

## International relations, defence, national security or public safety (regulation 12(5)(a))

### Environmental Information Regulations

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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 help public authorities fully understand their obligations and promote good practice.
4. This guidance explains to public authorities how the exceptions provided by regulation 12(5)(a) and 12(6) apply to protect information which, if disclosed, would adversely affect international relations, defence, national security or public safety.

## Overview

- There can be a significant overlap between the four interests protected by regulation 12(5)(a).
- International relations describes our relations with other states and international organisations.
  - An adverse effect on international relations does not have to be tangible or immediate. It includes situations where a diplomatic response is required to limit the damage to a relationship.
  - Another country's response to a disclosure will depend on the culture and traditions of that country.
  - The exception can protect the UK's negotiating position with other members of the international community.
- Defence refers to the protection of the UK Islands and any

colony.

- There are many threads to national security. It protects the UK, its people and our legal and democratic institutions.
  - National security involves the cooperation with other states in the fight against global terrorism.
  - Consideration should be given to whether the requested information could be pieced together with other information to reveal something that would undermine national security – the mosaic argument.
- Public safety describes injury to the physical or mental health of the public or any section of the public. It extends to the safety of a particular individual.
  - Worry or stress is not considered an adverse effect on mental health.
- Under regulation 12(6) a public authority does not have to confirm or deny that it holds information in response to a request, if doing so would adversely affect one of the interests within regulation 12(5)(a).
- Regulations 12(5)(a) and 12(6) are subject to the public interest test.

## What the EIR say

5. Regulation 12(5)(a) 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 -

(a) international relations, defence, national security or public safety.

12(6) – For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest ....

## Introduction

6. To engage regulation 12(5)(a), disclosing the requested information must have an **adverse effect** on at least one of the following interests; international relations, defence, national security or public safety. As explained in [‘How exceptions and the public interest test work in the Environmental Information Regulations’](#) this sets a high threshold. It has to be **more probable than not** that the alleged harm would occur if the information were released.
7. The other exceptions provided by regulations 12(4) and 12(5) require the public authority to confirm or deny whether it holds the requested information, even if it is not obliged to make that information available. However regulation 12(6) provides that a public authority **can** refuse to confirm or deny that the information is held.

8. Both the exception from the duty to make information available and the duty to confirm or deny that the information is held, are subject to the public interest test, set down in regulation 12(1)(b).
9. This guidance will now consider each interest within regulation 12(5)(a) separately, starting with international relations, before looking at the application of the public interest test. There is a significant overlap in the interests protected by regulation 12(5)(a). For example, if relations between the UK and an ally are harmed, this may also have implications for national security and defence.

## International relations

10. Whilst international relations clearly describes relations between different states, it is not restricted to relations directly between the UK and another state. In the politically complex world, states often pursue their interests through membership of international organisations. The exception also protects the UK's relationships with these organisations, which are an important means of defending and promoting the UK's political, economic and other interests.
11. The Department of Environment, Food and Rural Affairs "Environmental Information Regulations 2004 detailed Guidance" is helpful when explaining what sort of information may be captured by the exception. It states that,  
  
"this may comprise information obtained from (or which relates to) a foreign state, an international organisation or overseas territories where disclosure might compromise future co-operation with the UK in areas of our vital interests or information which has the potential to undermine the relationship between UK and other countries or international organisations" (Paragraph 7.5.2.11 on page 11).
12. In the above quote the UK's vital interests include economic and security interests.

### **Scope of international relations**

13. The scope of international relations is demonstrated by decision notices issued by the Commissioner. To date he has found the exception applied to:

- information on legal proceedings between the UK and European Commission (a body that the UK is a member of) (FER0219897);
- information provided in confidence by the government of a British Overseas Territory (FS50385845); and
- communications between the Prime Minister's Office and a private oil company about a project to build a pipeline in Russia (FER0162453).

**Example**

In [FER0282488](#) data on climate change provided by the national meteorological services of other states was requested from the University of East Anglia (UEA). The Commissioner accepted that the disclosure of this information had the potential to impact on international relations. This was because the UEA was recognised as the UK's leading research facility on climate change and had close links to the Met Office, part of the Ministry of Defence. It was therefore possible that the actions of the UEA would be perceived as reflecting the attitude of the UK government.

