

Confidentiality of commercial or industrial information (regulation 12(5)(e))

Environmental Information Regulations

Contents

Introduction.....	2
Overview.....	2
What the EIR say	3
General principles of the exception	3
The information is commercial or industrial in nature	4
Confidentiality is provided by law	5
Common law of confidence	5
Contractual obligations of confidence	7
Statutory bars on disclosure.....	8
The confidentiality is protecting a legitimate economic interest	8
Disclosure would cause harm	9
Legitimate economic interests	10
Whose interests?	11
The confidentiality would be adversely affected by disclosure.....	12
The public interest test.....	12
Harm to legitimate economic interests	13
Preserving the principle of confidentiality	13
Public interest in disclosure.....	15
Trade secrets.....	16
Practical points.....	17
Publication scheme	17
Entering into confidentiality clauses	18
Examples of commercial information held by public authorities..	19
Other considerations.....	19
More information	20

Introduction

1. 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 the EIR can be found in [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the Guide to EIR, to help public authorities to fully understand their obligations and to promote good practice.
4. This guidance explains to public authorities how to apply the exception in regulation 12(5)(e) to protect the confidentiality of commercial or industrial information.

Overview

To refuse environmental information under the exception in regulation 12(5)(e), public authorities will need to establish that:

- the information is not on emissions;
- the information is commercial or industrial in nature;
- it is confidential under either the common law of confidence, contract, or a statutory bar;
- the confidentiality is protecting a legitimate economic interest;
- the confidentiality will be adversely affected by disclosure; and
- the public interest in maintaining the exception outweighs the public interest in disclosing the information.

What the EIR say

5. Regulation 12(5)(e) states:

12.—(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

6. As with all EIR exceptions, this is a qualified exception. Even if the exception is engaged, public authorities must go on to apply the public interest test set out in regulation 12(1)(b). They can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.
7. Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.
8. Regulation 12(9) provides that the exception is not available for information on emissions.

General principles of the exception

9. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality.
10. The exception can be broken down into a four-stage test, which was adopted by the Information Rights Tribunal in [Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association \(EA/2010/0012, 24 May 2010\)](#). All four elements are required in order for the exception to be engaged:
- The information is commercial or industrial in nature.
 - Confidentiality is provided by law.
 - The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.

11. The exception has no direct equivalent in the Freedom of Information Act 2000 (FOIA). It incorporates elements of both section 41 (information provided in confidence) and section 43 (commercial interests) of FOIA. However, the EIR exception differs from those FOIA exemptions in some key respects and public authorities should take care before applying the same arguments. In particular, it is not enough simply to argue that disclosure would adversely affect the commercial interests of the public authority or a third party. There must also be confidentiality provided by law, which may turn on some of the same factors relevant to section 41 but is not an identical test.
12. If the information is a trade secret, the exception will be engaged. See the section on [trade secrets](#) below for more information.
13. If the information attracts specific intellectual property rights, the intellectual property exception in regulation 12(5)(c) is likely to be more appropriate and public authorities are advised to consider that first.
14. The exception does not allow public authorities to neither confirm nor deny (NCND) whether they hold relevant information. Under the EIR, a public authority can only refuse to confirm or deny whether it holds information if to do so would adversely affect the interests in regulation 12(5)(a) (international relations, defence, national security of public safety) and would not be in the public interest. The EIR differ in this respect from FOIA, where most exemptions include NCND provisions.

The information is commercial or industrial in nature

15. The exception only protects the confidentiality of “commercial or industrial” information.
16. For information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information. In particular, information about a public authority’s revenues or resources will not generally be commercial information, unless the particular income stream comes from a charge for goods or services.

17. "Industrial" is generally understood to describe the processing of raw materials and the manufacture of goods in factories, as opposed to their sale or purchase. Industrial information could for example include information about methods of manufacture, raw ingredients, or precise recipes or formulae used for making a product.

