

# Volunteered Information Exception or Disclosure would adversely affect the interests of the person who provided the information

## Version

v2.1

## Introduction

This document aims to explore Regulation 12(5)(f) the 'Volunteered Information' exception in the [Environmental Information Regulations 2004](#) (EIRs) when managing requests for information that contains volunteered information. It acts as guidance for the Countryside Agencies but will have relevance to other public bodies.

It will not discuss which bodies are caught by the EIRs wide definition of what is a 'public body'. Nor will it discuss the definition of Volunteer.

## Legal Framework and Conservation Background

The EIRs give public bodies, a legal duty to give free access to their environmental information<sup>2</sup>. The regulations were created to enable compliance with the UK's commitments under the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters, and with the EU Directive 2003/4/EC on public access to environmental information. However, the Regulations list a number of potential exceptions allowing a public body to withhold the release of information. One of these exceptions relates to Regulation 12(5)(f): -

### Regulation 12(5)(f) says:

(5) For the purposes of paragraph (1)(a), a public body may refuse to disclose information to the extent that its disclosure would adversely affect -

- (f) 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 body;
  - (ii) did not supply it in circumstances such that that or any other public body is entitled apart from these Regulations to disclose it; and
  - (iii) has not consented to its disclosure;

However, this is not an absolute exception; in each case, the decision to withhold must be subject to a 'public interest test'.

This exception must be considered alongside other legal exceptions, which may also apply,

---

<sup>1</sup> 'Environmental' is taken to mean any aspect of species, habitats, geological features and details of the physio-chemical environment and the interrelations between and within these.

<sup>2</sup> 'Information' in this context refers to raw *data*, aggregated *data*, products created from these (interpretations) as well as descriptive text. The terms 'information', '*data*' and '*dataset*' will be used interchangeably.

for example, commercial confidentiality, public safety or intellectual property rights.

The Countryside Agencies’ Open Information Network<sup>3</sup> supports the principle that, wherever possible, environmental information should be freely available to all. Generally, this benefits the environment by increasing awareness, enabling better decision-making and reducing risk of damage.

However, in a small number of cases, public access to information can result in environmental harm or harm to the interests of the person who supplied the information. The Network recognises that in such cases, availability of information may need to be controlled, although the presumption remains in favour of release and restrictions will be interpreted narrowly.

**Background to the Guidance Note**

DEFRA and the Information Commissioner’s Office (ICO) have published guidance on the interpretation of the EIRs. However, this guidance is general in nature, and the Network has recognised the need for more detailed, sector specific guidance for those bodies that deal primarily with biodiversity information. Therefore, the Network is publishing a series of EIR Guidance Notes to aid the development of a legally valid, consistent and defensible approach. The Information Commissioner's Office and Defra have reviewed this Guidance Note. They accept it as valid, sector specific advice.

<b>Current membership of the Countryside Agencies Open Information Network</b>		
Countryside Agency	English Nature	Scottish Natural Heritage
Countryside Council for Wales	Forestry Commission	National Biodiversity Network Trust
Joint Nature Conservation Committee	Environment and Heritage Service Northern Ireland	
<b>Invited organisations</b>		
Information Commissioner's Office	DEFRA	Scottish Executive
Environment Agency		

**Why is volunteered environmental information important?**

There are an enormous number of biological records being gathered on an on-going basis in the UK. In 1995 a survey commissioned by the then Department of the Environment and run by the Coordinating Commission for Biological Recording (CCBR) found that there were in excess of 60 million records available (approximately a fifth of which were in electronic form). Over 60,000 recorders, 70% of which were volunteers were involved in collecting this information. It should be stressed however that this figure does not include the peaks in biological recording because of initiatives such as the “Great Garden Bird Watch” where around 400,000 observers may be involved. The CCBR survey was by no means complete and it is certain that over the last decade since the survey was carried out both the number of records available and the proportion available electronically will have significantly increased. In essence, access to information collected by volunteers is a critical contribution to our understanding of the environment and practices affecting it.

<sup>3</sup> The Network is an inter-agency group, set up in 2004, which exists to share experience and good practice in the area of open access to information.

