EIR Exceptions: How They Differ from FOI Exemptions

The Environmental Information Regulations 2004 give a separate right of access to environmental information. Councils, NHS bodies, water companies and many other authorities receive these requests every week, often without realising the request should be handled under the Regulations and not the Freedom of Information Act. The main differences are that every exception is subject to the public interest test, and that there is a built in presumption in favour of disclosure.

AT A GLANCE

	FOI exemptions	EIR exceptions
Law	Freedom of Information Act 2000	Environmental Information Regulations 2004. Scotland has its own regulations
Request format	Must be in writing	Can be made verbally
Time limit	20 working days	20 working days under regulation 5. A longer period can be allowed where the volume and complexity make it impracticable to comply within that time
Absolute exemptions	Yes, a list in section 2(3)	None. Every exception is subject to the public interest test
Presumption	None	A presumption in favour of disclosure under regulation 12(2)
Personal data	Section 40	Regulation 13

1. When do the Regulations apply instead of the Act?

Section 39 of the Freedom of Information Act makes environmental information exempt from that Act, so that it is handled under the Regulations. The definition of environmental information is wide. It covers the state of the elements such as air, water, soil and land, factors that affect them such as emissions, waste and noise, measures and activities that affect them such as policies, plans and programmes, reports on implementation, cost benefit analyses, and the state of human health and safety so far as it is affected by the environment.

In practice, requests about planning, land use, pollution, waste, transport schemes, energy, flood defences, housing conditions and highways frequently fall under the Regulations. Check the definition whenever a request touches the physical environment. If you are not sure, treat it as environmental and handle it under the stricter regime.

2. What is the presumption in favour of disclosure?

Regulation 12(1) allows refusal only if an exception applies and the public interest in maintaining the exception outweighs the public interest in disclosure. Regulation 12(2) adds that you must apply a presumption in favour of disclosure. It affects how you weigh the balance: the starting point is disclosure, and the case for withholding must overcome it.

3. What are the regulation 12(4) exceptions?

These are about the request or the nature of the material.

- **12(4)(a)** The authority does not hold the information when the request is received.
- **12(4)(b)** The request is manifestly unreasonable.
- **12(4)(c)** The request is formulated in too general a manner, and the authority has helped the requester under regulation 9 to clarify it.
- **12(4)(d)** The material is still in the course of completion, or is unfinished documents or incomplete data.
- **12(4)(e)** The request involves the disclosure of internal communications.

Each is subject to the public interest test. For 12(4)(c), you must offer advice and assistance first. For 12(4)(b), the equivalent of vexatious or cost grounds is considered, but you must still weigh the public interest.

4. What are the regulation 12(5) exceptions?

These apply where disclosure would adversely affect one of the following.

- **12(5)(a)** International relations, defence, national security or public safety.
- **12(5)(b)** The course of justice, the ability of a person to receive a fair trial, or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
- **12(5)(c)** Intellectual property rights.
- **12(5)(d)** The confidentiality of the proceedings of a public authority, where such confidentiality is provided by law.
- **12(5)(e)** The confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest.
- **12(5)(f)** The interests of the person who provided the information, where that person was not under a legal duty to supply it, did not supply it in circumstances where the authority could be entitled to disclose it, and has not consented to disclosure.
- **12(5)(g)** The protection of the environment to which the information relates.

The test is adverse effect, which is typically stronger than the prejudice test in FOI. You must show that disclosure would cause the adverse effect, not just that it might.

5. Is there any protection for emissions information?

Yes. Regulation 12(9) says you cannot rely on the exceptions in regulation 12(5)(d) to (g) for information that relates to emissions. Public authorities often overlook this in cases involving pollution, discharge or industrial releases.

6. How is personal data handled?

Regulation 12(3) sends personal data about someone other than the requester to regulation 13. It follows the same structure as section 40 of the Act. The first condition, that disclosure would breach the data protection principles, is a bar. The second and third conditions are subject to a public interest test. Personal data of the requester is outside the Regulations altogether and is dealt with under the right of access.

