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The Fit Between the UK Environmental Information Regulations and the Freedom of Information Act

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Summary

The Natural Environment Research Council (NERC) is one of seven UK Research Councils. It delivers independent research, survey, training and knowledge transfer in the environmental sciences. All the UK Research Councils are public bodies falling under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. This open access legislation came into force on January 1, 2005 and since then the authors have built up substantial experience in managing NERC's data and information under both the Act and the Regulations. This article aims to explain how to manage the, often blurred, boundary between these two pieces of legislation, and the overlap between data management and the legislation¹.

¹ The authors are not lawyers and this article represents their current understanding and personal interpretation of the law. Their views do not necessarily represent the views of NERC. The *International Journal of Digital Curation* is an international journal committed to scholarly excellence and dedicated to the advancement of digital curation across a wide range of sectors. ISSN: 1746-8256 The IJDC is published by UKOLN at the University of Bath and is a publication of the Digital Curation Centre.

Open Access Legislation

Any member of the public can now apply for access to information from public bodies and, unless protected by an exemption to disclosure, that information will have to be released. When the Freedom of Information Act 2000 (FoIA) came into effect it led to a flurry of requests ranging from the serious to the frivolous – from demands for the official papers on Black Wednesday² to a request for the number of eligible bachelors within Hampshire Constabulary. The FoIA specifically excludes environmental information which is covered by the Environmental Information Regulations 2004 (EIRs), which provide broadly similar rights to the Act but relate specifically to information about the environment.

Requests can come from, or be about, anywhere in the world. As environmental science covers the globe and much of NERC's data and information is made available to the academic community for research, we sensibly treat most requests for information as normal business. If we did not, then our business would rapidly grind to a halt under the weight of administration – and that would certainly not be in the public interest. Only when the request exhibits some risk under the legislation (e.g. we are unsure whether to release information) do we have to ask questions such as:

- is the information readily available from us?
- if not - do we hold the information?
- ... or should we direct the applicant to another source?
- is the information exempt from release?
- do we need to consider public interest?

Who Knows About the Legislation?

The FoIA has had extensive press coverage since its introduction, with topical issues still making the headlines such as Parliament being ordered to disclose the details of its Members' second-home allowances, receipt by receipt, in a High Court ruling from May 2008.

The power of the legislation is changing our view of the once-protected world of internal government workings. Conversely, the EIRs have had little publicity prompting Kevin Dunion, the Scottish Information Commissioner to state at the Scottish Planning and Environmental Law 2005 conference in Glasgow "(FoIA) guidance ... was put in place well before the 1 January 2005 implementation deadline ... by contrast the EIRs (Scotland) quietly slipped into force, laid before Parliament on 2 December 2004, before coming into effect less than a month later." Since 2005, environmental campaigners have been quick to take up the opportunities provided by the Regulations, but, in our experience, very few media stories have been attributed to release under the EIRs.

Published UK statistics seem to bear this out: EIR requests accounted for less than 2% of all requests handled under open access legislation across UK monitored departments in 2007³. Conversely NERC identifies and handles over 40% of its

² 1992: UK crashes out of ERM

http://news.bbc.co.uk/onthisday/hi/dates/stories/september/16/newsid_2519000/2519013.stm

³ Ministry of Justice: Freedom of Information Act 2000: Statistics on implementation in central government <http://www.justice.gov.uk/publications/freedomofinformationquarterly.htm>

requests under the EIRs. Likewise the Department for Environment Food and Rural Affairs (Defra) also records around 45% of its requests under EIRs. Despite the environmental focus of these two organizations, these contrasting figures still suggest there may well be an element of under-recording elsewhere in the system.

Two Versions of the Legislation

Just to complicate life for NERC which has wholly-owned sites across the UK, the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 apply to England, Wales and Northern Ireland. There is equivalent but subtly different legislation implemented in Scotland (Freedom of Information Act Scotland 2002 and the Environmental Information Regulations Scotland 2004).

