

The exemption for environmental information (section 39)

Freedom of Information Act

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Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in [The Guide to Freedom of Information](#).
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 and when to apply the section 39 exemption to environmental information caught by the scope of a freedom of information request.

Overview

- Section 39 provides an exemption under FOIA for any environmental information held by a public authority which is subject to the Environmental Information Regulations (the EIR).
- Environmental Information is defined in regulation 2(1) of the EIR.
- The definition of a public authority for the purposes of the EIR is given in section 2(2) of the EIR. Only public authorities who meet this definition are subject to the EIR.
- The purpose of the exemption is to allow authorities that are subject to the EIR to handle requests for environmental information under the EIR without also having to consider whether the information should be disclosed under FOIA.
- If a public authority is dealing with a request for environmental information under the EIR then we won't expect it to issue a section 39 FOIA refusal notice as well.
- An organisation that is not subject to the EIR won't be able to use Section 39, and must deal with any request for environmental information under FOIA.
- Section 39 is subject to a public interest test. However, it is difficult to foresee any circumstances where it would not be in the public interest to deal with a request for environmental

information under the EIR.

5. Section 39 of the FOIA provides an exemption for information that falls within the scope of the Environmental Information Regulations 2004 (the EIR).
6. Its purpose is to allow authorities to deal with requests for environmental information under the EIR, without also having to consider the information under the FOIA regime.
7. It is a class based exemption and will be engaged if the public authority is subject to the EIR and the requested information meets the definition of environmental information as set out in regulation 2(1) of the EIR. There is no requirement for the authority to demonstrate that any level of prejudice would arise from disclosure.
8. It is also a qualified exemption which means that the authority will be required to carry out a public interest test.
9. Where an authority believes that section 39 applies, it should proceed to handle the request as a request for environmental information made under the EIR.

What the FOIA says

39.—(1) Information is exempt information if the public authority holding it -

- (a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or
- (b) would be so obliged but for any exemption contained in the regulations.

(1A) In subsection (1) "environmental information regulations" means—

- (a) regulations made under section 74, or
- (b) regulations made under section 2(2) of the European Communities Act 1972 for the purpose of implementing

any obligation relating to public access to, and the dissemination of, information on the environment.

(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(3) Subsection (1)(a) does not limit the generality of section 21(1).

10. Section 39(1) states that information will be exempt if the authority;
 - has an obligation to disclose the information under the EIR; **or**,
 - would have an obligation to disclose the information, but for an exemption in the EIR.
11. By definition section 39 can only apply where an authority has an obligation to deal with the request under the EIR. It therefore follows that an authority must be subject to the EIR in order to claim the exemption.
12. If an authority is subject to the EIR, then the effect of this provision is to bring all environmental information within the scope of section 39, including material that would be exempt from disclosure when considered under the EIR.

Determining whether the public authority is subject to the EIR

13. The full definition of what constitutes a 'public authority' for the purposes of the EIR is set out in [Regulation 2\(2\)](#) of the legislation. However, in broad terms, an organisation will normally be covered by the EIR if:
 - it is a public authority as defined by FOIA (except those which are only covered for certain information or have been designated as public authorities by the Secretary of State under section 5 of FOIA);
 - it carries out 'functions of public administration'; or

- it is under the control of a public authority and has functions or responsibilities relating to the environment.
14. Further information on the definition of a 'public authority' under the EIR can be found in our [Guide to the Environmental Information Regulations](#).
 15. If the authority doesn't meet the criteria in regulation 2(2) then it won't be subject to the EIR and must deal with any requests for environmental information under FOIA.

Determining whether the information is environmental

16. The meaning of 'environmental information' is defined in regulation 2(1) of the EIR. If the requested information does not fall within the scope of this definition then section 39 can't apply.
17. Usually it will be obvious whether the requested information is environmental, for example where the subject matter is land development, pollution levels, energy production or waste management. However, the character of the material won't always be so clear-cut, and sometimes information which appears, at first glance, to fit the definition of environmental information won't be covered, and vice versa.
18. We would therefore recommend that authorities refer to our more detailed guidance [What is environmental information?](#) before making a final decision to apply section 39.

