

# Retention and destruction of requested information

## Freedom of Information Act Environmental Information Regulations

**Please note:** The following information has not been updated since the Data Protection Act 2018 became law. Although there may be some subtle differences between the guidance on this page and guidance reflecting the new law – we still consider the information useful to those in the media. This guidance will be updated soon to reflect the changes.

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## Introduction

1. The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA and the EIR can be found in [The Guide to Freedom of Information](#) and [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the Guides, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to public authorities the issues they need to consider concerning the retention and destruction of information which has been requested under FOIA or the EIR.

## Overview

- If information is destroyed before a request is received, a public authority can say it does not hold it but should explain why the information was destroyed and advise the applicant of any other available information.
- A public authority should have disposal schedules for records in order to identify and describe those that can be routinely destroyed.
- If information is held when a request under FOIA is received, a public authority may lawfully be able to say that it does not hold it if it would normally be destroyed before the deadline for responding. However, the authority should, if possible, and as a matter of good practice, suspend any planned destruction and consider the request as usual.
- If environmental information is held when a request under the EIR is received, a public authority must consider disclosure as usual irrespective of any planned destruction.
- Destroying requested information outside of a public authority's normal policies is unlawful and may be a criminal offence if done to prevent disclosure.
- As a matter of good practice, a public authority should keep all

requested information for at least six months to allow for appeals to the Information Commissioner.

## Destruction of information before request is received

5. Requests made under FOIA or the EIR apply to information held at the time that the request is received. So, if a public authority receives a request for information that it held in the past, but has since been destroyed, it no longer holds that information. In order to comply with FOIA or the EIR, the public authority can reply to the request stating that it does not hold the information.
6. Under the duty to advise and assist in section 16 of FOIA and regulation 9 of the EIR, the public authority should advise the applicant whether the information is, or may be, available from another public authority or source, and also whether it holds any similar or related information which it can provide instead.
7. The Commissioner would also expect that the public authority, as a matter of good records management practice, explain to the applicant when and why the information was destroyed. This conforms with the [Lord Chancellor's Code of Practice on the management of records](#) (issued under section 46 of FOIA) which states at section 12 that, "*authorities should define how long they need to keep particular records, should dispose of them when they are no longer needed and should be able to explain why records are no longer held.*"

## Routine destruction after a request is received

8. Good records management also dictates that a public authority should have a disposal schedule in order to identify and describe the records which can be disposed of as a matter of routine in accordance with a defined timetable. This is one of the ways in which a public authority can carry out the disposal of records in accordance with a clearly defined policy.
9. This is of relevance to section 1(4) of FOIA, which states:

**1.—(4)** The information—

(a) in respect of which the applicant is to be informed

under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

10. This means that a public authority does not have to release the information under FOIA if it is scheduled to be destroyed under its usual disposal schedule before the time for compliance with the request expires. This cannot apply to situations where the decision to delete or destroy is prompted by the request, or if destruction is scheduled for a date later than the 20 working day deadline for responding. Where this is the case, a public authority must still consider the request in the usual way.

### **Example**

In the case of [\*Harper v the Information Commissioner and the Royal Mail \(EA/2005/0001; 15 November 2005\)\*](#), the Information Tribunal provided an example (at paragraph 17) of a situation in which a public authority could take account of deletion.

A request is made on 1 January for information that is held on a database which is completely erased every six months. This erasure occurs on 10 January. The time for compliance with the request is the end of January, and so the public authority, if it complies with the request after 10 January, may inform the applicant that the information is not held. [Note, however, that section 10 requires public authorities to comply with section 1 **promptly**, and no later than the twentieth working day following receipt.]

In contrast, should a public authority decide to delete relevant requested information when this is not in the normal course of business, it would be acting unlawfully. In particular, in such circumstances, a public authority would be likely to commit an offence under section 77 of FOIA.