Volunteered information is not limited to biological records. It includes any other information supplied voluntarily for example collecting statistical data, conducting sample surveys or information about alleged offences damage under the Wildlife and Countryside Act 1981 as substituted by Schedule 9 of the Countryside and Rights of Way Act 2000 or breaches of agreement conditions. The Countryside Agencies rely on members of the public reporting these incidences through letters, verbal accounts or witness statements.

### **Relationships with partner organisations**

The ability to collate accurate and sufficient information to conserve nature relies heavily on the conservation community working together with a wide range of bodies. Voluntary organisations and volunteers working individually, invest a huge amount of time and effort gathering information that is vital to learning about habitats, species and earth science features. There are concerns that through continuing to supply this information to public bodies (such as the JNCC, CCW, EN, SNH etc) the EIRs would effectively be removing these volunteers' right to own and manage their own information

If the 'public interest test' were interpreted in such a way as to oblige public bodies to disclose every detail of all information it has access to, through its relationships with other organisations, this would have a strongly detrimental impact not only on the quantity of information received, but also the relationships with collaborating organisations who would become unwilling or refuse to pass on information that they felt would be more widely released.

### **How is this different to the 1992 EIRs?**

Although there was a similar exception under the 1992 Regulations, the exception under those Regulations said volunteered information "...must be treated as confidential." The exception did not depend on the disclosure of the information having an adverse affect on the interests of the person who provided the information, and there did not have to be a public interest test in favour of withholding the information.

### **How does the 2004 EIR exception work?**

Under the new EIRs, all exceptions (except Regulation 13 – personal information) enabling refusal of information are subject to the public interest test. The exception in Regulation 12(5)(f) is a prejudice-based exception. Prejudice is normally considered to mean harm (or damage). This exception requires an adverse effect to be demonstrated if information is to be withheld. In the EIRs, this is called "adverse effect" or harm test.

This test of harm is stronger than that in the Freedom of Information Act 2000, in which some exemptions apply if the information '...would, or would be likely to, prejudice...'. Therefore, to engage regulation 12(5)(f) exception in the EIRs there must be appropriate evidence to support the probability of harm, not merely an assertion or feeling of harm. Appropriate evidence could include an evidence-based risk analysis that takes into account the probability and the potential impact of misuse of that information.

### **What does Chapter 7 – Refusals in the DEFRA guidance say?**

Section 7.5.7.2 states the intention behind this exception:

"The purpose of this exception is to ensure the free flow of volunteered information to government,... It could include information provided by organisations and individuals who are not public authorities for EIR purposes."

Section 7.5.7.3 goes on to say, "...It [the exception] recognises that making such information available to the public could inhibit open and constructive discussions between public authorities and third parties. It is recognised therefore that the supply of volunteered information could diminish if information is later published in response to EIR requests."

### **Interaction with other Exceptions**

The Information Commissioner discourages the use of multiple exceptions, mainly to avoid past situations where public bodies have just thrown them all in, in the hope that one works. However, if there is more than one and they are both/all appropriate and applicable then there is no real reason to avoid using more than one.

When assessing the information for release, you may encounter various overlaps with other EIR exceptions. These will most probably be intellectual property rights, commercial confidentiality, damage to the environment to which the information relates and personal information. When identifying the harm or adverse affect it may help in assessing if another exception may be more appropriate and applicable.

### **Gaining Consent**

Providers of volunteered information should be encouraged to consent to release where appropriate, ideally, when the information is collected. The use of consent forms is recommended, as new datasets are received. Providers would be able to indicate their willingness to release information. If there is any information that they consider should be withheld then they can give clear and substantive justification together with a time limit when any information could be disclosed.

Consent is best sought in advance of a request. For key historic datasets, which are frequently used, or are the basis of important decisions it is recommend that public bodies proactively consult with providers of the information. A pragmatic approach for other historic datasets, would be to consult with the provider when an EIR request arrives, as the task of gaining consent can be unreasonably large

### **Separating information out**

Wherever possible refused information must be separated out or blanked out. The remaining part of the information should be made available. Quite often, this may satisfy the requester.

### **Information relating to Emissions**

If the information relates to emissions into the environment, then this exception is not available and the information should be released unless some other exception applies.

### **The Three-Step Approach**

It is useful to see the exception as a set of sequential steps. A public body must qualify each step before proceeding to the next.