Confidentiality is provided by law

18. In this context this will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
19. In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees of the public authority are under an obligation of confidence imposed by the common law, contract, or statute.
20. The exception will protect confidentiality owed by a third party in favour of a public authority, as well as confidentiality owed by a public authority in favour of a third party. This was explicitly confirmed by the Information Tribunal in [South Gloucestershire Council v Information Commissioner and Bovis Homes \(EA/2009/0032, 20 October 2009\)](#).

Common law of confidence

21. The key issues to consider are:
 - Does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain. Information may still keep its quality of confidence if it has been shared with a limited number of people, as long as it has not been disseminated to the general public. It is also possible for information to keep its quality of confidence even if it is all in the public domain, if it would take time and effort to find and collate it from multiple sources.

- Was the information shared (or provided to employees) in circumstances creating an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information. A useful test is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.

Example

In [Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association \(EA/2010/0012, 24 May 2010\)](#), the Tribunal accepted evidence that it was “usual practice” for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in this case as part of the public planning process.

The Tribunal applied the “reasonable person” test: *“in view of our findings ... that at the relevant time the usual practice of the council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being provided) ... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realized that that was what the developer was doing.”*

22. A public authority may explicitly accept information in confidence but also refer to the fact that it might still have to be released under the EIR (ie if the other elements of the exception or the public interest test cannot be satisfied). This type of warning that even confidential information may have to be disclosed will not undermine the fact that there is still an explicit obligation of confidence for these purposes.
23. In contrast to the section 41 exemption under FOIA for information provided in confidence, there is no need to consider whether there would be an unauthorised disclosure to the detriment of the confider. This is because there is no need to establish an actionable breach of confidence for the purposes of

this exception; it is sufficient that there is a theoretical duty of confidence provided by law. However, the element of detriment will still need to be considered in the third stage of the test: is the confidentiality protecting a legitimate economic interest? This is discussed further below.

24. There is also no need to consider whether there would be a public interest defence to any breach of confidence. Again, this is different to the section 41 exemption under FOIA because there is no need to establish an actionable breach. On a practical level, as the EIR exception is subject to the public interest test, the balance of the public interest will still be fully considered before any decision on disclosure can be reached. Any prior consideration of a public interest defence could not ultimately change the outcome of the case, and would therefore cause unnecessary duplication. This supports the view that there is no need to consider the public interest defence as part of the engagement of this exception.

Contractual obligations of confidence

25. If a public authority can establish that there is a binding confidentiality clause covering the requested information, the Commissioner would accept that confidentiality is provided by law for the purposes of this exception.
26. However, this does not allow public authorities to contract out of their obligations under the EIR by inserting or accepting broadly drafted confidentiality clauses. Confidentiality is just one element and is not enough on its own to justify withholding information. To use the exception, public authorities will still have to show that the information is commercial or industrial, the confidentiality is protecting a legitimate economic interest, and the public interest in maintaining the confidentiality in the particular circumstances of the case outweighs the public interest in disclosure. If the information is not inherently sensitive a confidentiality clause will not protect it from disclosure under the EIR.
27. Public authorities should also be aware that if the confidentiality is self-imposed by contract, this may affect the weight given to maintaining the exception when conducting the public interest test. This is discussed further below.
28. We would advise public authorities to establish at this stage that the information has the necessary quality of confidence (ie

is not trivial and not in the public domain), as well as confirming that the contract creates an explicit obligation of confidence. In effect, this mirrors the common law test of confidence. If there is no quality of confidence, the exception will not apply in any event as it will not be possible to satisfy other elements of the exception.