Applying the exemption

Public interest test

19. Section 39 is a qualified exemption which means that the authority will be required to carry out a public interest test.
20. However, given the fact that authorities have an obligation to respond to requests for environmental information under the EIR, it is hard to envisage any circumstances where it would be in the public interest for the authority to also consider that information under FOIA.
21. In practice, therefore, the public interest test should be a formality as the balance of the public interest is always likely to weigh in favour of maintaining the exemption and considering the request under the EIR.

Procedural requirements

22. Technically, the authority will still be under a duty to comply with the procedural requirements of FOIA in terms of providing a response within 20 working days, confirming or denying whether the information is held and issuing a refusal notice explaining why the exemption applies.
23. However, in practice, we would not expect an authority to issue a response under FOIA where the information falls to be dealt with under the EIR regime.
24. Rather, it should proceed to deal with the request as a request for environmental information in accordance with the procedural requirements of the EIR.
25. It follows that the authority must respond to the request in accordance with the EIR time limits for compliance (these are outlined in our guidance [Time limits for compliance under the EIR](#)).
26. The time for compliance must be calculated from the date of receipt of the original request, not from the date the authority applied the section 39 exemption.
27. Guidance on how to handle EIR requests can be found in our [Guide to Environmental Information Regulations](#).

Dealing with 'mixed' requests for environmental and non-environmental information

28. Sometimes the information caught by a request will contain a mix of environmental and non-environmental information.
29. Where this is the case, the authority should collate and then separate out the two classes of information, dealing with the environmental information under the EIR and handling the non-environmental information under the FOIA.
30. However, this may not be practicable in cases where the authority is considering refusing the information for exceeding the FOIA cost limits (section 12) or as vexatious (section 14) or manifestly unreasonable (regulation 12(4)(b)).
31. This is because part of the purpose of sections 12 and 14 and regulation 12(4)(b) is to protect authorities from the burden of collating the information. That purpose would be undermined if

the authority had to spend time and resources separating out the environmental and non-environmental information before applying those provisions.

32. Authorities will therefore need to take a different approach when dealing with mixed requests that exceed the cost limits, or are vexatious or manifestly unreasonable. This is explained in more detail in our guidance:

[Regulation 12\(4\)\(b\): Manifestly unreasonable requests](#)

[Calculating costs where a request spans different access regimes.](#)

The interaction between section 39 and section 21 of FOIA

33. The interaction between sections 39 and 21 of FOIA is as follows

39.— (3) Subsection (1)(a) does not limit the generality of section 21(1).

21. (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information

34. Section 21 of the FOIA is an exemption for information that is reasonably accessible to the requester by other means. Further information on section 21 can be found in our guidance [Information reasonably accessible to the applicant by other means \(section 21\)](#).
35. Section 39(3) stipulates that the exemption for environmental information doesn't limit the generality of section 21(1).
36. So potentially a public authority that intends to disclose information under the EIR could issue an FOIA refusal notice citing section 21, explaining that it is exempt from providing information under FOIA because the information is reasonably accessible to the applicant under the EIR. The presence of section 39 doesn't prevent an authority from doing this if it wishes to.

37. However, in practice, this provision shouldn't have a bearing on how an authority that is subject to the EIR handles a request for environmental information.
38. This is because, provided the authority is subject to the EIR, it will remain under an obligation to deal with the request under the EIR regime, regardless of whether the information is exempt under section 21 or 39 of the FOIA.
39. Rather than issuing a section 21 or a section 39 refusal notice we would recommend that the public authority simply deals with the request under the EIR.

More information

40. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.
41. 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.
42. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
43. If you need any more information about this or any other aspect of freedom of information, please [contact us](#), or visit our website at www.ico.org.uk.