

**Director of Legal Services :**  
David Tatlow

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# BRIEFING

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## ENVIRONMENTAL INFORMATION REGULATIONS 1992 & 2004

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### Introduction

1. The opening up of environmental information to public inspection has been precipitated by European Directives. The first directive<sup>1</sup> was incorporated into UK Law through the Environmental Information Regulations 1992<sup>2</sup> ("EIR"). They have been amended by Environmental Information (Amendment) Regulations 1998<sup>3</sup> ("EIAR") to bring EIR in line with the European Directive on freedom of access to information on the environment<sup>4</sup> by narrowing the exemptions to disclosure of environmental information.
2. The EIR and EIAR share a number of common objectives with the Freedom of Information Act 2000 ("FOIA"), but a deliberate decision by was made by Parliament not to incorporate the EIAR into the FOIA as the EIAR was the product of specific European legislation which was (and still is) developing.
3. The environmental information legislation is currently in the process of being redrafted to take into account the European Union signing up to the Aarhus Convention<sup>5</sup> in 1998, but it is

expected to adopt similar terms and provisions relating to access to information as currently contained in the FOIA<sup>6</sup>. Whilst the Directive sets the 14 February 2005 as a deadline for implementation, it is actually expected that the new regulations will come into effect at the same time as the FOIA on 1<sup>st</sup> January 2005.

### Environmental Information Regulations 1992

4. The EIR created a general right allowing the public to request access to environmental information held by or under the control of public bodies, including local authorities<sup>7</sup> ("Relevant Bodies"). This means that if a Relevant Body holds environmental information, and provided that the information does not fall under one of the grounds permitted to refuse disclosure, then it must release that information to the person making the request, either by releasing a copy of the information or allowing the person to inspect the information.
5. Environmental information is defined<sup>8</sup> as being anything contained in any records in any form, including computer files and records not in the form of a document. This information

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<sup>1</sup> 9182/88 (COM) 484

<sup>2</sup> SI 1992/3240

<sup>3</sup> SI 1998/1447

<sup>4</sup> Council Directive 90/313/EEC

<sup>5</sup> 1998 United Nations Economic Commission for Europe Aarhus Convention on Access to Information, Public Participation in Decision-

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making, and Access to Justice in Environmental Matters

<sup>6</sup> see Birmingham City Council Briefing note on Freedom of Information.

<sup>7</sup> S3(1)

<sup>8</sup> s2(4)

must relate to the state of any or all of the following :

- water;
- air;
- flora;
- fauna,
- soil; or
- natural site or other land<sup>9</sup>
- or any activities or measures which or is likely to adversely affect any of the above;
- or any activities or measures which are designed to protect the above;

in order to be deemed to be Environmental Information. It can be in the form of registers, reports and returns, and therefore suggests that documents expressing opinions relating to environmental information are subject to disclosure.

6. The EIR makes no distinction between information obtained or collated prior to 1992 or after, it merely states that there is a duty to disclose the information held.
7. The EIR states that any person who makes a request for environmental information must be responded to as soon as possible, and no later than two months after the request was made.
8. The EIR allows the Relevant Body the right to charge for the information<sup>10</sup>, such charge to be "reasonably attributable to the supply of information to the" applicant. It also allows the right to refuse to supply the

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<sup>9</sup> s2(2)

<sup>10</sup> s3(4)(a)

information until the charge has been paid<sup>11</sup>.

9. The EIR grants the Relevant Bodies the right to refuse to disclose information where the information sought is capable of being treated as confidential. The criteria for information to be deemed to be confidential is now contained in the EIAR<sup>12</sup>, as being information which on disclosure:-

- would affect international relations national defence or public security;
- would affect matters which are issues in any legal proceedings or enquiries, or are the subject of any investigation which may result in legal proceedings or enquiries;
- would affect the confidentiality of any deliberations by any Relevant Body;
- would involve the supply of a draft or uncompleted document, or any internal communications within the Relevant Body;
- would affect any matter to which a duty of confidence arises, including duties created by contract or intellectual property;
- would breach any legislation or agreement;
- would involve disclosing personal information relating to a person who has not given their consent to the release of the information (breach of the Data Protection Act 1998);
- would increase the likelihood of damage to the environment

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<sup>11</sup> s3(4)(b)

<sup>12</sup> the EIAR's sole effect was to revise the definition of confidential information

affecting anything to which the information relates; or

- where the information was given to the Relevant Body by a third party who was not under a legal obligation to disclose the information; did not supply it in circumstances where the Relevant Body is entitled to disclose it apart from the EIR; and has not consented to the disclosure.