Statutory bars on disclosure

29. Regulation 5(6) disapplies any statutory bars on disclosure for environmental information. This means that a statutory bar is not in itself a justification for withholding information under the EIR.
30. However, a statutory bar will mean that confidentiality is provided by law for the purposes of this exception. A public authority may therefore be able to refuse the information under regulation 12(5)(e), but only if it can satisfy the other elements of the four-stage test, and the public interest test.
31. For example, public authorities might consider that regulation 43 of the [Public Contracts Regulations 2006](#) prevents the disclosure of some information provided in confidence during a tendering process. However, even if the information falls within that regulation, this will only establish that confidentiality is provided by law. Public authorities will still need to establish that the information is commercial or industrial, the confidentiality is protecting legitimate economic interests, and the confidentiality will be adversely affected by disclosure; and also consider the public interest balance.

The confidentiality is protecting a legitimate economic interest

32. The confidentiality must be “provided... to protect a legitimate economic interest”. The Information Rights Tribunal confirmed in [Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd \(EA/2010/0106, 4 January 2011\)](#) that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

Disclosure would cause harm

33. Public authorities will therefore need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.
34. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure **would** cause some harm.
35. This approach is supported by [European Directive 2003/4/EC](#) on public access to environmental information. The EIR are intended to implement the provisions of the Directive. Article 4 paragraph 2 of the Directive sets out a duty to interpret exceptions in a restrictive way. Taking into account this duty, the wording “*where such confidentiality **is** provided by law to protect a legitimate economic interest*” (as opposed to “*where such confidentiality **was** provided...*”) indicates that the confidentiality of this information must be objectively required at the time of the request.
36. In addition to the duty to interpret exceptions restrictively, the [implementation guide](#) for the Aarhus Convention (on which the European Directive and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

“Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure **would** significantly damage the interest in question and assist its competitors.” (emphasis added)

37. This interpretation is also more consistent with the general scheme of the EIR 12(5) exceptions, which require that “disclosure **would** adversely affect” the relevant interests identified in each exception (emphasis added). Unlike FOIA, there is no lesser test of “would be likely to adversely affect”.

Example

In [Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd \(EA/2010/0106, 4 January 2011\)](#), the request was for a viability report for a new development submitted as part of the planning application. The council and the developer asserted that disclosure could harm the developer's interests, but did not accept that they needed to demonstrate that harm would result. The Tribunal found that the exception was not engaged, saying that "*statements by interested parties that harm might or could be caused are insufficient [...] The use of words such as 'could' or 'may' do not in our view provide evidence of harm or prejudice to the required standard of proof*".

Legitimate economic interests

38. Legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income. However, they will not include personal privacy concerns.
39. Some of these arguments may be similar to those made under the section 43 commercial interests exemption under FOIA. However, economic interests are wider than commercial interests, and can also include financial interests. For example, arguments that disclosure would adversely affect the finances or tax revenue of a public authority may be relevant to this element of the exception, even if we would not accept that this constituted a commercial interest.
40. However, public authorities should remember that the information itself must still be commercial or industrial in nature, even if the interests at stake are not commercial interests.
41. Unsurprisingly, illegitimate economic interests are not covered. For example, the exception would not protect the proceeds of illegal activity (eg trade in counterfeit goods) or a market position achieved by anti-competitive practices (eg price fixing or a cartel).

Whose interests?

42. For purely internal information, it will of course be the public authority's interests that are relevant here.
43. If the information was provided by one party to another under the common law of confidence, it would be the interests of the confider (ie the person providing the information) that are relevant.
44. If the information was originally provided by party A to party B, and then provided by party B to the public authority under the common law of confidence, it is plausible that disclosure would also affect A's interests. However, only B's interests as the confider are relevant to this exception, unless the public authority can establish that A also provided the information to either B or the public authority in confidence – ie that a separate duty of confidence exists to protect A's interests.
45. If the information was jointly agreed or was provided under a contractual obligation of confidence or is protected by a statutory bar, either party's interests could be relevant, depending on whose interests the confidentiality is designed to protect.

Example

In [South Gloucestershire Council v Information Commissioner and Bovis Homes \(EA/2009/0032, 20 October 2009\)](#), the request was for appraisal reports on potential development sites. The reports had been written by a third party and provided to the council under a contractual obligation of confidence. However, the confidentiality clause was actually designed to protect the council's interests (its bargaining position in planning negotiations with developers) rather than the confider's interests. The Tribunal accepted that the confidentiality was to protect the council's legitimate economic interests.

