

How exceptions and the public interest test work in the Environmental Information Regulations

Environmental Information Regulations

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1. The Environmental Information Regulations 2004 (EIR) give rights of public access to environmental information held by public authorities.
2. An overview of the main provisions of EIR can be found in [The Guide to the Environmental Information Regulations](#). This is part of a series of guidance which goes into more detail, to help public authorities to fully understand their obligations and to promote good practice.
3. This guidance explains to public authorities how the EIR exceptions from the duty to make information available work, the different types of exceptions, what is meant by 'adverse effect' and how to carry out the public interest test.

Overview

EIR contains exceptions from the duty to make information available, but there is a presumption in favour of disclosure.

The exceptions in regulation 12(4) relate to the nature of the request or the type of information; those in regulation 12(5) relate to an adverse effect on a particular interest.

To engage an exception in regulation 12(5) public authorities must show that disclosure *would* have an adverse effect ie that it is more probable than not.

All the exceptions in regulations 12(4) and 12(5) are subject to a public interest test.

- The public interest means what is in the public interest, not what is of interest to the public.

- Public interest arguments for an exception must be inherent in the exception.

- When deciding whether to apply an exception, public authorities must assess all the circumstances of the case and not simply make blanket rulings.

- There is always a general public interest in disclosure, deriving from the purpose of EIR. There may also be a public interest in

transparency about the issue the information relates to. Arguments in favour of disclosure of the specific information should also be considered.

- A suspicion of wrongdoing can give rise to a public interest in disclosure but there should be a plausible basis for the suspicion.

- There is always some public interest in disclosing information to present a full picture.

- When deciding whether to disclose information, irrelevant factors include the requester's identity, their private interests, and, in most cases, the argument that the information may be misunderstood.

- The fact that other methods of scrutiny are available does not in itself weaken the public interest in disclosure. But, where other means of scrutiny have been used, apart from EIR, this may weaken the public interest in disclosure.

- The factors determining the weight of the arguments for and against disclosure can include: the likelihood and severity of any adverse effect; the age of the information; how far disclosing the information would serve the public interest; and what information is already in the public domain.

- The authority must weigh the public interest arguments for maintaining the exception against those for disclosure. The information must be disclosed unless the public interest in maintaining the exception outweighs that in disclosure.

- Where more than one exception applies to the same information, public authorities will need to consider the public interest under each exception, and may also need to consider the aggregate public interest.

Public authorities should consider any adverse effects of disclosure and the balance of public interest as at the time for responding to the original request.

The only exception that includes a 'neither confirm nor deny' provision is regulation 12(5)(a), and it is subject to the public interest test. In addition, where a request is formulated in too general a manner the authority will not be able to confirm or deny whether it holds the information.

What the EIR say

Exceptions to the duty to disclose environmental information

12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—
(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
(2) A public authority shall apply a presumption in favour of disclosure.

The exceptions in regulations 12(4) and 12(5)

4. Under EIR regulation 5(1) public authorities have a duty to make environmental information that they hold available on request. There are certain exceptions¹ to this duty, listed in regulations 12(4) and 12(5). In addition, the duty does not extend to an applicant's own personal data (regulation 5(3)) and personal data about other people can only be released subject to the conditions in regulation 13.
5. This guidance relates to the exceptions in regulations 12(4) and 12(5). It explains how they work in general terms. We have produced separate guidance on what each exception covers.
6. The exceptions in regulation 12(4) relate to the request or to the type of information requested. For example, regulation 12(4)(b) refers to requests that are manifestly unreasonable; regulation 12(4)(e) refers to material that is still in the course of completion. So, under regulation 12(4), if the request or the information is of the type specified in the exception, then the exception is engaged. Public authorities don't need to establish that disclosing the information would have an adverse effect in order to engage the exceptions in 12(4). But, if there would be an adverse effect, this would be relevant to the public interest test.

¹ EIR uses the terms 'exceptions' rather than 'exemptions', which is the equivalent term in the Freedom of Information Act (FOIA).

7. Regulation 12(5) relates to situations where disclosing the requested information would have an adverse effect. For example, regulation 12(5)(b) refers to an adverse effect on the course of justice; regulation 12(5)(c) refers to an adverse effect on intellectual property rights. The exceptions in 12(5) are engaged if there would be an adverse effect on the particular interest listed in the exception.

Example

In *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008), Justice Mitting said at paragraph 23:

"As is evident from the words of regulation 12, potentially exempt information is dealt with in two categories or classes... Where an item of information falls within one of the classes identified in regulation 12(4) it is not necessary, for the provisions of 12(1) and (2) to be engaged, that prejudice to any particular interest should be disclosed. When regulation 12(5) is in issue, it is."

8. So, the exceptions in 12(4) and 12(5) are engaged in different ways. However, all the exceptions in these two regulations are subject to the public interest test. Once the exception has been engaged it is then necessary to consider the balance of the public interest in maintaining the exception or disclosing the information.
9. Under regulation 12(2) the public authority must apply a presumption in favour of disclosure, in both engaging the exception and carrying out the public interest test. In relation to engaging the exception, this means that there must be clear evidence that the request or the information falls into the class listed in regulation 12(4) or that disclosure would have the adverse effect listed in 12(5).