11. In the context of section 1(4), the Commissioner interprets the reference to "*promptly*" in section 10 of FOIA to mean that where requested information is scheduled for deletion before a response is due to be issued, **if** the public authority is in a position to respond earlier in the statutory twenty working day time limit, and at that point the information is still held, the authority should provide the information.
12. In any event, as a matter of good practice, a public authority should delay the destruction of the information if it is known to be the subject of a request. This is reflected in paragraph 12.9 of the section 46 Code of Practice which recommends that disposal decisions should take in to account variations such as those caused by outstanding requests for information.
13. In addition to "*deletion*", section 1(4) also refers to the scheduled "*amendment*" of information that is requested. Circumstances will often exist where a public authority amends information on a regular basis; for example, statistical information on a particular subject that is updated every month. Adopting the same principle that is applied to deletion, if the public authority is able to respond before the statistics are updated, it should provide the information that is held at that point. Where the public authority is aware of the request but unable to respond prior to the amendment it should, as a matter of good practice, preserve the information as it existed at the time of the request where it is reasonably practicable to do so.
14. The situation with environmental information under the EIR is different in this regard as there is no equivalent to section 1(4) of FOIA. Regulation 5(1) requires a public authority to make information that it holds available on request, and regulation 12(4)(a) provides an exception for information not held at the time the request is received. There is no exception for information that is held when the request is received but is due for routine destruction shortly afterwards. A public authority should therefore delay destruction or amendment of the requested information and consider the request in the usual way.
15. Whilst the EIR do not contain any provisions allowing public authorities to take into account routine amendment or destruction of information the Commissioner acknowledges that, in reality, there will be instances where such changes will already have occurred by the time the request is identified and processed within the statutory deadline. In such circumstances

he would not expect public authorities to take steps to recover deleted information or to reverse any amendments.

## The offence of altering etc. records with intent to prevent disclosure

16. Section 77 of FOIA states:

**77.—(1) Where—**

- (a) a request for information has been made to a public authority, and
- (b) under section 1 of this Act or section 7 of the Data Protection Act 1998, the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section,

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.

(2) Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.

17. Regulation 19 of the EIR mirrors the provisions of section 77 for cases where a request for environmental information has been made to a public authority under regulation 5, and the applicant would have been entitled to that information in accordance with that regulation.
18. These provisions mean that it is an offence to intentionally prevent the disclosure of requested information to which the applicant is entitled. An obvious example would be where, subsequent to a request for information being received by a public authority, information within the scope of the request is shredded with the deliberate intention of preventing its disclosure.

19. The offence under section 77 or regulation 19 is a summary matter, which means it is triable only in the Magistrates' Court.
20. If information that is held at the time of the request is destroyed outside of a public authority's normal disposal schedule, this is a breach of the Act as the authority must confirm that it holds the information and consider disclosure subject to any exemption or exception. Such action becomes an offence if the requested information is altered, concealed or destroyed with the **intention** of preventing disclosure under either FOIA or the EIR. As can be seen from section 77 and regulation 19, individual employees can be guilty of this offence as well as the authority itself. It should be noted, though, that an offence under either section 77 or regulation 19 cannot be committed by a government department. This exclusion, however, does not apply to civil servants, who can be guilty of the offence.

## The benefits of a disposal schedule

21. Reference is made in paragraph 8 to having a disposal schedule as an example of good records management practice. As well as its general contribution to the efficient management of a public authority's records, a disposal schedule will offer the authority a defence to any suggestion of a section 77 offence, as it will be able to explain that a record containing the requested information was destroyed as part of its routine disposal process.
22. The section 46 Code states that "*disposal of records should be undertaken only in accordance with clearly established policies...*". Disposal schedules form a key part of this process as they are timetables that set out when individual records or groups of records are due for review, for transfer to an archives service or for destruction. This will assist the authority in knowing the location of information it holds or has transferred to archives, or whether the information has been destroyed and, if so, why and when.
23. Section 12 of the section 46 Code provides a series of recommendations and good practice advice concerning the disposal of records and describes the benefits of having reliable disposal schedules. For example, at paragraph 12.14 it states that conformity with the Code will enable a public authority "*to provide evidence that as part of routine records management processes destruction of a specified type of record of a*

*specified age took place in accordance with a specified provision of the disposal schedule” and that such evidence “will enable an authority and its staff to ..... defend themselves against a charge under section 77 of the Act that records were destroyed in order to prevent their disclosure in response to a request for information.”* The Commissioner encourages public authorities to follow the recommendations and advice contained in the section 46 Code.

