specify the harm that would be caused and demonstrate that the harm is likely to occur – identifying a vague possibility of harm is not enough.<sup>3</sup>
- Any prohibition on releasing information contained in another law will **not** apply to environmental information.<sup>4</sup> If an authority refuses to disclose environmental information they must base that refusal on one of the EIRs exemptions and also apply the presumption in favour of disclosure.

## Refusing FOIA Requests

If you request information that is **not** “environmental information” your request will be dealt with under the FOIA rules. There are some exemptions under the FOIA that involve a public interest test (similar to that applied in the EIRs). These are called “qualified exemptions”. There are also some exceptions where no public interest test is applied. These are known as “absolute exemptions”. A full list of the qualified and absolute exemptions is contained in Annex 2 to this briefing.

## Guidance about the exemptions

The Information Commissioner has published detailed guidance (see Useful Links at the end of this briefing) about the EIRs and FOIA exemptions. Although that guidance is not

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<sup>2</sup> Article 4(2) of Directive 2003/4/EC of the European Parliament on public access to environmental information.

<sup>3</sup> See, for example, ICO Decision Notice FS50650700, 28 March 2017, relating to Hastings Borough Council (also a case where the authority wrongly applied the FOIA rules to an environmental information request).

<sup>4</sup> Reg 5(6) of the EIRs

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binding, it's usually helpful and is worth reading if you need to know more about any particular exemptions.

### Deciding what's in the public interest

Under both the EIR and FOIA, the exemption will be allowed if the public interest in maintaining it outweighs the public interest in disclosing the information in all circumstances.

Deciding where the public interest lies in any particular case depends on the kind of information that you have asked for and a range of other factors.<sup>5</sup>

The following are often strong factors **in favour** of disclosing information:

- The fact that, under the EIRs, there's always a "presumption in favour of disclosure" of environmental information – in other words, it's in the public interest to be open and transparent on environmental issues.
- Promoting informed public debate about significant decisions or topical issues.
- Ensuring that the public can participate effectively in decisions affecting them.
- Allowing proper scrutiny of the decision-making process, especially where decisions are controversial.
- Making sure that authorities are accountable for the spending of public money and that they do their job properly.
- Ensuring that the public are informed about the way public authorities (and the bodies they regulate) operate.
- Informing the public about possible dangers to health and safety or the environment.
- Exposing misconduct.

In addition, the following can be of assistance:

- The passage of time may mean that information is less sensitive than when it was created.
- Where information relates to an investigation, the investigation is now at a point where disclosure would not adversely affect it.
- Disclosure would have beneficial impact on individuals and the wider public.
- General factors such as openness, transparency and accountability which are relevant to the particular circumstances of the request.<sup>6</sup>

You can rely on and use the above examples to explain to the public authority why they should release the information to you. However, you may also be able to use your own specific knowledge of the situation to explain why there's a strong public interest in releasing the information that you have asked for. You can also consider the combined public interest to each exemption together to argue that cumulatively, the overall public

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<sup>5</sup> For an example of arguments around the 'public interest' in a very high-profile case see the tribunal decision concerning the disclosure of the correspondence of the Prince of Wales (Evans v Information Commissioner [2012] UKUT 313 AAC). The tribunal concluded that the public interest would be served by the disclosure of some (but not all) of the Prince's correspondence. The Attorney General disagreed with the tribunal's conclusion but, in a judicial review that went all the way to the Supreme Court, his attempt to overturn the tribunal's decision was ruled unlawful (see R (on the application of Evans) v Attorney General [2015] UKSC 21).

<sup>6</sup> Mersey Tunnels Users Association v Information Commissioner EA/2009/0001 (Stage 2).

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interest is in favour of disclosure.<sup>7</sup>

### Responding to refusals

Where you receive a refusal to release information, you should consider the authority's response to see:

- whether the authority has complied with the procedural requirements for refusals (see above section "refusal notices")
- whether you agree with their reasons for refusing to release information to you.

At this stage, you should compare the particular exemption relied on by the authority against:

- the wording of the law
- any guidance produced by the Information Commissioner in relation to that exemption.

You should also consider whether the authority has correctly applied the public interest test, taking into account all the factors in favour of disclosure and not over-emphasising (or inventing) public interests in favour of withholding the information. Don't forget that under the EIRs, there's a presumption in favour of the disclosure of environmental information.