#### **Step One – Are there any adverse affects?**

If adverse affect cannot be identified, then the exception becomes irrelevant and there is no need to go through the other tests involved in this or any other exceptions

Although this exception is clearly intended to allow people and organisations to share information with public bodies, it can only be utilised if the disclosure of the information

would adversely affect the interests of the person or organisations who provided it. In order for the exception to apply, the public body must be confident that the disclosure, using appropriate evidence, supports the probability of harm, not merely an assertion or feeling that it might cause harm. Appropriate evidence could include an evidence-based risk analysis that takes into account the probability and the potential impact of misuse of that information.

In many instances, a public body may not have a good understanding of the interests of the person or body that volunteered the information. The public body should enter into negotiations with the provider to establish what interests they have in the information. If they have concerns about release of the information, you should clarify why the provider is concerned. It may be that the issue can be more appropriately addressed under one of the other exceptions to release. For example if the issue was commercial relating to the ability to continue to generate income then the Commercial Interests exception may be more appropriate and applicable. Whilst a public body has to take into account the wishes of the information provider, it does not have to abide by them.

Where the issue cannot be addressed by any other exception, then the actual risk to the provider would need to be investigated in order to demonstrate confidently that this would occur if the information were released.

If there is any information the provider considers should be withheld then they can give clear and substantive justification together with a time limit when any information could be disclosed.

### **What are interests?**

The regulations and guidance say that for the exception to apply the release of the information must adversely affect the interests of the provider. A point to note is that it is the interests of the provider not the public body or the public. These interests could include:-

**Academic Publishing** - the interests of the provider could be adversely affected by the release of information if the release could jeopardise their ability to gain academic or professional credibility by being the first to publish research. Evidence of intent to publish would be needed, this would make it time-limited and an estimate of when the information would be available should then be made. This could be linked to the exception covering material that is still in the course of completion exception.

**Personal Safety** - The safety of the provider could be put at risk if their name, contact details or any other information, which could lead to them being identified, were released. This is a real issue for 'whistleblowers' and 'informers', who could, for example fear harassment. A recent ICO decision Notice ([FS50062329](#)) confirmed a potential adverse affect is only likely to arise where the third party is identified explicitly or by inference. The Information Commissioner was "...satisfied that disclosure of the third party's identity would have an undesirable impact on their relationship with the complainant and that this is sufficient to amount to an adverse affect." This could also be linked to the exception covering personal information.

**Confidential information** - This is where the provider believes that the information was provided in confidence, and indeed, at the time of the supply, this may have been the case. This may constitute "adverse effects on their interest" to breach that duty of confidence by passing on of volunteered information. However, for information to be confidential in law, it

must have been imparted in circumstances importing an obligation of confidence ie the person receiving the information knew or ought to have known that the information was fairly and reasonably to be regarded as confidential and it must have the “necessary quality of confidence”, this means:

1. The information is in fact confidential ie not in the publicly known, not common knowledge or not easily available by other means. That is not to say it must be a secret, but is not widely available eg the fact that you have told your friend does not necessarily undermine the information’s legal confidentiality
2. The information must be worthy of protection; is neither useless or trivia
3. The public interest that confidences should be preserved outweighs some other public interest, which favours disclosure.

Detailed guidance on confidentiality is available on at [www.foi.gov.uk](http://www.foi.gov.uk) and [www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk).

**Other Interests** - In a number of cases there will be no commercial or public safety interest. Many providers will not want their information released simply because they believe it to be sensitive, although they may not have strong factual grounds for this belief or because they do not want to lose control over it. These may be valid interests, and discussions with the provider may need to be held to clarify and explore these interests.

### **What about damage to relationships between public bodies and providers and/or damage to the interest of the public body?**

It is quite common when assessing adverse affect to conclude that the release of information would also adversely affect the relationship between the provider and the public body and/or the interests of the public body. If this is then the case, this can be a valid factor, but can only be used during the public interest test, in Step 3.

The interests discussed above are not exhaustive. There may be other valid interests that need to be considered. The crucial element is that there must be appropriate evidence to support the probability of harm (adverse effect) to the interests of the person supplying the information, not merely an assertion or feeling of harm.