Ultimately the decision notice found that the exception was not engaged. In broad terms this was because the Commissioner was not satisfied that the foreign meteorological services would react negatively to the disclosure in the way claimed by the UEA.

However this does not alter the fact the UEA's interaction with these meteorological services had the potential to raise issues around international relationships. If the national meteorological services were to react in the way UEA feared, the consequences would not solely impact on the university. It could damage opportunities for other academic institutes to work with international partners and even colour the dealings of the UK government with other states over climate change.

14. The exception is not engaged simply because a disclosure may lead to one UK public authority falling out with its contacts

abroad. For example, strained relations between a UK school and a foreign school, as a result of an unsatisfactory student exchange programme, is unlikely to impact on the UK's international relations with that country.

15. Central government departments are most likely to hold information relating to international relations. However, as demonstrated by the UEA example, other public authorities may hold information of this nature. It is not possible to list all the types of information that have the potential to impact on international relations. In many cases it will be easier to recognise the international relations aspect to information when it arises than to anticipate it.

### **Adverse effect on international relations**

16. An adverse effect on international relations does not need to be measurable in terms of a tangible or material loss, as demonstrated by the example below. Nor does it have to be immediate.

#### **Example**

Campaign Against the Arms Trade v Information Commissioner and the Ministry of Defence ([EA/2007/0040](#) 26 August 2008).

This case concerned a request for a memorandum of understanding between the UK and the Kingdom of Saudi Arabia (KSA) relating to the sale of defence equipment. Although the request was not for environmental information the findings about what may be deemed a prejudice to international relations are relevant to regulation 12(5)(a).

Maintaining strong relations with the KSA is important to the UK's economy. The appellant argued that to demonstrate there would be an adverse affect on our relations with the KSA, it was necessary to show there was a risk of losing valuable defence contracts if the information was disclosed.

The Information Tribunal rejected this approach. It found that the exemption was engaged if the disclosure;

"... makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not

otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage.”

17. The case also illustrates that it is not necessary for a disclosure to result in some immediate, negative reaction by another state or international body for the exception to be engaged. It is possible that the state likely to be offended by the disclosure would not openly react. But this does not mean that the UK’s relationship with that country would be unaffected. The government may still consider that it needs to take remedial steps to protect the UK’s relationship with the other party in order to prevent any harm.
18. The public authority will need to explain why it has grounds for believing such remedial action is necessary in order to engage the exception.

**International relations are not just about how favourably the UK is viewed by the international community**

19. International relations are not simply about fostering better relations with another state or international body. It can also describe the comparative position of one country to another. In other words, weakening the UK’s position in respect of another country is also an adverse effect on our relationship with that country.

**Example**

In *Matthew Sinclair v Information Commissioner and Department of Energy and Climate Change* ([EA/2011/0052](#) 8 November 2011), the appellant had requested the UK’s estimates of the cost to the UK of reducing carbon emissions. The information had been prepared for international negotiations on climate change.

The Department of Energy and Climate Change was concerned that disclosing this information would weaken the UK’s bargaining position and strengthen the position of other countries.

The First Tier Tribunal found (para 20) that,

"... the exception is not limited to disclosure which would harm international relations by annoying other states. The phrase 'would adversely affect international relations' seems to us to encompass..., the adverse effect on the UK's relations with other states by weakening the UK's bargaining position. We do not consider that the term 'international relations' can properly be confined to how favourably or otherwise other states view the UK; rather, it covers all aspects of relations between the UK and other states or international organisations."

### **The culture and traditions of other countries**

20. How another country reacts to a disclosure will depend on the culture and tradition of that country. Many countries have their own legislation providing access to information held by their public authorities. Countries subject to the European directive giving rise to the EIR will be familiar, and more comfortable, with public access to the environmental information held by their state institutions. They are therefore less likely to have concerns over the principle that UK public authorities may disclose information relating to them.
21. Other states may place greater value on confidentiality. Therefore a public authority must have regard for the cultural values of the state to which information relates, as this will have a very real effect on how that country reacts.

#### **Example**

Returning to the Campaign Against the Arms Trade case ([EA/2007/0040](#) 26 August 2008) concerning information that the Kingdom of Saudi Arabia (KSA) considered confidential between itself and the UK government. The Ministry of Defence (MOD) withheld the information under section 27(2) which provides that information is exempt if it is confidential information obtained from another state. The tribunal considered whether it was reasonable for the KSA to have expected the information to be treated as confidential. The Information Tribunal found that the confidentiality of the information should be judged against:

“what would have been reasonable for the KSA to have expected” (para 75).