24. The National Archives has produced a series of Implementation Guides that relate directly to the good practice recommendations in the section 46 Code. For further information on disposal policies and schedules, public authorities should refer to [Guide 8 on the Disposal of Records](#).

## Destruction after disclosure or refusal

25. As stated in the section 46 Code, public authorities are advised to follow the general principle that records should be kept for as long as they are needed. However, as a matter of good practice, a public authority should keep any requested information for a period of time after the date of the last communication concerning the request. This is particularly important if you have refused to disclose any part of the information.
26. Paragraph 12.3 of the section 46 Code states that where information is known to be the subject of a request for information, destruction should be delayed until all relevant complaint and appeal provisions have been exhausted. This will include internal reviews, any complaint made to the Information Commissioner, and any appeals from decision notices. The refusal notice should set out the time limit for requesting an internal review; the Commissioner would then expect complaints to be made within two months of the internal review decision; and, following the issuing of a decision notice, there are rights of appeal to the Information Rights Tribunal and then to the courts. Given the various time limits involved, it is recommended that a public authority retain the requested information for a period of at least six months from the date of the last communication about the request, or related appeals, to allow for the appeal process.
27. When retaining information in these situations, public authorities should also consider the need to maintain the integrity of the information that has been refused pending the



conclusion of the appeal process. For example, the information that has been requested may comprise statistical information that is constantly changing. If the public authority refuses the request and this becomes the subject of a complaint to the Commissioner, it should ensure that it retains a copy of the information that was refused and not allow it to be overwritten by more recent data.

28. Even if a public authority discloses the information, the request may indicate that there is some wider interest in the matter and that there may be other requests for it in the future. In such cases, it is still recommended that the information is retained for a minimum of six months. If it was scheduled for destruction, the public authority may also want to reconsider whether it is still appropriate to destroy the information. If the decision is to proceed with the destruction, the public authority should keep a record of the reasons for that decision.

### Retention and destruction where the request is vexatious, manifestly unreasonable or exceeds the Section 12 cost limits.

29. We will not expect authorities to delay the deletion of information until the relevant complaints and appeal procedures have been exhausted in any case where;
- The request has been refused under Section 12; or
  - The request has been refused as vexatious under Section 14(1) or manifestly unreasonable under Regulation 12(4)(b) of the EIR,
- and**
- It would be an onerous exercise for the authority to extract and isolate the information caught by that request, or the records known to contain that information.
30. In these scenarios, an authority may continue to delete any material falling within the scope of the request where this is required in the normal course of business or dictated by its retention policy, regardless of whether the decision has been challenged.

31. This is because the function of Section 12, and part of the purpose of both Section 14(1) and Regulation 12(4)(b), is to protect authorities from the burden of collating the information, and we recognise that it would defeat the purpose of these provisions if authorities were obliged to put considerable resource into locating and setting aside the requested material in case the original decision should later be overturned.

## Other considerations

32. You might also want to consider the Commissioner's guidance on [Determining whether information is held](#). For example, this contains guidance on when electronic information can be considered to be deleted.
33. Further guidance on records management is available from the [National Archives](#).
34. Additional guidance is available on [our guidance pages](#) if you need further information on engaging the public interest test, other FOIA exemptions, or EIR exceptions.

## More information

35. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
36. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
37. If you need any more information about this or any other aspect of freedom of information, please [contact us](#): see our website [www.ico.org.uk](http://www.ico.org.uk).