### **Step Two - Does the Volunteered Exception Apply?**

For this exception to apply it must be shown that some rule of law would prevent public bodies from disclosing the information eg rules of confidentiality, contract or statutory rules and that there is no other express statutory power that overrides any of those general rules of disclosure. This can be done by passing three tests:

1. The person or organisation who supplied the information could not have been forced to do so, ie it was supplied voluntarily, AND
2. the public body is not entitled to disclose in any other way, AND
3. the provider has not consented to its disclosure.

### **The information was volunteered**

It is important to be clear about whether the information had been volunteered. Volunteered means the supplier of the information was not under, and could not have been put under, any legal obligation to supply it to the public body. There are complexities in that many voluntary groups actively collecting wildlife information, are for example in receipt or in the past received public sector funding. In some cases, it may be a straightforward task to separate the



information that had been collected at public expense. However, in many cases the line between publicly funded and purely volunteered effort will be blurred. In these instances, the public body should undertake to:

- Re-examine the way contracts and grants are let out, making it explicit that any information generated as a result of this funding may be made available in accordance with the bodies own obligations and policy.
- Re-visit past contractual and grant arrangements with the voluntary sector with a view to reaching an agreement, as to how the information can now be made available.

This exception is unlikely to apply to information that is provided voluntarily when applying for grants, permits and licences even if that information could be specifically required part of the application process, even though the decision to apply for the grant etc may have been a voluntary action.

If the public body could have required the information subject to a regulatory or statutory function had it not been provided voluntarily, then this information cannot fall within this exception.

#### **The information cannot be released in another way**

This exception cannot be claimed if the public body can show that some rule of law, legal rights or obligations allows them to disclose, eg public registers or applicable vires.

#### **The provider has not consented to release of the information**

Public bodies when they receive a request are encouraged to consult with the volunteers of the information and in particular ‘sensitive’ information.

If in negotiating with the provider it is agreed that the risk in release is not as great as first anticipated and they are now happy for the information to be released there is no point in continuing to apply the exception.

Alternatively, the provider may be happy to make the information available at a summary level, but want the detail to be withheld. In this case, the exception would still need to be worked through to ratify the decision to withhold the detailed information. You may need to use Guidance Note 1 - The ‘Environmental Exception’ and access to information on sensitive features.

### **Step Three – Apply the Public Interest Test**

All the EIR exceptions are subject to the public interest test, meaning that they can be overruled if the public interest will be best served by disclosing, not withholding, the information. The EIRs state, we must withhold information only if, “In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”. Where the balance between disclosure and withholding the information is seen as equal the information must be released.

Factors in favour of disclosure can include:

- The information supplied voluntarily in support of an application for a regulatory benefit, including a licence, a permit or a grant and what impact on the application if it had not been supplied.

- Individuals having access to information that helps them understand the reasons why actions were taken by public bodies that affect them and in individuals having the ability to challenge those decisions,
- Understanding the nature of the relationship between the public body and the third party.
- Furthering the understanding of and participating in the public debate of issues of the day.
- Promoting accountability and transparency by public bodies for decisions taken by them.
- Promoting accountability and transparency in the spending of public money.
- Bringing to light information affecting public health and public safety. The prompt disclosure of information by scientific and other experts may contribute not only to the prevention of accidents or outbreaks of disease but may also increase public confidence in official scientific advice.
- Information being released if it could contribute towards scientific advancements or research
- Understanding the circumstances under which the information was obtained ie using public funds.
- Whether the information is already public.

Factors in favour of withholding can include:

- Protecting an individual from malicious complaints and avoiding the waste of public resources investigating such complaints.
- In safeguarding the free flow of information to the public body, which it relies on in order to carry out its regulatory and statutory functions under legislation.
- In ensuring that people are not deterred from volunteering information if they are concerned that their identity could be revealed and that this would hinder the ability of the public body to deal with its regulatory and statutory functions.
- The potential damage to relationships.
- The potential for unnecessary external pressures (this is normally time limited).
- The 'strength' and number of exceptions applicable
- Whether sensitive information can be separated from discloseable information that meets the requesters' needs.

Factors, which should not be taken into account, are:

- the public interest does not simply mean, that which interests the public.
- potential or actual embarrassment to government/organisation/employee or loss of confidence is not a valid factor in determining the public interest.
- risk of the information being misunderstood (eg because it is incomplete or may be overly technical) is not an argument against disclosure. It is recommended that if information could be possibly misunderstood then an explanation should be added to information to provide some context.