The Tribunal took account of the fact that:

“... the attitude of the KSA to defence or supply of arms agreements was consistently that they should remain secret and confidential” (para 66).

The Tribunal accepted evidence:

“... as to the particular characteristics of the KSA including the secretive nature of its society. .... The concept of freedom of information and transparency is generally alien to their culture” (para 76).

## **Re-opening old wounds**

22. Information relating to disputes between the UK and other states in the past may still be sensitive, even if the issues were well reported at the time. The other party may still react adversely if disclosure refocuses attention on the dispute.

## **Defence**

23. Information will be covered by this limb of the exception if its disclosure would assist an enemy or potential enemy.
24. The term ‘defence’ is not defined in the EIR. However it can safely be interpreted as referring to the protection of the UK Islands (which includes the UK, Channel Islands and the Isle of Man) or any colony. In reality, our armed forces may need to carry out operations against enemies in any part of the world, in order to ensure their defence.
25. Our armed forces provide the means of directly engaging our enemies and therefore anything that adversely affects their capabilities or effectiveness will also have an adverse effect on

our defence. This is regardless of any other role those forces are fulfilling. For example, if our armed forces were contributing to a UN peace keeping mission then, although there may not be any immediate threat to the UK, any harm to our forces would ultimately weaken our defence. Similarly, if our forces were cooperating with foreign forces, any threat to those forces, threatens our armed forces too. The adverse effect on our defence need not be immediate or direct.

26. The capability of the armed forces is affected by the equipment and supplies they have. It is conceivable that requests for information on supply chains, the specification of equipment or problems with it, or even information which, if disclosed, may threaten the continued production of equipment, may engage the exception. However caution is needed with this last point as illustrated by the following example.

**Example**

In [FS50089556](#) information held by the Department for Business, Innovation and Skills (BIS) relating to the procurement of trainer aircraft by the Ministry of Defence was requested. The information was not environmental and so was dealt with under FOIA but there are lessons applicable to regulation 12(5)(a).

BIS withheld the information under a number of exemptions. It argued that the disclosure would be likely to prejudice the commercial interests of the manufacturer of the trainer jet and so applied section 43 of FOIA – commercial interests, to withhold the information. It argued that, as the company was a major manufacturer of defence equipment used by our armed forces, any harm to that company and its long term success would also harm the defence of the UK and therefore applied section 26 of FOIA – defence.

The Commissioner rejected the application of section 26. Although there is logic to BIS’s argument, the public authority failed to satisfy the Commissioner that any impact on the manufacturer would be sufficient to jeopardise its long term future and the supply of defence equipment to the UK’s armed forces.

27. The scope of the defence limb of regulation 12(5)(a) can be drawn quite widely to provide similar protection for environmental information as section 26 does in FOIA.
28. The defence of the UK Islands and its colonies does not solely relate to military operations. Information on infrastructure could also have implications for our defence. Currently the most realistic threat to infrastructure would be from terrorists and therefore these considerations are also relevant when considering the national security limb of this exception. But public authorities should not be overly concerned with ascribing a particular threat to one limb of the exception. The exception naturally accommodates these overlaps.
29. Central government departments, particularly the Ministry of Defence, are most likely to apply this limb of regulation 12(5)(a), but other public authorities may also do so. For example, emergency services and national health bodies will hold information about emergency planning that could have implications for our defence.
30. To date the Commissioner has not considered many cases where a public authority has applied regulation 12(5)(a) because there was a risk to defence. Nor has he investigated many complaints concerning the equivalent exemption under section 26 of FOIA. However it is easy to think of obvious examples when releasing information would adversely affect defence such as the disclosure of battle plans for an imminent military campaign. Requests about the following **may** capture environmental information and raise concerns about the defence of the UK:
  - the use, storage or testing of nuclear, chemical or biological weapons;
  - the decommissioning of ships; or
  - fuel consumption.
31. This list is speculative and is only intended to prompt public authorities to consider whether the requested information could be environmental and, if its disclosure would undermine defence, to apply the appropriate exception.