Example

Robin Philip Burgess v the Information Commissioner and Stafford Borough Council ([EA/2006/009](#), 7 June 2007) concerned a request for legal advice that the council received about a planning appeal. The council withheld the information under regulation 12(5)(b).

The Information Tribunal said at paragraph 38:

"We have had in mind Regulation 12(2) and the presumption in favour of disclosure when considering the exception and

have taken it to require, in this part of the application of Regulation 12, that in any case where there is doubt of the applicability of the exception that doubt must be resolved in favour of the disclosure i.e. the exception does not apply."

In that case the Tribunal found that there was no doubt and the exception was engaged.

Adverse effect test

10. Regulation 12(5) refers to an adverse effect on various interests. The Commissioner's view is that the phrase 'adversely affect' implies harm to something; in other words, disclosing the information would harm the interest specified in the exception. Parliament introduced the EIR to implement [EU Directive 2003/4/EC](#) on public access to environmental information, which in turn implements the Convention on Access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention). The UK is an independent signatory to the Aarhus Convention. The [Implementation Guide](#) to the Aarhus Convention says:

"Adversely affect means that the disclosure would have a negative impact on the relevant interest." (page 58)

11. In this respect, 'adverse effect' is equivalent to 'prejudice' in FOIA and there are similarities between the exceptions in regulation 12(5) and the 'prejudice-based' exemptions in FOIA². However, the threshold for what constitutes adverse effect in EIR is different to that for prejudice in FOIA, as explained below.
12. The Information Tribunal, in *Benjamin Archer v the Information Commissioner and Salisbury District Council* ([EA/2006/0037](#) 9 May 2007) ("Archer"), identified some key elements of the adverse effect test at paragraph 51:

² See our FOIA guidance on *The prejudice test* for further discussion of prejudice-based exemptions

- *“First, it is not enough that disclosure should simply affect [the interests referred to in the exception]; the effect must be “adverse”.*
- *Second, refusal to disclose is only permitted to the extent of that adverse effect.*
- *Third, it is necessary to show that disclosure “would” have an adverse effect - not that it could or might have such effect.*
- *Fourth, even if there would be an adverse effect, the information must still be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”.*
- *All these issues must be assessed having regard to the overriding presumption in favour of disclosure.*
- *The result, in short, is that the threshold to justify non-disclosure is a high one.”*

Adverse effect

13. To engage the exception, a public authority must be able to show that there would be some adverse effect on those interests specified in the exception. It is not enough to show that the information is related to those interests. As long as it can be shown that disclosure would produce *an* adverse effect as specified in the exception, the exception is engaged. The extent or severity of that adverse effect is not relevant here, though it is relevant to the public interest test.

Example

Decision Notice [FER0369650](#) concerned a request to Thanet District Council for a copy of the condition survey it commissioned in 1997 on the air raid and disused rail tunnels under Ramsgate. The council withheld the information with reference to regulation 12(5)(a), which is concerned with an adverse effect on interests including public safety. The tunnels were in a dangerous condition and the council argued that disclosing the survey would encourage the public to enter the tunnels and risk their safety. So, the withheld information related to public safety. However, the Commissioner found that much of the information in the report was general. The Commissioner also did not accept that disclosing the specific

information in the survey about the condition of the tunnels would encourage people to enter them because a lot of information about the tunnels was already publicly available on the internet:

"...there is already a lot of information in the public domain regarding the tunnels and more importantly, the council has not persuaded the Commissioner that disclosure of additional information, in the form of the survey report will assist and encourage members of the public, not already so minded, to enter the tunnels." (paragraph 35).

So, even though the information was about public safety, it could not be said that its disclosure would have an adverse effect on public safety. The Commissioner found that the exception was not engaged.

14. Public authorities must also be able show how the adverse effect would happen. This is equivalent to the 'causal link' in establishing prejudice under FOIA.³

Example

The Information Tribunal case of *North Western and North Wales Sea Fisheries Committee v the Information Commissioner* ([EA/2007/0133](#), 8 July 2008) concerned a request to the Committee for information relating to an oyster and mussel fishery in the Menai Strait. The exception was 12(5)(e); disclosure would adversely affect the confidentiality of commercial or industrial information. The Tribunal commented at paragraph 81:

"Mr. Wilson [a witness] did not address how disclosure of each individual element of the request would adversely affect confidentiality. This has not been addressed by the Committee in its submissions beyond the assertion that if the information was disclosed there would be considerable detriment to the interests of the Leaseholders and that it would be of advantage to competitors."

³ See our FOIA guidance on *The prejudice test*

To the extent of the adverse effect

15. A public authority can refuse to disclose information only to the extent of the adverse effect. This means that where disclosing parts of the requested information would not have the relevant adverse effect, then the exception is not engaged in respect of those parts.