**Importantly, don't assume that the authority is right.** The exemptions are complex and the people answering your request will often be no more expert than you are. They may even be less so, as you may know more about the subject matter of the request. This will put you in a strong position to argue the "public interest" in your particular case.

If your request is for "environmental information", make sure that the authority bases its refusal on the EIRs exemptions rather than the FOIA exemptions.<sup>8</sup> In relation to requests for documents that contain both environmental, and non-environmental information, the Information Commissioner's advice is that "in the vast majority of cases a broad interpretation of 'any information on' should mean that the document can be easily divided into environmental and non-environmental information, depending upon the broad subject matter under consideration in each section or part of the document."<sup>9</sup> If you ask for a document and the authority is allowed to withhold some of the information in that document, they must still release the rest of it. Make sure the authority has not refused to release all of the information simply because they can legally withhold **some** of the content. The fact that removing the confidential information may be a difficult job does **not** mean that the authority shouldn't do it.

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<sup>7</sup> Office of Communications v Information Commissioner Case C-71/10, 28 July 2011.

<sup>8</sup> For an example of a situation where the local authority AND the Information Commissioner applied the wrong rules see: Kirkcladie v Information Commissioner & Thanet District Council (EA/2006/0001, 4 July 2006).

<sup>9</sup> ICO Guidance "What is environmental information?" para. 64; for a tribunal decision on this issue see The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth [EA/2007/0072] 29 April 2008.

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### Appealing against a refusal

There are ways you can appeal should your information request be refused, but in order to have a chance at being granted a successful appeal, you must follow the correct procedure in chronological order as set out below:

#### 1. Request an Internal Review

If you disagree with the public authority's decision, the first step is to request an **Internal Review**. You should write to the public authority and ask them to reconsider your request. Under the EIRs you must do this within 40 working days of the date when the authority refused your request (or the date when it should have done so). There's no statutory requirement for a public authority to have a complaints or internal review procedure in place under FOIA, but the FOIA Code of Practice recommends this as best practice. The Information Commissioner recommends that you request a review "as soon as possible and within two months of receiving the authority's final response." Note that the Code of Practice states:

"Public authorities are not obliged to accept requests for an internal review made after 40 days of the date on which the public authority responds to an information request."<sup>10</sup>

The authority must make sure that a different person deals with the internal review process – i.e someone who was not involved in responding to the original request.

There's no particular format for an internal review request – a letter or email will do. Authorities must treat any letter of complaint as a formal request for an internal review. You should set out as clearly as possible why you think the authority should have disclosed the requested information to you. If possible, try and include the sections of the regulations you believe they are in breach of. It's good to enclose a copy of your original request and of the response you were given.

Under the EIRs the authority must complete their internal review within 40 working days. Under the FOIA there's no time limit, but the Information Commissioner recommends that they should complete their review within "20 working days in most cases, or 40 in exceptional circumstances", in accordance with the Code of Practice.

#### 2. The Information Commissioner

If, once you have received the authority's response to your internal review request, you are still dissatisfied with the way that your request has been dealt with because it does not comply with the legal requirements for disclosure, then you can complain to the Information Commissioner. The complaint must be made in writing as soon as possible and within 6 months of receipt of the internal review response. Complaining to the Commissioner is free, although unfortunately there's often a long delay in getting a decision due to the large number of complaints they receive.

The Commissioner will not accept a complaint if you've not already completed the internal review procedure, if there has been "undue delay" in applying (usually this means

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<sup>10</sup> Freedom of Information Code of Practice (2018) paragraph 5.3.

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you should contact them within three months of your last meaningful contact with the public authority) or if your complaint is frivolous or vexatious.

Note that an authority can change its mind about which exemptions apply to an information request in the course of an appeal to the Information Commissioner or the tribunal.<sup>11</sup> However, the Upper Tribunal has ruled that in relation to FOIA, the public interest test will be assessed throughout any challenge or appeal according to the circumstances at the date of the public authority's refusal decision – the public interest test won't be reassessed in respect of circumstances that may have arisen **since** the refusal decision.<sup>12</sup>

Having considered your complaint, the Commissioner will notify you of their decision with their reasons, and will send a copy to the public authority.

If you'd like to see what Information Commissioner Decision Notices look like you can search the website register of Decision Notices (see Useful Links below).