## National security

32. The term 'national security' is not defined in the EIR but the same language is used in other legislation, including FOIA, and has been considered by the Commissioner, tribunals and the courts.
33. In *Norman Baker v the Information Commissioner and the Cabinet Office* ([EA/2006/0045](#) 4 April 2007), the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Reham* [2001] UKHL 47, which considered whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:
- 'national security' means the security of the United Kingdom and its people;
  - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
  - the protection of democracy and the legal and constitutional systems of the state is part of national security as well as military defence;
  - action against a foreign state may be capable, indirectly, of affecting the security of the UK; and
  - reciprocal cooperation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
34. There are many threads to national security and, as identified above, it overlaps with, but extends beyond military defence.
35. There have been a limited number of cases where regulation 12(5)(a) has been engaged because of a threat to national security.

### **Example**

In *The Office of Communications and the Information Commissioner and T-Mobile (UK) Limited* ([EA/2006/0078](#) 4 September 2007), Ofcom successfully argued that disclosing a database of base stations for mobile phones would assist criminals wanting to steal cabling and other materials. This in turn would adversely affect public safety. The Tribunal also

accepted that information would be of use to terrorists intending to disrupt the country's communication system.

36. This illustrates that relatively mundane information about primarily civil infrastructure could also be of use to terrorists and therefore could attract the exception provided by regulation 12(5)(a). In other cases the threat to national security is more obvious.

**Example**

In [FS50117924](#) the Commissioner considered a request made to the UK Atomic Energy Authority (UKAEA) for information relating to the storage and safety of nuclear materials. UKAEA were concerned that disclosing the information would assist those wishing to steal material for use in a so-called dirty bomb.

37. There is often an overlap between national security and international relations. This is because our national security depends, in part, on cooperation with allies, as well as our ability to resolve conflicts diplomatically rather than using force. Public authorities do not need to worry about ascribing a particular threat to just one limb of the exception as it naturally accommodates these overlaps. However, when investigating a complaint, the Commissioner will expect public authorities to fully articulate the reasons why one or more of the interests protected by regulation 12(5)(a) would be adversely affected.

**The threat to national security does not have to be immediate**

38. It is not necessary to show that disclosing the information would lead to a direct or immediate threat to the UK.

**Example**

Returning to the Secretary of State for the Home Department v Rehman [2001] UKHL 47, concerning the deportation of a foreign national, Lord Slynn found that:

“To require the matters in question to be capable of resulting ‘directly’ in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse effect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate”.

39. This concept is particularly relevant when a public authority is concerned that disclosure would damage the UK’s relations with another country. This, in turn, could frustrate cooperation against terrorism, for example by reducing or preventing the sharing of intelligence. This would leave the UK more vulnerable to attack.
40. Alternatively, it may be that the disclosure would hinder attempts to improve relations with a country which could be an ally in the fight against terrorism. In such cases it may not be possible to identify all the benefits that might have arisen if the requested information had not been disclosed, but the public authority will need to explain why fostering good relations with that country is important to national security.
41. Maintaining national security is not only about protecting current targets. This point is discussed in more detail in the FOIA guidance on section 24 and illustrated by the example below.

**Example**

The West Yorkshire Fire and Rescue Service successfully argued in [FS50308040](#) that the details of its fleet of vehicles could be used to clone vehicles. This would allow its command centre, which coordinated incidents of national significance, to be infiltrated.

Although there was no evidence that anyone was currently planning an attack against the command centre the Commissioner accepted that this posed a threat to national security.

## The 'mosaic' argument

42. The Commissioner recognises terrorists can be highly motivated, potentially well resourced and may go to great lengths to gather intelligence. This means there may be grounds for withholding seemingly harmless information, on the basis that it may assist terrorists when pieced together with other information they possess or could obtain. This principle can be demonstrated by a request made under FOIA for non-environmental information.

### Example

In [FS50368290](#) the Commissioner considered a request to the Metropolitan Police Service for the previous year's cost of the Royal Protection Unit. The police argued that the information could be compared to other information, in the public domain, and that this would provide terrorists with intelligence on the relative vulnerabilities of members of the Royal family.

