

Information on emissions (regulation 12 (9))

Environmental Information Regulations

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Introduction

1. The Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.
2. An overview of the main provisions of the EIR can be found in [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to public authorities how to determine whether information that has been requested is information on emissions, as this will have an impact on the exceptions that can apply as a result of regulation 12(9).
5. The EIR originally implemented EU [Directive 2003/4/EC](#). The source of the Directive is the [Aarhus Convention](#), an international agreement to which the UK is a party. [The Aarhus Implementation Guide](#) provides assistance to those implementing the Convention and is therefore relevant to interpreting the EIR.
6. This guidance refers to case law from the CJEU. Although the UK has left the EU, relevant case law of the CJEU issued before exit day has been retained though the UK Supreme Court will no longer need to follow it.

Overview

- The Commissioner adopts the approach taken by the Information Tribunal that the word “emissions” should be given its plain and natural meaning. Consequently the definition of what constitutes an emission for the purposes of the EIR is broad. This interpretation is consistent with the [European Directive 2003/4/EC](#) and Aarhus Convention purpose of achieving greater awareness of environmental matters and more effective participation by the public in environmental decision making.
- Regulation 12(9) will only apply to information that is on emissions and therefore falls within regulation 2(1)(b). It will

not apply to information that is only indirectly on emissions.

- Where regulation 12(9) applies, the exceptions in regulations 12(5)(d) to (g) cannot be used to refuse disclosure.
- The prevention of the use of the exceptions in regulations 12(5)(d) to (g) reflects the importance that the EIR give to the disclosure of information on emissions.
- Information on localised or low level emissions is still information on emissions within regulation 2(1)(b).
- Emissions referred to in regulation 12(9) are not limited to emissions that have already taken place.

What the EIR say

7. Regulation 12(9) states:

12.—(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

What is an emission?

8. Reference is first made to “emissions” in the definition of environmental information found in regulations 2(1)(a)–(f). The full text of regulation 2(1) is available in Annex 1. Regulation 2(1)(b) states that environmental information includes information on “*factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)*”. Elements of the environment described at subparagraph 1(a) include air and atmosphere, water, soil, land, landscape, natural sites, and biological diversity.
9. Neither the EIR, nor the European Directive 2003/4/EC, from which Parliament implemented the EIR, provide a definition of the term “emissions”. However, the Aarhus Implementation

Guide provides an example of a definition provided by the [Integrated Pollution and Control Directive \(Directive 2008/1/EC\)](#) (IPCC). This defines emissions as a *“direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land”*.

10. The definition in the IPCC Directive is a relatively narrow one. It has been interpreted by some as indicating that the term “emissions” should only apply where polluting substances, such as chemical elements, are being released into the atmosphere from certain types of industrial plant.
11. However, the IPCC example is not binding, and the Commissioner accepts the view expressed by the Information Tribunal in the case of [Ofcom v Information Commissioner and T-Mobile \(EA/2006/0078, September 2007\)](#) that, for the purposes of regulations 2(1)(b) and 12(9), the word emissions *“should be given its plain and natural meaning and not the artificially narrow one set out in the IPCC Directive”*. In that particular case, the Tribunal accepted that radio wave radiation emanating from a base station was an emission.
12. The Shorter Oxford English Dictionary provides the following definitions of the words “emit” and “emissions”:

“Emit –	1. Give off, send out from oneself or itself (something imponderable, as light, sound, scent, flames etc); discharge, exude, (a fluid).
Emission -	1. Something emitted; an emanation. 2. The action or an act of emitting”.

13. Applying these definitions, emissions will generally be:
 - the by-product of an activity or process;
 - which is added (or potentially added) to and affecting the elements of the environment;
 - over which any control is relinquished.

Example

In [G.M. Freeze v Information Commissioner and The Department for Environment, Food and Rural Affairs \(EA/2010/0112 8 March 2011\)](#) the Information Tribunal considered whether the six digit National Grid reference of the site where a trial crop of a variety of rape seed was sown was information on emissions. The Tribunal commented that the dictionary definition was, "reflected in the inclusion of emissions with "energy", "noise", "radiation", "discharges" and "other releases into the environment" in category (b) of the definition of environmental information in Reg. 2 of EIR".

The Tribunal noted that genetically modified organisms appear as an element of the environment in regulation 2(1)(a) and as such "*sowing is not a release into the environment of the kind listed in category (b) but a deliberate act*". It therefore found that the act of sowing was not an emission. The Commissioner agrees and considers that it is information about the uncontrolled by-product of that activity such as details of any gases released as the rapeseed grows that would constitute information on emissions for the purposes of the EIR.

14. The terms used in regulation 2(1)(b) are intended to illustrate what is meant by "factors" and there is potential for overlap. For example, in some instances discharges may constitute emissions but not all emissions would also be discharges. Therefore public authorities need to determine, on a case by case basis, whether the information requested is on the uncontrolled by-product of an activity or process.