It is apparent that any of the above information can be redacted (deleted or blanked out) from any document containing Environmental Information before disclosing the document to the public.

10. In addition, the Relevant Body is entitled to refuse the request where the request is manifestly unreasonable or the scope of the request is too wide or general in nature.
11. Should the Relevant Body wish to rely on any of the exemptions, they are still under an obligation to notify to the applicant, in writing, as to the reasons for the refusal to disclose.
12. In the event of a Relevant Body failing to comply with the EIR, the remedy left to the applicant appears to be either judicial review of an action for breach of statutory duty<sup>13</sup>, and is dependant on the basis of the complaint
13. The judicial review test is relevant where the dispute relates to whether a particular organisation falls within the definition of a "Relevant Body" contained in the EIR and thus whether it is subject to the duty to disclose.
14. However, where the complaint relates to whether a Relevant Body was incorrect in refusing to disclose information under an exemption, then judicial review is inappropriate, as it

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<sup>13</sup> s3(6)

does not permit the review of a Relevant Body's decision on its merits. The only way a Relevant Body's decision could be overturned would be if the decision was "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".<sup>14</sup>

### **Environmental Information Regulations 2004**

15. The Environmental Information Regulations 2004 ("**EIR2004**"), at the time of writing, has neither been fully drafted nor been released for consultation, despite being scheduled to be implemented by 1 January 2005. It is designed to implement the provisions of the United Nation's Aarhus convention.
16. However, from the indications given by the Department for Environment, Food and Rural Affairs (DEFRA) and from the terms of the Aarhus convention, it is apparent that the EIR2004 will adopt the provisions of the Freedom of Information Act 2000, by:-
  - reducing the maximum time to respond to requests from two months to 20 working days;
  - imposing a public interest test so that information can only be withheld where the public interest in refusing to disclose the information outweighs the public interest of disclosing the information;
  - transferring enforcement of the Environmental Information Act to the Information Commissioner's Office. It is unclear what sanctions the Information Commissioner will

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<sup>14</sup> *Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985], AC 374*

have in respect of non-compliance;  
and

- removing any geographical restrictions as to the eligibility of applicants seeking information, thus opening the right to potentially anyone in the world.

17. In light of the above, it is apparent that contracts which contain Environmental Information need to reconsider the definitions of confidentiality and confidential information, as a general blanket definition of confidential information will no longer be sufficient to stop disclosure. In addition, the other contracting parties need to be made aware that the confidential information contained in the contract may not be as confidential as originally envisaged.

18. It is expected that a draft of the EIR2004 will be published in the summer of 2004

### **Implications for Birmingham City Council**

19. On the basis of the indications given by DEFRA as to the effect of the EIR2004, the most fundamental change will be the shift from the existing system to one mirroring the Freedom of Information Act 2000 regime. The most obvious change will be the reduction in the time-limits to respond to requests, from two months to two weeks, bringing requests for environmental information in line with general requests for information made under the FOIA 2000. The Council will have to ensure that any policies, procedures and structures being developed to handle Freedom of Information requests can also be used to meet the requirements to be set out in the EIR2004.

20. As compliance with FOIA in dealing with requests, including meeting the deadlines set out in the FOIA are

expected to be adopted as a criteria in the forthcoming review of the Comprehensive Performance Assessments (CPA), it is highly probable that compliance with the EIR2004, including meeting its deadlines will also be incorporated into the CPA. Accordingly, there may be detrimental implications if the Council fails to comply fully with the EIR2004.

21. As the draft of the EIR2004 has not yet been published, it is unclear what further implications the proposed legislation will have on the Council in responding to requests for environmental information and on a wider scale. This will be kept under review and an update Briefing Note issued at the relevant time.

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