Example

Archer concerned a request for a report to a council committee on a planning enforcement matter. The report was withheld under regulation 12(5)(b); it was claimed that disclosure would adversely affect the ability of the council "to conduct an inquiry of a criminal ... nature". The Tribunal found that the first part of the report contained only the background to the case, and disclosure would not have the adverse effect specified in the exception. However, the second part of the report discussed possible enforcement action and prosecutions, the strengths and weaknesses of the council's position and recommendations for action. The Tribunal found that the exception was engaged in respect of this part.

Would adversely affect

16. For a public authority to apply an EIR exception, it must show that disclosure is more likely than not to have the adverse effect (ie a more than 50% chance). It is not enough to show that disclosure could or might have an adverse effect.
17. Our interpretation of "would adversely affect" is supported by the decision of the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* ([EA/2005/0026 and 0030](#), 17 October 2006) ("*Hogan*"), at paragraphs 28–34. The Tribunal in *Hogan* was considering a prejudice-based exemption in FOIA; 'prejudice' in FOIA is considered to be equivalent to 'adverse effect' in EIR. The *Hogan* Tribunal said at paragraph 33 that the term 'would prejudice' means:

"the occurrence of prejudice to the specified interest is more probable than not"

18. The prejudice-based exemptions in FOIA use the phrase "would or would be likely" to prejudice. The *Hogan* Tribunal went on to say that "would be likely" meant "*a real and significant risk of*

prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not". Unlike the FOIA exemptions, however, the EIR regulation 12(5) exceptions do not contain the phrase 'would be likely', so they can be applied only where it is more probable than not that the adverse effect would happen.

19. It is not possible to prove beyond doubt that the adverse effect would happen, but a public authority must still show that:
 - the causal link between disclosure and effect is so convincing that the adverse effect is clearly more likely than not to happen. This could be the case even if the adverse effect would happen only once or affect only one person or situation; or,
 - disclosure is more likely than not to have an adverse effect, given the potential for the adverse effect to arise in certain circumstances, and how frequently these circumstances arise (ie the number of people, cases or situations in which the prejudice would occur).
20. The fact that EIR uses only "would" and not "would be likely" means that the test for engaging these exceptions is more stringent than that for prejudice-based exemptions in FOIA. A public authority cannot engage an exception if it cannot show that the adverse effect is more likely than not to happen (ie if there is a less than 50% chance).

Example

Decision Notice [FER0395418](#) concerned a request to Advantage West Midlands (AWM) for information about the nature and scale of contamination at a former industrial site in Walsall. One of the exceptions that AWM used to withhold the information was regulation 12(5)(e), which is engaged where disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest". In its initial communications with the Commissioner, AWM argued that other parties could use disclosure to negatively affect the purchaser's commercial plans and that this could result in sale negotiations ending, with subsequent costs to both parties. They later said that disclosure *would be likely to cause an adverse affect to the parties involved in the sale of the site.*

The Commissioner examined the evidence put forward by AWM and found at paragraph 38 that it did not meet the test of 'would' adversely affect, so the exception was not engaged.

The public interest test

21. The effect of regulation 12(1)(b) is that all the exceptions in regulations 12(4) and 12(5) are subject to a public interest test. This means that a public authority can refuse to disclose information under these exceptions only if "in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information". In assessing this, under regulation 12(2), the authority must also apply a presumption in favour of disclosure. The Commissioner recognises that where an authority refuses a request under regulation 12(4)(a) because it does not hold the information, it is not possible to consider the public interest in whether the information should be disclosed.
22. To carry out the public interest test it is necessary to understand what 'the public interest' means in the context of EIR.

In the public interest

23. The public interest can cover a wide range of values and principles relating to what is the public good, or what is in the best interests of society. In the context of EIR, there is a public interest in a sustainable environment. More generally, there is also a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public and environmental resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.
24. However, these examples of the public interest do not in themselves automatically mean that information should be disclosed or withheld in any particular case. For example, an

informed and involved public helps to promote good decision making by public bodies, but public bodies may also need space and time to fully consider their policy options and reach an impartial and appropriate decision, away from public interference. Revealing information about wrongdoing may help the course of justice, but investigations into wrongdoing may need confidentiality to be effective. This suggests that in each case the public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exception.

Of interest to the public

25. The public interest is not necessarily the same as what interests the public. The fact that a topic is discussed in the media does not automatically mean that there is a public interest in disclosing the information that has been requested about it. Media coverage of an issue may well indicate that there is a public interest at stake, but it is not proof of the fact.

Public interest arguments

26. In carrying out the public interest test, the authority should consider the arguments in favour of disclosing the information and those in favour of maintaining the exception. The authority should try to do this objectively, recognising that there are always arguments to be made on both sides. It may be helpful for the authority to draw up a list showing the arguments it is considering on both sides; this will help when it comes to assessing the relative weight of the arguments.

Arguments in favour of maintaining the exception

- The public interest must be relevant to the specific exception

27. In considering the public interest in relation to any particular exception, a public authority should take into account only the public interest arguments that are relevant to that exception – public interest arguments that support other exceptions are irrelevant.