One of the key differences between the UK and Scottish legislation is that Scotland has a more robust “substantial prejudice” harm test and different case law. The Scottish Information Commissioner has made it clear that “substantial prejudice” means that there has got to be real harm in releasing the information, not just the theoretical possibility or a “glancing blow”.

NERC operates globally - from the Antarctic to the Arctic - but our headquarters are in the more prosaic location of Swindon in England. This is the deciding factor in determining which regime we operate under. All requests for information, even those to our wholly-owned research centres in Scotland, are answered under UK legislation.

Why Is Environmental Information Treated Differently?

The FoIA is “home-grown” UK legislation, whilst the EIRs 2004 have taken a different route in law. In 1998 the UK signed the UN Economic Commission for Europe Aarhus Convention in Denmark: access to information, public participation in decision-making and access to justice in environmental matters. In October 2003 the European Commission published a final package of proposals relating to the Aarhus Convention; among them was the Directive on Access to Justice in Environmental Matters. The Environmental Information Regulations 2004 are based on this Directive and replaced earlier 1992 legislation. They give the public access rights to environmental information held by a public authority in response to requests. The Regulations came into force on January 1, 2005 along with the Freedom of Information Act and cover any information that is considered to be “environmental information” within the terms of the Regulations. The EIRs are designed to promote the release of as much environmental information as possible, to enable increased public participation in environmental decision-making.

What Does Environmental Information Include?

The definition of environmental information is very broad under the Regulations and is still being defined in law. The Department for Environment Food and Rural Affairs (Defra) has a unit dedicated to developing policy and guidance, and offering advice on the Regulations. Defra lists elements in its definition including air, water, land, natural sites, flora and fauna (including crops, livestock, genetically modified organisms and biodiversity), the built environment, health and, two categories to which we will return later, emissions and discharges.

How this information is held also covers a multitude of formats including: documents, pictures, registers, reports, contracts, tables, drawings, data, and across a variety of types - opinion, advice, facts, measures, effects, economic analyses etc.

The general advice currently being given is, however, that in order to treat information as ‘environmental’, there should be a reasonably strong, direct relationship between the information requested and the environment.⁴ However, until there is a substantial body of case law it remains a grey area and not just in the UK: reports by EU Member States have flagged that the definition of environmental information is still an issue.

Key Similarities Between the FoIA and the EIRs

- There has been some attempt to dovetail the two pieces of legislation, and there are similarities. Although the following list is not exhaustive, it does cover those areas which we have found important in working across both FoIA and EIRs:
- Both natural (individuals) and legal persons (representing organisations) can make requests.
- Requesters do not have to say why they want the information.
- Requesters do not have to mention legislation.
- The FoIA and EIRs support pro-active publication, i.e. getting the information into the public domain before it is requested.
- Requests can be about anywhere in the world, and from anywhere in the world.
- Initial response times for answering requests: 20 working days.
- All refusals must be in writing.
- Both the FoIA and EIRs are overseen by the Information Commissioner who also oversees Data Protection.
- Both have complaints and enforcement procedures to back them up.

The EIRs: Key Differences from the FoIA

Because they stem from different legislative origins, there is still a number of key differences between the FoIA and EIRs. Unlike the FoIA, which lists the public authorities that come under the Act, the EIRs leave the door open to include organisations with certain characteristics including bodies with public responsibilities, or which provide public services, in relation to the environment. For instance, some executive agencies, public utility companies, and waste contractors may well fall under their provisions. Other key differences include:

- The EIRs have a more open access regime and all requests are subject to a public interest test - authorities cannot agree to blanket confidentiality, especially over time.
- Under the EIRs organisations can be allowed up to 40 days to respond if the request is “complex or voluminous”.
- The EIRs have no set charging regime. NERC operates under HM Treasury guidelines and makes “reasonable” charges for information

⁴ See the Information Tribunal Decision: *Kirkaldie v Information Commissioner* in which the Tribunal defines environmental information in relation to night flying from a regional airport.
<http://www.informationtribunal.gov.uk/Decisions/eir.htm>

where appropriate.