Detailed guidance on the application of the public interest test is available at [www.foi.gov.uk](http://www.foi.gov.uk) and [www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk).

This is the critical decision for the public body. The three possible scenarios are identified below. In all cases, each decision should be backed by a summary of the issues considered and how they were assessed and how the final decision was reached.



1. The release would clearly have an adverse affect on the interests of the person that volunteered the information. In this case, the public body believes it is in the greater public interest to refuse or restrict the level of access to the information.
2. The person that volunteered the information believes that release would have an adverse affect on their interests, but after examining the case the public body believe that refusal is not justifiable, because such an adverse effect is unlikely, and it is in the greater public interest to release the information.
3. The release would clearly have an adverse affect on the interests of the person that volunteered that information. However, in this case the public body believes it is in the greater public interest to release the information.

### **What about damage to relationships between public bodies and providers and/or damage to the interest of the public body?**

It is quite common when assessing adverse affect to conclude that the release of information would also adversely affect the relationship between the provider and the public body.

Considerations would include the public interest in a public body breaking an ethical/trust relationship between the provider and the public body on releasing information against a provider's express desire, and what adversely affect that breach of trust might have on other members of the voluntary community and the longer term supply of voluntary information to the public body. If by releasing, the information the public body alienated completely the volunteer network, and a key free information source ceased, it might have very significant impact on the public purse, or the public bodies' scientific information base. This can only be used as part of the Public Interest Test. If this is the case, it can be a valid factor. Issues to assess can include:

- What weight to apply to this harm?
- What are the issues in the relationship breaking down?
- Will the supply of information stop?
- Will it damage partnership working?
- What is the overall effect on the volunteer community?

Similar to the adverse affect assessment above, there must be appropriate evidence, supporting the probability of harm, not merely an assertion or feeling that it might be harm.

### **What about damage to nature conservation?**

There is a strong interaction between this exception and 12(5)(g) damage to the environment to which the information relates. For example if the damage to relationships is used to withhold, the adverse affect could be to nature conservation in general if the relationship breaks, not on the volunteer. Here both exceptions could be used.

## **References**

**Amos & Innes, (2001)** – A guide for business to the Freedom of Information Act 2000, The Constitution Unit, University College London.

**Coutts, Peter, (2005)** – Internal Guidance on the EIR exceptions, Draft, Countryside Council for Wales.

**Department of Constitutional Affairs, (2004)** - [Code Of Practice On The Discharge Of Public Authorities' Functions Under Part I Of The Freedom Of Information Act 2000](#), Issued Under Section 45 Of The Act

**Department of Constitutional Affairs, (2004)** – [Procedural Guidance - Chapter 08: Responding to the request](#), Department of Constitutional Affairs.

**Department of Constitutional Affairs, (2004)** – [Detailed Guidance on the Freedom of Information Act Exemptions](#), Department of Constitutional Affairs.

**English Nature, (2005)** – Legal Advice on application of EIRs, Browne Jacobson.

**Department for Environment, Food and Rural Affairs, (2005)** - [Chapter 7 – Exceptions, Guidance for the Environmental Information Regulations 2004](#), Department of Department for Environment, Food and Rural Affairs.

**Green, Darren, (2005)** – [Environmental Information Regulations - guidance on exceptions](#), English Nature.

**Information Commissioner’s Office, (2004)** – [Freedom of Information Act Awareness Guidance No 20 – Prejudice & Adverse Affect](#), v1 Oct 2004, Information Commissioner’s Office.

**Information Commissioner’s Office, (2004)** – [Detailed Guidance on the Freedom of Information Act Exemptions](#), Information Commissioner’s Office.

**Information Commissioner’s Office, (2004)** – [Detailed Guidance on the Environmental Information Regulations Exceptions](#), Information Commissioner’s Office.

**Information Commissioner’s Office, (2005)** – [Decision Notice Reference: FS50062329](#), Information Commissioner’s Office.

**Wilkinson, Steve, (2004)** – Internal document on volunteered data, Draft, Joint Nature Conservation Committee

## Simple flow chart showing the three step process