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| Example |
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In *Office of Communications v the Information Commissioner and T-Mobile (UK) Ltd* ([EA/2006/0078](#), 4 September 2007) (“Ofcom”) the Information Tribunal said at paragraph 58:

“It seems to us that for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception. It is a factor in favour of maintaining that exception, not any matter that may generally be said to justify withholding information from release to the public, regardless of content. If that were not the case then we believe that the application of the exceptions would become unworkable.”

28. The *Ofcom* Tribunal’s comments above relate to the public interest for an individual exception. Where more than one exception is engaged, see the comments under **Aggregation of public interest factors** below.

- Blanket rulings

29. Under EIR regulation 12(1)(b), the public authority must consider whether, “*in all the circumstances of the case*”, the public interest in maintaining the exception outweighs the public interest in disclosure. So an authority may have a general approach to releasing certain types of information, and this may be helpful from an administrative point of view, but this should not prevent them from considering the balance of public interest in the circumstances of a particular request.

- Effect of regulation 5(6)

30. Regulation 5(6) states that “any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply”. This contrasts with section 44 FOIA which says that information is absolutely exempt if disclosing it is prohibited under other legislation. So the existence of another legal bar cannot prevent disclosure under EIR, but if there is such a bar, this may indicate that there is a public interest argument for maintaining the exception.

Arguments in favour of disclosure

- General public interest in transparency

31. There is always a general public interest in the disclosure of environmental information. As noted above, EIR originally implemented [EU Directive 2003/4/EC](#) on public access to

environmental information. Recital 1 of the preamble to the Directive states this public interest clearly:

“Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.”

32. The Directive in turn implemented the Convention on Access to information, public participation in decision-making and access to justice in environmental matters (the [Aarhus Convention](#)). The Objective of the Aarhus Convention, set out in Article 1, is that:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information ... in accordance with the provisions of this Convention.”

33. So there is a general public interest in the disclosure of environmental information because it supports the right of everyone to live in an adequate environment and ultimately contributes to a better environment. This is a general public interest argument for disclosure and it does not have to relate to a specific exception. On the other hand, public interest arguments in favour of the exception have to relate specifically to what that exception is protecting.

- Public interest in the issue

34. As well as the general public interest in transparency, which is always an argument for disclosure, there may also be a legitimate public interest in the subject the information relates to. If, for example, a decision on environmental policy has a widespread or significant impact on the public, there is a public interest in furthering debate on the issue. So, this can represent an additional public interest argument for disclosure.
35. If a major policy decision is being taken, there may also be a contrary argument that information should not be disclosed because of the need for a safe space in which to formulate and develop that policy.

- Public interest in the information

36. In addition to the general public interest in transparency and accountability, and any public interest arising from the issue concerned, there may be a specific public interest in disclosing the information in question. This will of course depend on the circumstances of the case.

Example

Decision Notice [FS50194691](#) concerned a request to Nottingham City Council for legal advice it had received about the legal status of a piece of land called the Arboretum. The council withheld the information under regulation 12(5)(b). The Commissioner agreed that the advice was legally privileged and disclosure would have an adverse effect on the course of justice.

There is always a strong public interest in preserving the principle of legal professional privilege. However, in this case the Commissioner decided that the public interest in maintaining the exception did not outweigh the public interest in disclosure.

The use of the land was restricted by the Nottingham Inclosure Act 1845. The Commissioner noted that changing the use of such land for development purposes was controversial and a matter of public debate. Disclosing this information in this case would inform that debate:

“Disclosure of this advice would increase the information available to the public about the Inclosure Acts and how in this case legislators sought to protect an area of green space for recreational use within Nottingham. This may inform public debate on such issues as the pressure on the available green space and how that should be responded to by authorities under pressure to provide other important services to the community. The Commissioner recognises that this is a debate which is much larger than the individual case of the Arboretum....”(paragraph 47)

“Disclosure of the information from this case would inform public debate if any contentious plans to develop areas like the Arboretum are put forward in the future. Without disclosure of this information the council’s decision to allow or prevent a development would lack transparency and the public would not know whether a development fits within the council’s obligations as regards its management of inclosure land.” (paragraph 48)

In this case the specific public interest in disclosing this information

was so strong that the public interest in preserving legal professional privilege did not outweigh it. In carrying out the public interest test the Commissioner also took account of the presumption in favour of disclosure in regulation 12(2).

37. A specific public interest is not the same as a requester's private interest. The subject of private interests is dealt with below.

- Suspicion of wrongdoing

38. A further example of a potential public interest in transparency is where there is a suspicion of wrongdoing on the part of the public authority. A requester may, for instance, allege that a public authority has committed some form of wrongdoing, and that the information requested would shed light on this. For this to be considered as a factor in the public interest test:

- disclosure must serve the wider public interest (see **Private interests** below) and go beyond the requester's private interests; and
- the suspicion of wrongdoing must amount to more than a mere allegation – there must be a plausible basis for the suspicion, even it is not proven.