- The EIRs cover all information produced or received by an authority unlike the FoIA which does not extend to information held on behalf of another person.
- Under the EIRs there is less protection for certain information e.g. relating to emissions and discharges (see below).
- FoIA requests must be in writing (letter, fax, e-mail) whereas EIR requests can also be made by phone, or in person.
- The EIRs are less well known than the FoIA, so requesters need more advice and guidance.

Information Protected from Release

“Exemptions” under the FoIA, called confusingly “exceptions” under the EIRs, are barriers in the legislation to protect information that, if released, would cause harm. Such exceptions can be complex and difficult to apply, especially where they cut across both pieces of legislation; but they do cover much of the same ground. Release decisions need to weigh up the public interest in that information and what harm it would cause at the time the request is made. In particular for research organisations, we need to assess the impact of inappropriate release on our business, including work and data in the course of completion, intellectual property rights, any commercial or economic interests, personal information, and of course the protection of the environment itself. The public interest test should assess the harm to third parties and the organisation holding that information: i.e. it is not in the public interest that research organisations are prevented from carrying out valuable science by releasing information and data inappropriately.

There is also a key exception override in the EIRs for information relating to the release of “emissions and discharges”. Where the information is considered to concern an emission or discharge into the environment, it triggers an override to exceptions covering internal confidentiality, commercial confidentiality, information provided in confidence, and the protection of the environment. This override is not limited by those emissions that have already taken place. The definition of emissions and discharges is broad and includes “release of substances, liquids, gases, radiation, vibrations, light or noise from individual or diffuse sources into or onto air, water or land.” Again, this definition is being refined as the legislation is tested in law. A key case is the Decision Notice under the EIRs ordering the Office of Communications (Ofcom) to provide all data on mobile phone base stations held within its *Sitefinder* database⁵. Despite Ofcom trying to protect the commercial interests of the companies operating the masts, the decision to handle this request under the EIRs resulted in the information, including the names of the operators, being released, as the exception was overridden by the fact that phone masts were deemed to release “emissions”.

Resolving Uncertainties

There are certain aspects of responding to EIR requests which are potentially subject to confusion or likely to occasion difficulties. Some suggestions as to good practice are proposed here.

⁵ See Decision Notice on Ofcom Reference:FER0072933, September 11, 2006 (in particular para. 61) http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fer0072933.pdf

Receiving Oral Requests

To avoid any misunderstandings under the EIRs it is always better to put the request down in writing before confirming it with the applicant. The responsible body will also gain the contact details necessary for the written reply.

Exceptions Covering Work/Data in the Course of Completion

Whether or not data are “completed” will depend upon the circumstances of the case. For example, the timescales for what constitutes “completion” of the administrative outputs from central Government, which would be accessed via the FoIA, are very different from the “completion” timescales for long-term research datasets and scientific publication undertaken by research organisations. This is still open to interpretation and will continue to be tested in law. It is important that EIR practitioners regularly update their knowledge of Decision Notices issued by the Information Commissioner.

Nervousness in the Commercial Sector

There is some nervousness amongst organisations in the commercial sector contracting to public authorities: their interests in confidentiality can be overridden by public interest or emissions and discharge rulings as mentioned above. Continuing education of the commercial sector is required and contracts should be designed to incorporate appropriate information release clauses.

Interests of Person Supplying Information

The interests of the person supplying information can be overridden by public interest or emissions and discharges rulings. We advise that voluntary recorders involved in supplying information to public authorities should be encouraged to agree a release protocol.

Copyright Issues

There is also the matter of unauthorised re-use and any liabilities arising out of the use of information. Disclosure of information does not remove its copyright: recipients should seek permission if they wish to exploit the disclosed material further. Additionally, requesters do not have to reveal why they want the information so it is difficult to assess what level of expertise may be required in interpreting or using it. We recommend attaching appropriate licences or terms and conditions to information products where necessary.

N.B.: refer to Defra guidance on the differences between EIRs and FoIA which complements this advice⁶.

Striking a Balance: The Public Interest Test

Each information request must be treated on its own merits - making assumptions that a particular category of information is, or is not, always environmental can lead to problems and should be avoided. The public interest test is the same whether the information is environmental or not.