If you complain to the Information Commissioner you should send them the following information along with a completed complaints form (see Useful Links below):

- an explanation of why you are unhappy with the public authority's response to your request for information
- a copy of your initial request
- a copy of the public authority's initial response (the "Refusal Notice")
- a copy of your request for an internal review
- a copy of the public authority's response to you following the internal review
- any other information which you think is relevant
- confirmation of any particular urgency in your case.

Remember to contact them regularly if your complaint is delayed, and explain any reasons why it should be considered a priority. If there's a particular urgency to your complaint then you should say so clearly (and you may even need to consider an application to Court to speed matters up).

### 3. Appeal to First-Tier Tribunal

If you're dissatisfied with the decision of the Information Commissioner, you can appeal to a tribunal in the General Regulatory Chamber of the Courts & Tribunal Service (known as a First-Tier Tribunal). A complaint to the First-Tier Tribunal cannot be about the quality of information provided but can deal with any errors, including factual errors,<sup>13</sup> and can consider the merits of the decision.

The public authority may also apply to the tribunal if it disagrees with the Information Commissioner's decision.

Any appeal to the Tribunal must be received by the Tribunal within 28 days of the Commissioner sending its decision, so you must act quickly.

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<sup>11</sup> See the Court of Appeal decision in *Birkett v DEFRA* [2011] EWCA Civ 1606.

<sup>12</sup> *Maurizi v Information Commissioner and another* [2019] UKUT 262 (AAC) see paras 3 and 168.

<sup>13</sup> *Information Commissioner v Edward Malnick and another*, GIA/447/2017 (1 March 2018).

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Appealing to the tribunal is free and the tribunal can only make an order for legal costs against you in limited circumstances, such as if it considers that you have acted unreasonably in bringing the appeal. In practice it's very unusual for the tribunal to make a costs order against someone bringing an appeal under the FOIA or the EIRs.

An appeal to the tribunal should be made using the Notice of Appeal form (see Useful Links below).

You should state on your Notice of Appeal form whether you're willing for your appeal to be decided on the basis of the papers (i.e without a hearing). Usually the tribunal will only decide your appeal without a hearing if you agree to it. Where the tribunal deals with an appeal on paper, it will simply consider the written arguments from all parties and make a decision. Sometimes it will write to the parties asking for more information before it makes a decision.

If there's an appeal hearing it will normally be dealt with in one day (or less). Sometimes there will be third party witnesses, although this is unlikely. You will normally be a witness in your own appeal and submit a witness statement in support. It's possible that the tribunal and the lawyers for the other parties will want to ask you questions (known as cross-examination), although this is not usually required.

Tribunals are used to members of the public representing themselves and will try to assist you in presenting your appeal and explain the procedure to you as clearly as possible.

However, the reality is that the tribunal process can be legally and procedurally complex and you will usually be faced with expert barristers for the Information Commissioner and/ or the public authority. If you're thinking of appealing to the tribunal then you may wish to have legal representation.

### **4. Appeal to the Upper Tribunal**

It's possible to appeal to the Upper Tribunal against a First-Tier Tribunal decision, but purely on a point of law (similar to a judicial review – see the Friends of the Earth Briefings on Judicial Review in Useful Links below). You can appeal if you think the First-Tier Tribunal:

- didn't apply the law correctly
- made a mistake in the way it reached its decision
- didn't give good reasons for its decision.

In order to appeal you must first ask the First-Tier Tribunal for permission to appeal. The application must be received by the First-Tier Tribunal within 28 days of when it sent its decision. If the First-Tier Tribunal refuses you permission to appeal, you have the right to apply to the Upper Tribunal for permission to appeal. Any application for permission to appeal from the Upper Tribunal must be made within one month of receiving the First-Tier Tribunal's decision refusing your permission to appeal. The costs rules in the Upper Tribunal are the same as for the First-Tier Tribunal. A costs order will only be made against you if you are found to have acted unreasonably.

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### **5. Appeal to the Court of Appeal**

You have the right to appeal to the Court of Appeal from a decision of the Upper Tribunal but only on a point of law and only with the permission of either the Upper Tribunal or the Court of Appeal. You must apply to the Upper Tribunal for permission to appeal within one month of receiving their decision. If they refuse you permission, you must apply to the Court of Appeal for permission within 28 days of being refused permission by the Upper Tribunal. Appealing to the Court of Appeal involves serious costs risks and you should only consider doing so after having taken professional legal advice.