39. A number of sources may suggest whether this plausible basis exists:

- The facts of the case may suggest that the basis for an authority's actions is unclear or open to question.
- If there has been any independent investigation, for example by an Ombudsman or auditors, the outcome of this may indicate whether or not there is any substance in an allegation of wrongdoing.
- The content of the information is important in making this assessment. It may refute the suspicion, in which case there may be some public interest in disclosing the information to clear up misconceptions. Or it may indicate that the suspicion is justified (a so-called 'smoking gun'), in which case there is an even stronger public interest in disclosure.

Example

Peter Hoare v Information Commissioner and Basingstoke and Deane Borough Council ([EA/2007/0115](#), 11 August 2008) concerned a request to the council for information about a planning matter. The information included a memo containing legal advice, which

was withheld under regulation 12(5)(b). The Information Tribunal examined the memo and found at paragraph 33 that

"There would need to be a strong public interest in ordering its disclosure ... [T]he contents do not reveal any kind of "smoking gun" that might have caused the Tribunal to arrive at a different conclusion in relation to the public interest balancing test."

40. Evidence of public concern could also be a factor for disclosure. If there is evidence of public concern but those concerns do not have an objective basis, there can still be a public interest argument for disclosure if this would show that the concerns are unjustified and would help restore confidence in the public authority.

41. The Commissioner cannot assess whether there has been maladministration or other wrongdoing. In dealing with a complaint, we would consider the types of evidence listed above to assess whether the suspicion of wrongdoing creates a public interest in disclosure, not to decide whether there has been wrongdoing.

- Presenting a 'full picture'

42. Even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts. For example, there may be a public interest argument for disclosing advice given to decision-makers. The fact that the advice and the reasons for the decision may be complex does not lessen the public interest in disclosing it, and may strengthen it. Similarly, the information does not have to give a consistent or coherent picture for disclosure to help public understanding; there is always an argument for presenting the full picture and allowing people to reach their own view.

Example

The case of *Lord Baker v the Information Commissioner and the Department for Communities and Local Government* (DCLG) ([EA/2006/0043](#), 1 June 2007) concerned a request for the advice given to the Deputy Prime Minister in a decision on whether to grant planning permission for a large building in London. The information was withheld under regulation 12(4)(e) as it involved the disclosure of internal communications. The DCLG argued that the public

interest in disclosing the advice was reduced because the decision letter, which was in the public domain, fully reflected the issues considered. The Information Tribunal disagreed, and asserted the importance of releasing information to provide a full picture:

"It seems to us, however, that one reason for having a freedom of information regime is to protect Ministers and their advisers from suspicion or innuendo to the effect that the public is not given a complete and accurate explanation of decisions; that the outcome is in some way "spun" (to adopt the term whose very invention illustrates this tendency towards cynicism and mistrust). Disclosure of internal communications is not therefore predicated by a need to bring to light any wrongdoing of this kind. Rather, by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point." (paragraph 24)

43. If information that is already in the public domain (rather than the requested information) is misleading or misrepresents the true position, or does not reveal the full picture, this may increase the public interest in disclosure. For instance, where part of some legal advice has been disclosed, leading to misrepresentation or a misleading picture being presented to the public, there may be a public interest in disclosing the full advice.

Irrelevant factors

- Identity of the requester

44. The requester's identity or their motives in seeking the information are not relevant to the public interest test. A disclosure of environmental information is in effect a disclosure to the world. Public authorities must consider the effect of making the information public, not the effect of giving it to a particular requester, when they carry out the public interest test.
45. Regulation 12(4)(b) is engaged where a request for information is manifestly unreasonable. This is a similar provision to section 14(1) FOIA, which provides an exemption for vexatious requests. In assessing whether a request is vexatious or manifestly unreasonable, it may be appropriate to take account

of the context and history of the request, including the requester's identity. However, unlike section 14 FOIA, regulation 12(4)(b) requires the authority to carry out a public interest test. This is about the public interest in disclosing information to the world or maintaining the exception, so the requester's identity is irrelevant in the public interest test.

- Private interests

46. EIR regulation 12(1)(b) refers to the public interest, and disclosures under EIR are in effect to the world at large, not just to the individual requester. The requester's private interests are not in themselves the same as the public interest, and what may serve those private interests does not necessarily serve a wider public interest. Private interests are irrelevant to the public interest test.
47. A requester may have a grievance they are pursuing and may think the information they want will help them. However, there would be a public interest argument only if the public authority can show that disclosing the requested information will serve a wider public interest.

Example

The First-tier Tribunal case of *Roger Woodford v the Information Commissioner* ([EA/2009/0098](#), 21 April 2010) concerned a request for legal advice St Albans City and District Council received about a right of way over a piece of land. The requester was involved in a long-standing dispute with the council over the right of way. The council withheld the information under regulation 12(5)(b). The Tribunal did not accept that the requester's private interests in pursuing his dispute were relevant to the public interest test. They said at paragraph 34:

"...this case is not concerned in any way with the Appellant's own private interests... If it is claimed, as it seems to be, that the disputed information had some form of "vital evidentiary role" in the Appellant's dispute, the same is simply not relevant in addressing the equation to be resolved with regard to the competing public interest."