43. These 'mosaic' arguments arise when considering other exceptions. However, with other exceptions the question is often whether combining the requested information with other information in the public domain will cause harm. In national security cases the issue is whether the requested information will be useful when combined with other information that terrorists may already have or could obtain. The Commissioner will bear this in mind when assessing arguments presented by a public authority. He recognises that it may be harder for a public authority to say what additional information terrorists have access to or what they may pick as a target.

## Security Bodies

44. Unlike section 23 of FOIA which provides a class based exemption for named security bodies, such as the Security Service (MI5), there is no specific exception for information relating to security bodies under the EIR. However, by the very nature of the work that security bodies are involved in, much of the information either supplied by such bodies or relating to their work will have national security implications. But when a public authority wishes to withhold such information it will still need to explain how the disclosure would adversely affect

national security or one of the other limbs of regulation 12(5)(a). Under FOIA, information such as the address of GCHQ (one of the named security bodies) is technically exempt. But information of a similarly mundane nature would not be exempt under the EIR. The Commissioner is confident though that regulation 12(5)(a) will provide an adequate level of protection, if disclosing the information would undermine national security.

45. The Commissioner recognises that acknowledging whether the requested information is held can reveal if a security body is involved in a particular issue and that this could be damaging to national security. Regulation 12(6) caters for this by allowing a public authority to respond to a request by neither confirming nor denying that information is held. The application of regulation 12(6) is discussed in more detail later.

### **Ministerial certificates**

46. Regulation 15 allows a Minister of the Crown (or a person designated by a minister) to certify that disclosing the requested information would adversely affect national security and that the public interest favours withholding the information. This type of certificate is conclusive evidence of the adverse effect and the balance of the public interest.
47. It should be noted that these certificates can only be issued in respect of national security, not as conclusive evidence of an adverse effect on the other interests described in regulation 12(5)(a).

### **Commissioner's approach to defence and national security complaints**

48. When investigating complaints, in most cases the Commissioner will need access to the withheld information to inform his decision. This includes cases when regulation 12(5)(a) has been applied on the basis of harm to defence or national security. However public authorities which regularly handle this kind of information will have staff with significant expertise in defence and national security issues. In exceptional circumstances the Commissioner may consider whether he can reach a decision based on either submissions

or confidential discussions, or both from such staff, rather than having access to the withheld information.

## Public Safety

49. The term public safety is not defined in the EIR. But in broad terms this limb of the exception will allow a public authority to withhold information when disclosure would result in hurt or injury to a member of the public. It can be used to protect the public as a whole, a specific group, or one individual who would be exposed to some danger as a result of the disclosure.
50. The hurt or injury could be to the physical or mental health of those affected. However, the Commissioner does not accept that worry or stress equates to an adverse effect on mental health. This position was established by the following case.

**Example**

In *People for the Ethical Treatment of Animals Europe (PETA) v Information Commissioner and the University of Oxford* ([EA/2009/0076](#) 13 April 2008), the appellant requested information concerning animal experimentation. The request was dealt with under FOIA and refused under section 38, the health and safety exemption. There was concern over the risk posed by a campaign against animal experimentation targeting the university and its staff.

The appellant argued (in paragraph 31) that:

"... for the Tribunal to be satisfied that there was a danger to mental health that positive evidence from e.g. a psychiatrist as to the clinical impact of the campaign upon the mental health of those affected would be necessary. The Tribunal rejected that contention and was satisfied that the level and nature of the physical threat was sufficient that on a balance of probabilities the effect upon the mental health of those involved would go beyond stress or worry and constitute an endangerment to their mental health."

51. Even though a public authority may not need to seek expert evidence from health professionals about the risk to mental health, it will still need to explain its grounds for believing such a risk exists. Unsubstantiated speculation that a risk exists would not be sufficient to satisfy the Commissioner that the exception was engaged.
52. Although stress is not sufficient for regulation 12(5)(a) to apply, it may be an issue to consider under regulation 13 when deciding if the disclosure of personal data would be fair.

**Information that has the potential to affect public safety**

53. The examples below outline the sorts of information that the Commissioner has considered in cases involving regulation 12(5)(a) and an adverse effect on public safety.

**Example**

In *The Office of Communications v Information Commissioner and T Mobile (UK) Limited* ([EA/2006/0078](#) 4 September 2007), the Information Tribunal considered a request for information revealing the exact locations of the base stations for mobile phones. It found that public safety would be adversely affected because disclosure would encourage the theft of cable from those base stations rendering them dangerous. The information would also assist terrorists wishing to disrupt emergency service communications. Regulation 12(5)(a) was engaged.