## Annex 1 – List of EIRs Exemptions

### Environmental Information Regulations 2004 (Regulation 12)

These exemptions only apply where the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under the EIRs there's a presumption in favour of disclosure.

- The authority does not hold the requested information.
- The request for information is manifestly unreasonable.
- The request for information is formulated in too general a manner (exemption available only if the authority has asked the requester to provide further details of their request).
- The request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
- The request involves the disclosure of internal communications.

Circumstances where 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 a criminal or disciplinary inquiry
- intellectual property rights
- the confidentiality of the proceedings of a public authority where confidentiality is provided by law\*
- the confidentiality of commercial or industrial information where confidentiality is provided by law to protect a legitimate economic interest\*
- the interests of a person who provided the information where\*:
  - the person providing the information had no legal obligation to supply it;
  - the public authority is not entitled to disclose the information (other than under the EIRs); and
  - the person who provided the information has not consented to its disclosure
- the protection of the environment to which the information relates.\*

\*NOTE: The exemptions marked with an asterisk cannot be used in relation to requests for information on emissions to the environment. The relevant guidance from the Information Commissioner suggests that emissions:

“will generally be: the by-product of an activity or process which is added (or potentially added) to and affects the elements of the environment and over which any control is relinquished.”<sup>14</sup>

So, for example, information about the volume of steam or condensation generated by an industrial heating process, or noise generated by an industrial site would be “information on emissions”.

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<sup>14</sup> ICO Guidance on “Information on emissions, Regulation 12(9)”, para 11, available in Useful Links below

## Annex 2 – List of FOIA exemptions

### Freedom of Information Act 2000, Sections 2 and 21-44

**Absolute exemptions** (no public interest test applied – information can always be withheld).

- Information reasonably accessible by other means.
- Information supplied by or relating to security bodies.
- Court records.
- Information where disclosure would infringe parliamentary privilege.
- The Information is held by the House of Commons or House of Lords and its disclosure would prejudice the effective conduct of public affairs.
- Personal information (in most cases, although sometimes the public interest test will apply).
- Information where disclosure would involve an unlawful breach of confidence.
- Disclosure forbidden by law.

**Qualified exemptions** (information can only be withheld where the public interest maintaining the exemption outweighs the public interest in disclosing the information)

- Information intended for future publication.
- Disclosure could harm national security.
- Disclosure likely to prejudice defence.
- Disclosure likely to prejudice international relations or confidential information obtained from an overseas state.
- Disclosure likely to prejudice relations with devolved administrations (in Northern Ireland, Scotland and Wales).
- Disclosure likely to prejudice the UK's economic interests or the government's financial interests.
- Information relating to the investigation of criminal offences or criminal proceedings.
- Disclosure likely to prejudice the prevention of crime or the administration of justice.
- Disclosure would prejudice the audit functions of public authorities.
- Information relating to the formulation of Government policy (although statistical information which is used to help inform the taking of the decision does not fall under this exemption).
- Disclosure would prejudice the effective conduct of public affairs (if the information is held by the House of Commons or the House of Lords then this is an absolute exemption).
- Information relating to communications with the royal family or the conferring of any honour or dignity.
- Disclosure likely to endanger the health or safety of an individual.
- Disclosure would breach legal professional privilege.
- Trade secrets.
- Disclosure would prejudice commercial interests.

## Useful links

Complain to Information Commissioner: <https://ico.org.uk/make-a-complaint/>

Decision Notices (Information Commissioner):  
<https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query>

Environmental Information Regulations 2004:  
<http://www.legislation.gov.uk/uksi/2004/3391/contents>

Freedom of Information Act 2000:  
[http://www.opsi.gov.uk/Acts/acts2000/ukpga\\_20000036\\_en\\_1](http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000036_en_1)

Government guidance on Freedom of Information Act: <https://www.gov.uk/make-a-freedom-of-information-request/the-freedom-of-information-act>

Information Commissioner's guidance on emissions: <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/refusing-a-request/>

Information Commissioner's guidance on Freedom of Information Act:  
<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

Information Commissioner's guidance on Environmental Information Regulations:  
<https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/>

Notice of Appeal form and guidance: <https://www.gov.uk/guidance/information-rights-appeal-against-the-commissioners-decision>

Permission to Appeal form and guidance (First-Tier Tribunal):  
[http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court\\_forms\\_id=2799](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=2799)