- Information may be misunderstood

48. Information requested under EIR may be technical or complex. The argument that information may be misleading or misunderstood is often raised, regardless of the exception claimed. In the Commissioner's view it is not relevant to the

majority of the EIR exceptions and the obvious solution is for the authority to publish an explanation of the information, rather than to withhold it.

Example

Elmbridge Borough Council and Gladedale Group Ltd v the Information Commissioner ([EA/2010/0106](#), 4 January 2011) concerned a request for information that had been submitted in support of a planning application. In considering arguments put forward by Gladedale Group Ltd, the First-tier Tribunal said at paragraph 24:

"We are of the view that possible misinterpretation of a document is not a ground for withholding disclosure."

49. It may be argued that the information would be misleading, perhaps because it consists of notes reflecting only part of a discussion or because it is inaccurate or out of date. However, public interest arguments have to be inherent in the exception claimed, rather than just general arguments against disclosure. In any case the authority should be able to put the information into context when it releases it. It may also be in the public interest to show the information that a decision was based on, even if that information was incorrect.

50. The main exception where the Commissioner accepts that arguments about information being misunderstood may be relevant is regulation 12(4)(d) (material in the course of completion, unfinished documents or incomplete data).

In any other type of case, the argument may only be used if it is not possible to provide this explanation, or if the explanation would not limit any damage caused. The Commissioner accepts that in some isolated cases it may not be possible to provide the necessary explanation or context and thus it may not be possible to effectively protect the public interest inherent in the exemption.

51. Regulation 5(4) says that where information made available in response to EIR requests "is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes". Our view is that the scope of this regulation is narrower than it appears and that it only applies where:

- the request is for current factual data;
- the public authority is collecting this information on an ongoing basis for its own business purposes; and
- the authority is or should be aware that the information is not accurate, up-to-date or comparable.

The provision relates to factual data, so it does not require the authority to reconsider the quality or correctness of its opinions or decisions.

Other means of scrutiny

52. It may be argued that where issues of public concern are at stake, the existence of other means of scrutiny or regulation that could address them weakens the public interest in disclosure. This argument suggests that there is no need for the public to scrutinise the requested information through EIR because it can be adequately considered by another body as part of their scrutiny or regulatory function.

The fact that other means of scrutiny are available and could be used does not in itself weaken the public interest in disclosure and we consider that it is not a relevant factor in the public interest test. However, where these other means have been used or are being pursued, this may go some way to satisfying the public interest that would otherwise be served by disclosure. If, for example, a report providing the conclusions or outcome of the other means of scrutiny or regulation is publicly available, this may to some extent lessen the public interest in disclosing the information requested under EIR. Furthermore, if the other investigation is ongoing, the public interest may be better served by allowing it to continue without interference, rather than disclosing information prematurely.

53. The questions to be considered are:

- how far the other means of scrutiny go to meet the public interest in transparency in any particular case; and
- what information is available to the public by these other means.

There is always some public interest in disclosing the 'full picture', for general transparency and accountability purposes, so the public interest in disclosure cannot be completely discounted.

Attaching weight to the arguments

54. Once the public authority has identified the relevant public interest arguments for maintaining the exception and for disclosure, it must then assess the relative weight of these arguments to decide where the balance of public interest lies. This is not an exact process, but the authority should try to approach it as objectively as possible. If the Commissioner is considering the case, we will consider these arguments, or consider other public interest arguments that the authority did not include, and may reach a different conclusion.
55. Other factors can add weight to the arguments on either side, and these will help decide where the balance of public interest lies. These factors include the following.

- Likelihood of adverse effect

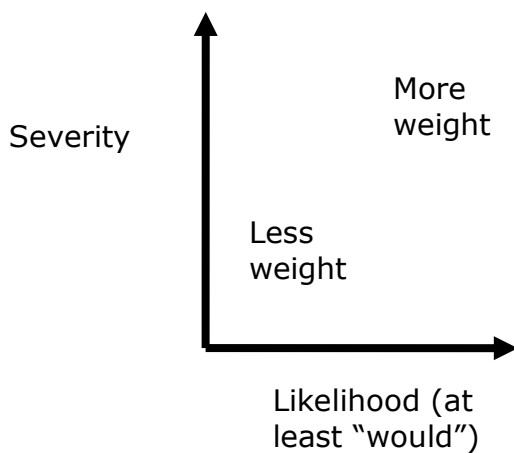
56. To engage an exception in regulation 12(5) the public authority must show that it is more probable than not that the adverse effect would occur. This means that there is a strong causal link between the disclosure and the adverse effect, or that the adverse effect could happen frequently.
57. So 'adverse effect more probable than not' is the minimum requirement for engaging a regulation 12(5) exception. It does not mean that the public interest in maintaining the exception necessarily outweighs the public interest in disclosure; it is the starting point for considering the public interest test for these exceptions. A conclusion that the adverse effect is 'more probable than not' cannot decide the issue alone, because of the presumption in favour of disclosure in regulation 12(2).
58. There must be at least a 50% chance of the adverse effect happening. However, the greater the likelihood above this threshold, the greater is the public interest in maintaining the exception. The likelihood will be affected by:
- how extensive the adverse effect is – how many people or situations would be affected; and
 - how frequently the opportunity for the adverse effect would arise.