46. If it is a third party's interests that are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. This principle was

established by the Information Tribunal in [Derry City Council v Information Commissioner \(EA/2006/0014, 11 December 2006\)](#). That case related to the commercial interests exemption under FOIA, but it is equally applicable to third party interests under regulation 12(5)(e).

47. However, the public authority must still respond to the request within 20 working days. As paragraph 44 of the [EIR code of practice](#) makes clear, consultation with a third party is no excuse for delay.
48. Although public authorities should consider the views of the third party, it is still the public authority's responsibility to decide whether or not the exception applies. The public authority can only withhold information if it is satisfied that the arguments for withholding the information are justified.

The confidentiality would be adversely affected by disclosure

49. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified.
50. This was confirmed in [Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association \(EA/2010/0012, 24 May 2010\)](#). The Tribunal stated at paragraph 14 that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest: "*it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest*".

The public interest test

51. It is important to consider both the specific harm that disclosure would cause to the relevant economic interest at stake in the particular case, and whether there is any wider

public interest in preserving the principle of confidentiality. However, the initial focus should be on the harm to legitimate economic interests.

52. Note that if more than one EIR exception applies to the information, it is possible to aggregate (combine) the public interest factors relevant to each exception when considering the public interest test.
53. These factors must then be balanced against the public interest in disclosure. Regulation 12(2) specifically provides that public authorities should apply a presumption in favour of disclosure. This means that there will be occasions when public authorities should disclose information even though it is confidential and disclosure would harm someone's legitimate economic interests.

Harm to legitimate economic interests

54. To engage the exception, a public authority will already have established that disclosure would cause some harm to a legitimate economic interest of the relevant person. It should therefore be straightforward to identify the relevant interests.
55. Only harm to the economic interest already identified to engage the exception will be relevant here, as the exception only protects confidentiality as far as necessary to protect those interests. Public authorities should not take any other arguments (eg relating to personal privacy or the interests of another party) into account for the purposes of this exception.
56. The weight given to this factor will depend on the extent, severity and frequency of the harm in the particular case.

Preserving the principle of confidentiality

57. There will always be some inherent public interest in maintaining commercial confidences. Third parties would be discouraged from confiding in public authorities if they did not have some assurance that confidences would be respected.
58. However, the Commissioner does not consider that a generic argument about inherent public interest carries significant weight.

59. Arguments about undermining confidentiality and the relationship of trust will have more weight when they relate to the specific circumstances of the case and identify how that particular relationship of trust serves the public interest. If a public authority can demonstrate that this disclosure would undermine its relationship with a particular party, or affect its ability to do similar business with others in future, and that those relationships serve the public interest, then this will carry more weight than an assertion that breaching confidentiality will have a harmful effect on trust generally.
60. To some extent the weight of this argument will again depend on the actual harm that the disclosure would cause to the third party. If the harm caused would be limited it is more difficult to argue that this would seriously undermine the authority's future relationships.
61. It may also depend on whether there are other methods of obtaining the information. If a public authority can easily compel the disclosure of similar information in the future, or it is in the third party's interests to continue to provide the information, there will be less public interest in preserving the principle of confidentiality.

Example

In [Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association \(EA/2010/0012, 24 May 2010\)](#), the Tribunal dismissed general arguments that disclosure of a viability report in relation to a planning application would affect the supply of viability reports from other developers in future. The Tribunal countered that the passage of the EIR meant that there could never be a blanket guarantee of confidentiality; that future developers in similar circumstances would be obliged to supply the reports if they wanted to obtain consent; and that in other circumstances (where there was no such obligation) different considerations may apply and developers should appreciate that this case would not set an automatic precedent.

62. However, this argument may still carry weight if it would take additional time and resources to compel the disclosure of information, especially if ensuring the free flow of information is important for the public authority's functions.