⁶ The Boundaries between EIR and FOI
<http://www.defra.gov.uk/corporate/opengov/eir/pdf/boundaries.pdf>

Unlike the FoIA, *all* release decisions under the EIRs have to be considered under public interest. Practitioners working in this field should be pragmatic and make the best decision they can at the time, remembering that an internal review period is allowed in the process should it be challenged. Practitioners should try and deliver the spirit if not the letter of the law. There is a presumption of release so if the balance between disclosure and secrecy is level, then they should release.

Should the decision be challenged then sound and well-documented decision making is vital, as applying exemptions and exceptions is not an exact science: Information Commissioner decisions are sometimes overturned by the Information Tribunal and in turn by High Court rulings. There is also some concern among practitioners that the Ministry of Justice can interpret areas of the legislation in a different way to the Information Commissioner's Office. It is advisable to review the guidance from both sources continually as it is subject to frequent revision.

Be aware however that there are also risks in inappropriate release of information that may damage third parties and result in legal action. This legislation is new and is still being tested in law: the definition of Environmental Information has not been thoroughly tested in domestic or European courts. We await important rulings (Decision Notices) by the Information Commissioner both in the UK and Scotland.

The general advice is - the more information you get into the public domain the fewer problems you will have, and if you can safely release the information or data then there is no need to decide whether it is environmental or not⁷.

The Overlap Between Data Management and the Legislation

For an organisation to answer FoIA & EIR requests effectively, it must know: what information it holds; where that information is; who is responsible for it; and crucially, are there any restrictions on access which must be maintained. Many organisations have developed catalogues of their information holdings; however it is still difficult to maintain a complete inventory of all information especially across a large organisation. Electronic records management systems and good record and data management practices can help with this. When the FoIA and the EIRs were first implemented many organisations had to undertake information audits and set up information catalogues so as to understand what information they held. NERC had a strong advantage in this area in that its existing infrastructure of data centres was already used to managing and making available environmental data. They had both catalogues of data holdings and processes to deal with requests for environmental data.

As the data held by the NERC data centres is classed as environmental information and the data centres are there to manage and to make these data available, this provided NERC with a pre-existing infrastructure to use when dealing with requests under the EIRs. So, for example, FoIA/EIR requests to the British Geological Survey (BGS - one of NERC's own research centres) are dealt with through the BGS enquiries section, which is part of the National Geoscience Data Centre, one of NERC's designated data centres.

⁷ For further information visit:

UK: Information Commissioner's Office <http://www.ico.gov.uk/>

& Ministry of Justice <http://www.justice.gov.uk/>

Scotland: Scottish Information Commissioner <http://www.itspublicknowledge.info/>

The NERC data centres provide support and guidance in data management to those bodies funded by NERC. They are responsible for the long-term curation of NERC's environmental data, and provide access to NERC's data holdings in support of re-use and re-purposing. The NERC Data Policy details NERC's commitment to support the long-term management of data and also outlines the roles and responsibilities of all those involved in the collection and management of data. The data centres hold data generated by NERC's own research centres, by NERC-supported researchers in Higher Education Institutes (HEIs), and also third-party data which are beneficial to hold in support of the objectives of NERC and the NERC community⁸. There are six NERC-designated data centres covering the spectrum of NERC's activities⁹. These are:

- Atmospheric sciences: British Atmospheric Data Centre¹⁰
- Earth observation: NERC Earth Observation Data Centre¹¹
- Earth sciences: National Geoscience Data Centre¹²
- Marine sciences: British Oceanographic Data Centre¹³
- Polar sciences: Antarctic Environmental Data Centre¹⁴
- Terrestrial & freshwater sciences, hydrology, genomics and biodiversity: Environmental Information Data Centre¹⁵

Not all data held by NERC's data centres are in the public domain. Often there are valid restrictions on access to data to protect, amongst other things, intellectual property rights or work in progress. For example, data centres hold data sets where the work that they refer to has yet to be published. These data would normally be embargoed to allow the investigator team time to publish results and papers based on these data. To release these data prematurely has the real danger of damaging the research process. It would remove the incentive for researchers to design and undertake experiments and data collection exercises, if they thought that others would publish scientific papers using their data before they had the opportunity to themselves. This is where it is perfectly legitimate to apply EIR Exceptions to protect the interests of the data creator and to avoid damaging the scientific process¹⁶.