- Severity

59. The severity of the adverse effect also affects the weighting. This is about the impact of the adverse effect when it happens and not about how frequently the adverse effect would happen; that is part of the likelihood of it occurring. The adverse effect

may still happen, even if its impact would not be severe. However, if the adverse effect has a particularly severe impact on individuals or the authority or other public interests, then this will carry considerable weight in the public interest test. This would be relevant if, for example, there is any risk of physical or mental harm to an individual.

60. In our view, severity and likelihood together indicate the impact of the adverse effect, and this in turn will affect the weight attached to the arguments for the exception. This is shown in the following diagram:



61. This indicates that the weight of the arguments for maintaining a regulation 12(5) exception are affected by both the severity of the adverse effect and the likelihood of it occurring (which must be at least more probable than not).

- Age of the information

62. Generally speaking, the public interest in maintaining an exception will diminish over time as the issue the information relates to becomes less topical or sensitive and the likelihood or severity of the adverse effect diminishes. However, this is not necessarily true in every case; for example an investigation may be closed for a long time and it may be argued that the weight of public interest in disclosure has increased, but if the investigation is re-opened, the weight of the public interest argument for the exception may be restored. So the weight of the arguments on either side can depend on the age of the information and the timing of the request.

- The specific information and the public interest in disclosure

63. In assessing the weight of arguments for disclosure, it is important to consider how far disclosing the requested information would further the public interests identified. The information may be relevant to a subject of public interest, but it may not greatly add to public understanding – in such cases the public interest in maintaining the exception may outweigh that in disclosure.

Example

In *Anthony Lavelle v the Information Commissioner and Stafford Borough Council* ([EA/2010/0169](#), 30 November 2011) the Appellant had requested information about the use of land near his property. The council had withheld the information under regulation 12(4)(b) (manifestly unreasonable). The First-tier Tribunal did not attach much weight to the argument that disclosure would increase transparency and accountability, partly because of the content of the information itself:

"We accept the council's statement that the records do not show why the land was not transferred and accordingly disclosure will not enable an understanding about this"
(paragraph 36)

- Information already in the public domain

64. It may be necessary to consider whether similar information is already available in the public domain, and what effect this has on the public interest test. If similar information is already available and the requested information would not significantly add to it, the public interest arguments about furthering debate and increasing accountability may carry little weight. If the requested information contains any new material that would help inform public debate, then the weight of the public interest argument is not reduced. Moreover, as noted above, there is always some weight in the general argument for transparency and having the 'full picture'.
65. The factors discussed above will help in assigning relative weight to the public interest arguments on each side but they are not intended to be a complete list. Other factors may also be relevant, depending on the circumstances of the case.

The balancing exercise

66. Having listed the public interest arguments and attached some relative weight to them, public authorities must then carry out

a balancing exercise to decide whether the public interest in maintaining the exception outweighs the public interest in disclosure. If it does not, the information must be released. In making this assessment, the authority must also apply a presumption in favour of disclosure.

67. The following case is an example of how the Information Tribunal has approached the balancing exercise. The arguments on each side and the weight attached to them reflect the circumstances of this case.

Example

In *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* ([EA/2010/0012](#), 24 May 2010), a residents' association concerned about the proposed demolition of a listed building had asked Bristol City Council for a report on the viability of the building and an estimate of feasibility costs, which a developer had given to the council. The council withheld these under regulation 12(5)(e) because of commercial confidentiality.

The balance of public interest, as considered by the First-tier Tribunal, can be summarised as follows:

| Public interest in maintaining the exception | Public interest in disclosing the information |
|--|---|
| <p>The inbuilt public interest in maintaining commercial confidentiality. The weight of this argument was reduced because the Tribunal considered the information was not of great sensitivity to the developer and because it was part of an otherwise open planning process.</p> | <p>The information was directly relevant to environmental decision-making about a listed building. In taking that decision the council was relying on information that was not available to the public.</p> |
| <p>Disclosing the viability report and cost estimates would damage the developer's commercial interests, but the likelihood of this happening and the severity of the damage were limited.</p> | <p>The features of the planning regime, including:</p> <ul style="list-style-type: none"> • the need for local community involvement • the fact that responsibility for stewardship of the historic environment is shared with voluntary bodies • the requirement for clear and convincing evidence of |