63. The weight of this wider public interest in respecting confidentiality may also be affected by the nature of the obligation of confidence. For example, if a duty of confidence has been voluntarily self-imposed on the public authority by contract, this is likely to carry less weight than an obligation of confidence imposed by statute. In support of this general approach, the Commissioner notes that paragraphs 46 to 53 of the [Code of Practice](#) issued under the EIR make clear that a public authority cannot contract out of its obligations under the EIR and should not accept information in confidence unless it is necessary to do so.
64. Respect for confidentiality in favour of the public authority itself is likely to carry little or no inherent weight. It may be important to preserve trust in public authorities' ability to keep third party information confidential. However, public authorities should expect that information they create may need to be disclosed under the EIR, even if they would prefer to keep it confidential. In such cases the public interest arguments should be focussed on the specific harm to legitimate economic interests, rather than on respect for confidentiality in principle.

Public interest in disclosure

65. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making, all of which ultimately contribute to a better environment.
66. Regulation 12(5)(e) often arises in relation to planning matters. The Commissioner considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure in such cases.

Example

In [Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association \(EA/2010/0012, 24 May 2010\)](#), the Tribunal considered various features of the planning regime concerned with public participation and transparency, with specific reference to the demolition of protected buildings. The Tribunal concluded: "*All that in our view indicated a very weighty public interest in disclosure in*

this case." (paragraphs 16-17)

67. There may of course be other factors in favour of disclosure, depending on the particular circumstances of the case. For example, these could include accountability for spending public money, the number of people affected by a proposal, any reasonable suspicion of wrongdoing, or any potential conflict of interest.

Example

In [Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association \(EA/2010/0012, 24 May 2010\)](#), the Tribunal considered that the fact that the council itself owned the site to be developed "*gave rise to a need for 'particular scrupulousness' on the part of the Council*" and added substantial weight in favour of disclosure.

Trade secrets

68. A trade secret is a form of confidential commercial or industrial information given additional protection under the common law. In broad terms, it refers to information of a unique and often technical nature which has taken some degree of skill or investment to produce, gives a competitive advantage to the person using it, and is treated as particularly confidential by its owner (eg restricted to a limited number of people within an organisation).
69. A classic trade secret might be unique information about processes or methodologies (eg secret formulae or recipes). However the concept is wider than this and could also include such things as unique financial models or pricing structures, customer lists, or promotional strategies, as long as these are not generally known and confer a competitive advantage.

Example

In [Department for Work and Pensions v Information Commissioner \(EA/2010/0073, 20 September 2010\)](#) the Information Rights Tribunal considered the concept of trade secrets in the context of the section 43 exemption under FOIA. The request was for a contract with a private sector

organisation to provide IT infrastructure services to government. The contract contained a financial model with detailed information on costs, pricing structures, profits, and overhead recovery rates in order to demonstrate that the services were provided on a value-for-money basis. The Tribunal found that the financial model was a trade secret of the IT provider. A significant amount of time and money had gone into preparing it, and it contained a unique model for calculating prices, rates of return etc which would, if disclosed, put competitors at an unfair advantage in relation to any future procurement exercise.

70. Trade secrets are not specifically mentioned in the exception. Whether information technically constitutes a trade secret will not therefore be a determining factor in applying the exception as long as a public authority can establish each element of the four-stage test as set out above. The Commissioner would not therefore advise public authorities to focus on the concept at any great length for the purposes of this exception.
71. Nonetheless, if it is clear that information does constitute a trade secret, the exception will be engaged as it is an inherent feature of a trade secret that it will be commercial or industrial information, that it is confidential, and that disclosure would cause significant harm to the trading position (and therefore the legitimate economic interests) of the relevant party.
72. If the information is a trade secret, there will be strong public interest in protecting it because of the level of investment involved and the extent to which disclosure would undermine the relevant party's competitive advantage. This principle was confirmed by the Tribunal in [Department for Work and Pensions v Information Commissioner \(EA/2010/0073, 20 September 2010\)](#). Even so, this does not mean that there is a de facto blanket exception for trade secrets, and it will of course still be necessary to consider the weight of public interest factors in favour of disclosure in the particular case.