This also cuts the other way - some researchers have been unwilling to release their data for re-use (the "these are my data!" syndrome). However, unless a data centre can justify restricting access under an EIR exception, data will have to be released if requested. Not releasing data just because a researcher does not want someone else to use them is not a valid exception under the EIRs.

Part of the philosophy of the information access regime established by FoIA/EIRs is to move more information into the public domain, so it is directly available from

⁸ NERC's data policy requires all those bodies funded by NERC to offer the NERC data centres a copy of any data generated under NERC funding for possible long-term curation and dissemination.

⁹ Further information on the data centres and NERC's data policy is available at <http://data.nerc.ac.uk>

¹⁰ British Atmospheric Data Centre <http://badc.nerc.ac.uk>

¹¹ NERC Earth Observation Data Centre <http://neodc.nerc.ac.uk>

¹² National Geoscience Data Centre <http://ngdc.nerc.ac.uk>

¹³ British Oceanographic Data Centre <http://bodc.nerc.ac.uk>

¹⁴ Antarctic Environmental Data Centre <http://aedc.nerc.ac.uk>

¹⁵ Environmental Information Data Centre <http://eic.nerc.ac.uk>

¹⁶ The specific exception under the EIRs that may be applied is Section 12.4(d) which allows refusal of disclosure when the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

websites for instance, creating a more open “public” information environment and reducing the need for people to make requests for information. NERC is moving towards more direct, web-based access to data sets, where users select and download the data they need. The first stage is to query the NERC Data Discovery Service¹⁷ – an integrated catalogue of the holdings of the data centres. Not all data in the catalogue can be directly downloaded, but NERC is working to increase the number of data sets that are available for view and download as it moves to a web services based data delivery architecture. Indeed, as part of the implementation of the Inspire Directive¹⁸ (to establish an infrastructure for spatial information in the European Community) NERC will provide catalogue, view and download services for all its data holdings, through a web services-based spatial data infrastructure. NERC also hopes to encourage more innovative re-use and re-purposing of its data holdings by encouraging third parties to use its data in mashups and other similar applications.

Easy access does not equal free, unrestricted access. Depending on the data, NERC also charges reasonable fees to cover the costs of supply and of maintaining the data collections. The NERC data centres also provide the infrastructure for licensing and charging. However, NERC’s longer-term aim is to make more data available without charge, using simple “click-use” licences, to encourage more re-use of the data held.

NERC’s data centres do not deal with all data requests as if they were EIR requests. As mentioned earlier, we sensibly treat most requests for data as normal business. Were we to operate otherwise, we would find that the work of the data centres would be seriously hampered by the inevitable increase in the administration workload. However, the EIRs provide a framework of standards within which we must operate our data supply activities and this provides an assurance to users that their requests for data will be dealt with fairly. The key elements of this framework are:

- NERC can only restrict access to data sets where EIR exceptions allow. However, NERC will use the exceptions to prevent inappropriate release of data to protect an investigator’s right of first use, etc.
- Charges for supplying data must be reasonable. Much of NERC’s data is available for free or at the cost of supply only, though some value-added data products are charged for on a cost-recovery basis. NERC follows HM Treasury guidance on charging.
- Response times for data requests must be no longer than the time allowed for EIR requests (normally 20 working days). In practice, the vast majority of requests are dealt with in much less time than this.

In conclusion the authors wish to point out that they are not lawyers and that this article represents their current understanding and personal interpretation of the law. Their views do not necessarily represent the views of NERC. They would further advise that it is always sensible to seek professional advice on decisions where the issues are particularly sensitive or the risk of challenge looks high.

¹⁷ The NERC Data Discovery Service <http://ndg.nerc.ac.uk/discovery>

¹⁸ Infrastructure for Spatial Information in the European Community (INSPIRE) <http://www.ec-gis.org/inspire/>