7. Can you neither confirm nor deny?

Regulation 12(6) allows it where confirming or denying would harm the interests in regulation 12(5)(a), and where it would not be in the public interest to confirm or deny. It is narrower than the FOI position.

8. What about information that is mixed with exempt material?

Regulation 12(11) says information cannot be withheld merely because it sits alongside exempt material. You must release the environmental information if it can reasonably be separated.

WORKED EXAMPLE (ILLUSTRATIVE)

A council receives a request asking for the full correspondence with a developer about drainage on a new housing site.

- **Regime.** The request is about land, water and development, so it is environmental information. The council handles it under the Regulations.
- **Internal communications.** The council considers regulation 12(4)(e), notes the presumption in favour of disclosure and weighs the public interest. Draft internal emails about negotiating tactics are withheld. Factual exchanges of technical data are released.
- **Developer's financial model.** The council considers regulation 12(5)(e), concludes that the commercial interest is real and that confidentiality is provided by law, and withholds the model after the public interest test.
- **Emissions data.** The correspondence includes monitoring results on discharge. These relate to emissions, so regulation 12(9) prevents reliance on some exceptions, and the results are released.

9. Handling mixed regimes: spreadsheet or structured case workflow

Task	Spreadsheet and email	Structured case workflow
Recognising the request type	Judged by the person who opens the email	Request type recorded as EIR, FOI, FOI (Scotland), EIR (Scotland), CHAIRs (Housing) or non regulatory
Splitting a request that spans regimes	A new thread	A multi part request split into separately managed cases
Recording exceptions and reasons	A note in a document	Exemption and reasons recorded in the audit log
Meeting the deadline	Calendar reminders	Deadline tracking that accounts for bank holidays

Frequently asked questions

Do the Regulations require a request in writing?

No. A request can be made verbally, which means you must have a way to record it.

Is there an absolute exception?

No. Every exception requires the public interest test, with the presumption in favour of disclosure.

Can we charge under the Regulations?

Yes, within the rules in regulation 8. Check the current provisions before charging.

What is the time limit?

20 working days under regulation 5, extended where the volume and complexity make it impracticable.

THE PITFALL

Handling an environmental request under the FOI exemptions.

THE REMEDY

Check the definition of environmental information first, then apply regulation 12 with the presumption in favour of disclosure.

KEY TAKEAWAYS

- Treat requests about the physical environment as EIR requests unless you are sure they are not.
- Every exception is subject to the public interest test, with a presumption in favour of disclosure.
- Offer advice and assistance before relying on 12(4)(c).
- Emissions information cannot be withheld under 12(5)(d) to (g).
- Personal data is handled under regulation 13, using the same conditions as section 40.

Conclusion: prioritise the right regime, the presumption of disclosure and the public interest

Check whether a request touches land, water, waste, planning or the built environment before you pick a regime. If it does, work through regulation 12 and weigh the public interest each time.

HOW PROVEPRIVACY HELPS

ProvePrivacy DSAR & FOI (Lite) supports EIR and EIR (Scotland) as request types alongside FOI, FOI (Scotland) and CHAIRs (Housing). A request that spans regimes can be split into separately managed cases, so each strand follows its own rules. The audit log records the exceptions relied on, and deadlines account for bank holidays.

Where this fits in the FOI process

Identifying the regime comes at the start of the process, before you decide how to respond. See our FOI process hub for the full journey.

SCOTLAND

Scottish public authorities apply the Environmental Information (Scotland) Regulations 2004. They follow a similar structure but are a separate instrument. See our guide on FOISA and the EIRs in Scotland.

Related guides

- FOI Exemptions: Cost, Burden and Vexatious Requests
- FOI Exemptions: Policy, Advice and the Conduct of Public Affairs
- FOISA and the EIRs (Scotland): What Differs

Sources

- Environmental Information Regulations 2004, regulations 2, 5, 9, 12 and 13 (legislation.gov.uk)
- Freedom of Information Act 2000, section 39
- ICO guidance: Environmental information regulations

- Scottish Information Commissioner guidance: Environmental information

Talk to someone who has handled FOI

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