### **Examples**

In [FER0069925](#) an audit report on a pedestrian crossing scheme had been requested. It was part of a multi-staged audit process. The Commissioner accepted that if disclosing the report would compromise future audits then regulation 12(5)(a) would be engaged. But he found that public debate generated by the earlier report would not prevent professional staff from conducting objective audits and therefore regulation 12(5)(a) was not engaged.

In [FER0172420](#) the Commissioner found that the Health and Safety Executive were correct to withhold a report on the risks posed by chemicals to be used in a proposed manufacturing plant. Evidence was provided that revealing the effect of a catastrophic failure at the plant would undermine national security and endanger public safety and therefore regulation 12(5)(a) was engaged.

[FER0321779](#) concerned plans to enforce planning restrictions at an illegal travellers' site. Its disclosure would endanger those carrying out the operation and therefore regulation 12(5)(a) was engaged.

In [FER0369650](#) a local council withheld a safety report that revealed the access points to a series of tunnels and air raid shelters. Although the tunnels were dangerous, the access points were already identified in material available from various websites. Therefore disclosing the information would not increase the risk of people entering those tunnels and injuring themselves. Regulation 12(5)(a) was not engaged.

54. The cases concerning mobile phone base stations and the report held by the Health and Safety Executive demonstrate the close link that can exist between national security and public safety.
55. In addition to the cases considered under regulation 12(5)(a), the Commissioner has considered a number of cases involving the application of section 38 of FOIA, the health and safety exemption. The information that raised safety issues in those cases fell into the following broad categories:
- details about systems designed to protect public safety. For example; safety cameras, drug testing and drug trials, telephone systems for the health service;
  - material identifying individuals who might be targeted as a result of disclosure. For example; those involved in controversial work such as animal experimentation, those making controversial decisions such as the awarding of grants to anti-fascist groups, the number of sex offenders in a locality and employees whom a service user may hold a grudge against;
  - details about potential targets for terrorists. For example information on MPs' travel arrangements or cars used by senior police officers; and
  - information that would undermine the security of particular establishments or operations. For example, information relating to the transport of nuclear weapons.
56. The Commissioner considers that similar issues are relevant to environmental information.

## Regulation 12(6) NCND

57. There will be occasions when revealing whether the requested information is held will itself adversely affect the interests that regulation 12(5)(a) protects.
58. Normally under the EIR a public authority has to confirm or deny that it holds the requested information. However it is different for the interests protected by regulation 12(5)(a). Regulation 12(6) provides that a public authority can respond to a request by refusing to confirm or deny that it holds the

requested information, if doing so would adversely affect international relations, defence, national security or public safety. This is often referred to as 'neither confirming nor denying' (NCND) that the information is held.

### **How requests are phrased**

59. The way a request is phrased will often have an important bearing on the application of the NCND provision.

#### **Example**

A hypothetical request is made to the Home Office for information on MI5's infiltration of the anti-nuclear movement and any intelligence gathered on the threat posed to the building of a new nuclear power station by eco-warriors. Some of the information captured by the request could be environmental.

Simply confirming or denying that the information was held would reveal whether or not MI5 had infiltrated the anti nuclear movement. This is likely to be sensitive and therefore the public authority could NCND that the information was held under regulation 12(6).

60. It may also be appropriate to NCND that information is held when requests identify particular safeguards or security measures.

#### **Example**

In [FS50223117](#) the Commissioner upheld a decision by the Northern Ireland Office to NCND that information was held about the number and costs of personal panic alarms issued to senior civil servants. As this was not environmental information the public authority applied section 38(2) of FOIA. This was on the basis that confirming whether they had issued panic alarms to staff would reveal something about the security measures they adopted, which could increase their vulnerability.

61. It is easy to transfer this principle to requests for environmental information on security or safety measures. For

example, confirming what security measures are adopted in the management of radioactive waste could render such operations more vulnerable to attack and this in turn could adversely affect public safety.