| | |
|--|--|
| | <p>the need to demolish a listed building</p> <ul style="list-style-type: none"> • the need to take account of local representations. <p>The First-tier Tribunal said at paragraph 17: "<i>All that in our view indicated a very weighty public interest in disclosure in this case</i>".</p> |
| <p>There was a risk that developers would not provide accurate viability reports in future. The weight of this argument was limited because:</p> <ul style="list-style-type: none"> • EIR means that there cannot be an absolute assurance of confidentiality. • The evidence put forward for this related to a different scenario (section 106 agreements). • Developers will still be required to submit the reports, but they do not have to include sensitive commercial information. | <p>The fact that the council owned the Coroner's Court which occupied part of the site. The council's interest in this meant that 'a particular scrupulousness' was called for, which increased the need for full disclosure. The First-tier Tribunal said at paragraph 17 that this added substantially to the weight of the public interest in disclosure.</p> |
| | <p>The mismatch in resources between the developers and the residents' groups.</p> |
| <p>The First-tier Tribunal's conclusion at paragraph 22 was that the public interest in disclosure substantially outweighed the public interest in maintaining the exception. The Tribunal emphasised at paragraph 23 that it had reached this decision based on the facts of the case, and it did not intend the decision to set a precedent. Nevertheless, their approach is a useful example of how to carry out the public interest test.</p> | |

Aggregation of public interest factors

68. Where more than one exception is engaged, a further step may be required in carrying out the public interest test. If more than one exception is engaged in relation to the same piece of information, and the balance of the public interest test for each

of them is in favour of disclosure, the authority may then weigh the public interest in disclosure against the aggregated weight of the public interest arguments for maintaining all the exceptions.

69. This is based on a ruling by the European Court of Justice (now Court of Justice of the European Union) from 2011. Domestic courts are still expected to follow pre-exit European case law as it existed on the day of the UK's departure from the EU. The case in question ([C-71/10](#)), arose from the Information Tribunal's original decision in *Office of Communications (Ofcom) v the Information Commissioner and T-Mobile (UK) Ltd* ([EA/2006/0078](#), 4 September 2007). The Information Tribunal case concerned a request for data on the locations of mobile phone base stations. The information was withheld under the exceptions in regulations 12(5)(a) and (c). The Tribunal had found that the public interest in maintaining the exceptions did not outweigh the public interest in disclosure for either exception. The case was appealed to the High Court and then to the Court of Appeal, who ruled that, as well as the public interest test on the individual exceptions, the aggregate public interest in both exceptions must be weighed against the public interest in disclosure. Subsequently the Supreme Court applied to the European Court of Justice for a ruling on this point.
70. The European Court of Justice referred to the second sentence of Article 4(2) of Directive 2003/4/EC, which EIR implements:

"In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal."
71. They ruled that

"Article 4(2) of Directive 2003/4 must be interpreted as meaning that, where a public authority holds environmental information or such information is held on its behalf, it may, when weighing the public interests served by disclosure against the interests served by refusal to disclose, in order to assess a request for that information to be made available to a natural or legal person, take into account cumulatively a number of the grounds for refusal set out in that provision." (paragraph 32)
72. In practice this is only likely to apply where the balance of the public interest on each exception is in favour of disclosure; if the balance of the public interest in relation to any one of them

is in favour of maintaining the exception, then the information is exempt from disclosure.

73. The European Court of Justice made this ruling in relation to the Environmental Information Regulations. The Commissioner's view is that it does not apply to FOIA.

Other considerations

Time at which to consider adverse effect and the public interest test

74. The assessment of whether disclosure would have an adverse effect may vary depending on events that are happening while the request is being handled. Circumstances may change between a public authority receiving and answering the request. The balance of the public interest can also change during this time.
75. When considering the possibility of adverse effects resulting from disclosure in relation to the regulation 12(5) exceptions, or when considering the balance of the public interest in relation to any of the exceptions, a public authority can take account of the circumstances at the time at which it deals with the request.
76. In any subsequent internal review under regulation 11(3), the authority may consider the circumstances up to the time its review is completed.
77. This reflects the position taken by the Upper Tribunal in [*APPGER v ICO and Foreign and Commonwealth Office \(UKUT 0377 \(ACC\), 2 July 2015\)*](#) It endorsed the line that 'the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review)'. Whilst these comments were directed at internal reviews carried out under the FOIA, we consider that the same principles will also apply to reviews conducted under the EIRs.
78. When dealing with a complaint that information has been wrongly withheld, the Commissioner will consider the situation at the time the authority dealt with the request or internal review. Rarely, events after this time change the balance of the public interest test such that disclosure would be inappropriate

or undesirable. If this happens, we consider that the Commissioner has discretion to decide what he orders the authority to do.

Neither confirm nor deny

79. The exemptions in FOIA include a provision that in certain circumstances a public authority may neither confirm nor deny that it holds information. Where the FOIA exemption is qualified (ie requires a public interest test), the decision to neither confirm nor deny is itself subject to the public interest test. However, in EIR the only exception with a 'neither confirm nor deny' provision is regulation 12(5)(a) (international relations, defence, national security or public safety). And this is subject to the public interest test.
80. For regulation 12(4)(c), the Commissioner recognises that where a request is formulated in too general a manner, the authority won't be able to confirm or deny whether it holds the requested information because it cannot identify what information the requester wants.

More information

81. 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.
82. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
83. 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.