Practical points

Publication scheme

73. We expect public authorities to routinely provide certain information about contracts that have completed a tendering

process. See our [publication scheme guidance](#) for more information.

Entering into confidentiality clauses

74. The [EIR code of practice](#) makes clear that public authorities cannot contract out of their obligations under the EIR, and should reject confidentiality clauses wherever possible. Information covered by a confidentiality clause will still need to be released unless an exception applies and the public interest test can be satisfied. Signing clauses that provide a false sense of security will only damage relationships if a public authority is obliged to disclose information under the EIR at a later date.
75. Nonetheless, the Commissioner recognises that confidentiality clauses may be appropriate in some circumstances if they help to identify information that would genuinely cause damage to the contractor's interests if released.
76. If in exceptional circumstances it is appropriate to agree to a confidentiality clause, public authorities should ensure that there is good reason for doing so and that contractors understand that disclosure might still be necessary under the EIR. Public authorities might want to consider explaining the effect of the EIR in tendering documentation so it is clear from the outset. Giving this type of warning that confidentiality may be overridden in some cases will not undermine the fact that confidentiality is still provided by law, and so will not affect the public authority's ability to use the exception.
77. To use the exception to protect the interests of a third party such as a contractor, public authorities will need evidence reflecting the concerns of that third party. However, there is no extension of time in which to consult the third party once a request is received. If information is accepted in confidence, it will therefore be helpful for a public authority to understand from the outset why the contractor considers information to be commercially sensitive, and how long it is likely to remain sensitive.
78. However, public authorities may still need to consult to obtain appropriate arguments and evidence at the time of a request, especially if circumstances have changed or market conditions have moved on so that information might be less sensitive than when it was originally provided.

Examples of commercial information held by public authorities

79. Examples of the types of information that might attract this exception include:
- Planning: information relating to development plans for land.
 - Private Finance Initiative (PFI) or public/private partnerships (PPP): information relating to a private business partner involved in the financing or delivery of public projects and services.
 - Procurement: information about a public authority's purchase of goods or services from private contractors, including information submitted during the tendering process by bidders, information about the resulting contract, and information about the public authority's own purchasing position. Note however that there are government guidelines that some details of any expenditure over £500 should be published (the name of the contractor, the goods or services purchased, and the cost) and this information is unlikely to be considered confidential.
 - Customer information: information about a public authority's customer base if the public authority charges for offering a particular service.
 - Regulatory information: information obtained about private businesses in order to perform a public authority's regulatory functions, eg issuing licences or investigating breaches of regulations.
80. This is not an exhaustive list, and does not imply that all such information will be covered by the exception. It is merely an indication of the variety of situations in which the exception might be relevant. Public authorities will need to consider the content of the information in the particular circumstances of each case to decide whether the exception actually applies.

Other considerations

81. Public authorities might also want to consider the following exceptions:

- regulation 12(5)(c) if the information attracts intellectual property rights;
 - regulation 12(5)(d) if disclosure would adversely affect the confidentiality of formal proceedings of a public authority; or
 - regulation 12(5)(f) if information has been voluntarily provided by a third party who does not consent to disclosure and whose interests would be adversely affected.
82. If the information is not environmental information, this exception is not relevant and public authorities will instead need to consider exemptions under FOIA. There is no directly equivalent FOIA exemption, but the most relevant exemptions are likely to be section 41 (information obtained in confidence) or section 43 (commercial interests).
83. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other EIR exceptions or FOIA exemptions.

More information

84. 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.
85. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
86. If you need any more information about this or any other aspect of freedom of information or data protection, please [Contact us: see our website www.ico.org.uk](http://www.ico.org.uk).