### **How regulation 12(6) works**

62. It is not necessary to show that both potential responses would have an adverse effect on the interests protected by regulation 12(6). It is sufficient to demonstrate that either a confirmation or a denial would have an adverse effect.
63. Furthermore a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide. For example, if it does hold the information the public authority is not limited to only considering what would be revealed by confirming that it holds the information. It can also consider what would be revealed by a 'hypothetical' denial that the information was held.

### **Use of regulation 12(6) to avoid establishing patterns to responses**

64. If a public authority is likely to receive numerous similar requests, they need to make sure that they consistently refuse to confirm or deny when responding, because a failure to do so could be harmful.

#### **Example**

A hypothetical request is made to the Home Office for information obtained by MI5 through its alleged infiltration of the anti-nuclear movement. If MI5 had not infiltrated the anti-nuclear movement, the public authority may be tempted to simply explain that no information is held, using regulation 12(4)(a) to do so.

However, if MI5 did then take an active interest in the movement at a later date, the Home Office would not be able to apply regulation 12(4)(a) if it received a new request. Instead it would have to fall back on regulation 12(6) to NCND that the information was held. This change in approach would itself signal a change in MI5's activities.

This could be avoided by applying regulation 12(6) when the first request was received and then doing so consistently for any later requests.

Regulation 12(6) would apply to both requests as denying the information was held would reveal that MI5 had not infiltrated the anti-nuclear movement, where as confirming the information was held would obviously reveal that MI5 had infiltrated the movement.

### **NCND is subject to the public interest test**

65. The exception from the duty to confirm or deny is subject to the public interest test. Once a public authority has satisfied itself that regulation 12(6) is engaged it must still consider whether the public interest in maintaining the exception outweighs the public interest in confirming or denying that the information is held. The public interest test is considered in more detail later.

### **Commissioner's approach to complaints**

66. As a general rule the Commissioner will be able determine whether the NCND provision in 12(6) is engaged without knowing whether the requested information is held. However in exceptional cases the Commissioner will need to know whether the information is held and in a very limited number of cases, he will require access to it. This may be necessary to determine where the public interest lies.

## **Public interest test**

67. As with all the exceptions under the EIR, regulations 12(5)(a) and 12(6) are subject to the public interest test in regulation 12(1)(b). The public interest is discussed in detail in ['How exceptions and the public interest test work in the Environmental Information Regulations'](#). However there are a

number of points that have particular relevance for regulations 12(5)(a) and 12(6).

### **The importance of protecting national security**

68. There is an obvious and weighty public interest in safeguarding national security. This does not remove the need for public authorities to fully consider the public interest in disclosure. However it does mean that there will have to be equally weighty public interest arguments in favour of disclosure before releasing information that would compromise the UK's national security.

### **International relations and the public interest in respecting confidences**

#### **Example**

Campaign Against The Arms Trade v Information Commissioner and Ministry of Defence ([EA/2007/0040](#) 26 August 2008) involved a memorandum of understanding (MOU) between the UK Government and the Kingdom of Saudi Arabia (KSA) that had been withheld under sections 27(2) and (3) of FOIA. In broad terms those sections relate to information obtained in confidence from another state. The Information Tribunal established that KSA had an expectation that the details of the MOU would remain confidential and found that the exemptions were engaged.

When looking at the public interest in maintaining those exemptions the Tribunal found that:

"Parliament recognised and we accept that there is an inherent disservice to the public interest in flouting international confidence. ....that confidence continued to apply to both MoUs and disclosure would have been seen as reneging on or flouting the basis upon which that information was obtained and the MoU entered. We regard that as a matter of significant weight in the context of international comity and relationships." (paragraph 95)

69. The example demonstrates the importance placed on respecting another state's expectations of confidentiality, in order to maintain international relations and diplomacy. The impact of disclosures under either the EIR or FOIA would extend beyond any immediate effect on the relationship between the UK and the confiding country. Disclosing such information would give the impression that the UK government could no longer be trusted with confidential information and this could affect our relations with the international community more generally. There is therefore an inherent public interest in preserving international confidences.

## Other considerations

70. Public authorities may also wish to consider the guidance available on the equivalent exemptions under FOIA. In particular the following guidance, which will be published shortly, may be of interest:
- Security bodies (section 23); and
  - Safeguarding national security (section 24).

## More information

71. 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.
72. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
73. If you need any more information about this or any other aspect of freedom of information, please [Contact us: see our website www.ico.gov.uk](http://www.ico.gov.uk).