Example

Information about the volume of water pumped into an open air container as part of an industrial process is information on a discharge affecting or likely to affect the air and atmosphere. However, it would not be information on emissions as it is still contained and controlled.

However, information about the volume of steam and any associated condensation caused by an industrial heating process would be information on emissions provided that it was not captured or contained.

Example

A request to a local authority for information about the noise levels at a specified industrial site would be a request for information on emissions. The noise is a by-product of the industrial activities and processes being carried out over which control is relinquished.

“Any information on emissions”

15. Regulation 2(1)(b) refers to “any information **on** ...emissions” and regulation 12(9) will apply to information falling within this definition. In other words, where it details the level of existing or potential emissions or for example where it records that testing has revealed that no emissions have occurred. As the example below illustrates, “information on emissions” will also cover assumptions and formulas used to calculate the emissions in question. This interpretation is supported by regulation 5(5) which requires public authorities to refer applicants who receive information falling within regulation 2(1)(b) to the place where further details about measurement procedures, methods of analysis or sampling can be found or to a standardised procedure used if they request it. Details of the consequences or effect of the emissions will also be information on or about them. This ensures that the public can properly and fully understand the information and that it facilitates effective participation by the public in environmental decision making.

Example

In ICO Decision Notice [FER0445318](#) the Commissioner decided that the majority of the information within a WRATE (Waste and Resources Assessment Tool for the Environment) report constituted information on emissions. The report contained data about the various factors in the waste management solution being considered. This included the efficiencies of the system and a lifetime analysis of its impacts in relation to intakes and emissions.

The Commissioner concluded that “*information on emissions includes predicted or forecasted emissions*” and was “*sufficiently broad to encompass assumptions upon which such predictions are based as well as information that details the possible consequences of such emissions*”. He therefore found that the majority of the information was on emissions and as such fell within the definition of environmental information in regulation 2(1)(b).

“Relates to information on emissions”

16. Identical information can fall within several aspects of regulation 2(1). A lot of information is environmental because it is on a measure affecting, or likely to affect, the elements of the environment listed in regulation 2(1)(a) directly or via one of the factors mentioned in 2(1)(b). However, regulation 12(9) will only be relevant where information falls within the definition of environmental information directly under regulation 2(1)(b). In other words it will only apply where information is directly linked to emissions.

Example

ICO Decision Notice [FS50431444](#) found that information about V music festival fell within the definition of environmental information in regulation 2(1)(c). Details of how much money the local authority was paid for the rental of Hylands Park for the purposes of the festival was information on a measure affecting, or likely to affect, the elements of the environment. It found that it was likely to directly affect the land as well as the air and atmosphere as a result of noise.

Subsequently the Commissioner decided that although the financial information requested was subject to the EIR it was not information on emissions falling directly within regulation 2(1)(b) and therefore regulation 12(9) was not relevant.

Example

A request is made for a cost benefit analysis used to inform a decision about whether to award a grant to contribute towards the cost of constructing a wind turbine. The turbine is being constructed with the aim of increasing the amount of energy generated from renewable sources and reducing the emissions created as a result of other energy generation methods.

The analysis is environmental information falling within the definition under regulation 2(1)(e). It is a cost benefit analysis used within the framework of the measures and activities set out in regulation 2(1)(c). In contrast to the WRATE report example above, it does not contain assumptions used to arrive at proposed emission levels. Therefore, in this case whilst the information relates to information on emissions it does not fall within regulation 2(1)(b) directly and therefore regulation 12(9) does not apply.

17. Requests are often made for information about a wide measure or set of measures likely to affect the environment. In such cases public authorities need to carefully consider the specific content of the requested information when deciding whether regulation 2(1)(b) applies and therefore regulation 12(9) is relevant.

Example

ICO Decision Notice [FER0436344](#) considered requests regarding water abstracted from the River Tawe. Water is abstracted for use in industrial processes and is subsequently returned into the environment. The complainant argued that the public authority should consider the process as a whole when determining the relevance of regulation 12(9).

The Commissioner disagreed and concluded that the requested information was specifically about the abstraction of water rather than the process as a whole. Furthermore, he concluded that whilst the water abstraction was a measure likely to affect the elements, the information requested was not on emissions into the environment and therefore regulation 12(9) was not relevant.

If the complainant had requested details of nickel levels in the water subsequently returned to the environment he is likely to have found that this would constitute information on emissions

falling within regulation 2(1)(b) and therefore regulation 12(9) would have been applicable to this extent.

18. This approach represents a narrowing of the Commissioner's interpretation of regulation 12(9). In the past the Commissioner has taken the view that regulation 12(9) can apply where information is more indirectly linked to emissions. However, this approach was reconsidered in light of experiences dealing with complaints and relevant decisions from the Information Tribunal. The Commissioner is satisfied that the European Directive 2003/4/EC does not contradict the approach outlined above.

Article 4(2) states:

4.—(2) ...Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to **information on emissions** into the environment.

19. This interpretation is also supported by the Advocate General's Opinion in a case concerning Article 4(2) of the Directive, *Ville de Lyon C-524/09* Advocate General Kokott found that information on the sale of emission allowances was environmental information because licence holders are permitted to release substances and transaction details would allow the public to ascertain who has the right to produce emissions.
20. However he also found that it was doubtful that, "*restriction of the exceptions to the right of access under the fourth sentence of Article 4(2) of the Environmental Information Directive is intended to encompass indirect information on emission in exactly the same way as the definition of environmental information. The two provisions have different functions which preclude a uniform interpretation*". He went on to say that if the exception regarding confidentiality of commercial or industrial information could not apply to information indirectly linked with emissions then the scope of that exception would be severely restricted as most environmental information can be linked indirectly with emissions.

Past, present and future emissions?

21. The term “emissions” is not limited to those that have already taken place and could include past, present and future emissions.
22. The Commissioner has considered the wording of the EIR, the EC Directive 2003/4/EC and the Aarhus Convention, and is satisfied that the wording of these documents does not limit the definition to existing emissions. The following extracts support this interpretation:
 - Article 4.2 of the EC Directive says that Member States may not “provide for a request to be refused where the request relates to information on emissions into the environment.”
 - Article 7 of the Aarhus Convention emphasises the importance of making available information about future plans relating to the environment.

Level of emissions

23. There is no test whereby only emissions at a certain quantifiable level begin to affect the state of the elements of the environment. This means that information on localised and low level emissions can still fall within the definition of environmental information under regulation 2(1)(b).
24. In order to fall within regulation 2(1)(b), emissions must affect, or be likely to affect, the elements of the environment in regulation 2(1)(a). The threshold for “likely to affect” is similar to that in the prejudice test under FOIA. The likelihood of an effect on the state of the elements of the environment must be substantially more than remote but does not have to be more probable than not.
25. In [Ofcom v Information Commissioner and T-Mobile \(EA/2006/0078, September 2007\)](#) the Tribunal considered that, within the natural meaning of the regulation, radio wave emissions passing through the atmosphere were likely to affect one or more of those elements. Although in that case they were not low level emissions, all information about any such emissions will fall within the definition of environmental information irrespective of quantity. That is, once it is accepted that a particular type of emission is covered, all information on

that type of emission is covered, irrespective of the quantity of emissions. Moreover, it is unrealistic to make decisions on a minimum level of emission that could have an effect on an element of the environment when there is on-going scientific debate on the subject. This also accords with the requirement, referred to above, to adopt a broad definition of environmental information. Consequently, even electromagnetic or radio wave emissions that are localised, or are at a very low level (such as from domestic appliances), are covered.

26. Support for the approach that even low level emissions with a minor effect on the elements of the environment can fall within the definition of environmental information can be found in the [Aarhus Implementation Guide](#). This states that, *“where information is concerned, efficiency is served not by imposing a threshold, but by including everything that is relevant.”* It goes on to say that *“any information on emissions that may affect the quality of the environment, in view of the Convention’s principles and objectives, should be considered relevant for environmental protection, irrespective of their quantities.”*

The effect of regulation 12(9)

27. It is important to note that where regulation 12(9) is applied correctly it means that a public authority cannot refuse to disclose the relevant information under the exceptions listed at regulations 12(5)(d) to (g). These exceptions are where disclosure would adversely affect:
- The confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law (12(5)(d)).
 - The confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest (12(5)(e)).
 - The interests of the person who provided the information where that person –
 - i. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

- ii. did not supply it in circumstances such that that or any other public authority is entitled apart from these regulations to disclose it; and
 - iii. had not consented to its disclosure (12(5)(f)).
- The protection of the environment to which the information relates (12(5)(g)).
28. The fact that regulation 12(9) prevents the use of certain exceptions highlights the importance that the EIR give to the release of information on emissions. This will also be a relevant public interest factor, which should be weighed, in the circumstances of the request, in cases where an exception can still apply and when deciding what environmental information should be proactively disseminated, in particular under regulation 4(4)(b).

Other considerations

29. Additional guidance is available on [our guidance pages](#) if you need further information on the EIR.

More information

30. 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.
31. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
32. 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.

Annex 1: the full text of Regulation 2(1)

2.—(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) Factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) Measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) Reports on the implementation of environmental legislation;
- (e) Cost-benefit and other economic analyses and assumptions used within the framework or the measures and activities referred to in (c); and
- (f) The state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or maybe affected by the state of the elements of the environment referred

to in (a) or, through those elements, by any of the matters referred to in (b) and (c)".