

3. What is covered by the Regulations?

What is 'environmental information'?

The definition of environmental information in the EIRs stems from the Directive. It is very broad, and covers not only elements of the environment but also information on measures and activities likely to affect them.

Regulation 2 says:

Interpretation

2. - (1) In these Regulations -

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -
(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

3.1 Experience from the implementation of the environmental information regime has established that 'environmental information' is interpreted very broadly. The Government has treated information relating to GM crop trials, to pesticide testing, to diseased cattle and to land-use planning (including the reasons for decisions to approve as well as to refuse planning permission) as environmental information. The definition could also include reports on the implementation of environmental legislation and analysis resulting from an appraisal of policy, including any Regulatory Impact Assessment (RIA).

3.2 The definition of environmental information in the 1992 Regulations was tested in the domestic and European courts. Although the definition in the new Regulations is different, these cases still provide useful guidance on how to approach this issue. In two cases before the High Court the expression "information relating to the environment" was given a fairly wide meaning. For example, the High Court held that whether information is environmental information is a question of fact. It also held that the definition could include the source of information relating to the state of the environment, including the name, if that is necessary to assess the credibility of the information. For this reason, in the *Ibstock* case, the name of an informant who gave information about munitions dumped down a mineshaft was considered to be a part of the environmental information that should be released.¹ In the second case the High Court decided that the content of a concession agreement relating to the construction of a motorway was environmental information for the purposes of the 1992 Regulations.²

3.3 The European Court of Justice has also indicated that it will adopt a broad construction of the definition of environmental information. However, there are limits to the extent of information being 'likely to affect' or 'may be affected by' the environment. Both the 1990 and 2003 Directives import a concept of 'remoteness', which requires that information requested should be sufficiently connected to the environment to be covered by the definition. A statement of views given by a countryside protection authority that was capable of influencing the outcome of development consent proceedings has been found to be environmental information.³

3.4 However, although the definition is very broad, it is not without limits. In one case, the ECJ decided that certain information is not within the definition even though it has a remote connection with safeguarding the environment. This case concerned information relating to controls on marketing foods containing genetically modified organisms (GMOs). The court left it open that such information could be environmental information if the purpose of the controls was to protect the environment. But in this case, the *purpose* of the marketing controls was to remove obstacles to trade in GMO products and to inform the consumer. So the information at issue, which included information about products that were improperly labelled and producers penalised for improper marketing, was not environmental information.^{4, 5}

¹ *R v. British Coal Corporation ex parte Ibstock Building Products Limited* [1995] JPL 836. NB This decision pre-dates the Data Protection Act 1998.

² Case No: CO/4553/98 in *High Court of Justice Queens Bench Division: R v The Secretary of State for the Environment, Transport & The Regions and Midland Expressway Limited Ex Parte Alliance Against the Birmingham Northern Relief Road and Others*

³ Case No: C-321/96 - *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat*, ECJ judgement of 17 June 1998 (Sixth Chamber) Pinneberg and Case No. C-217/97 – *Commission of the European Communities v Federal Republic of Germany* ECJ judgment of 9 September 1999.

⁴ Case No: C-316/01- *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen*, ECJ judgement of 12 June 2003 (Fifth Chamber <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=c-316%2F01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>)

⁵ The case of *Commission v Germany* C-217/97 (also under the old Directive) the ECJ reasoned that "no detailed evidence has been adduced to establish that such authorities

3.5 The EIRs implement the access to information provisions of the Aarhus Convention. Guidance on the Convention is given in the Aarhus Implementation Guide (AIG)⁶, which was prepared by the Regional Environmental Centre and other organisations for the United Nations. The AIG explores how the Convention may be interpreted, but it is for individual signatories to establish how to correctly apply the Convention in their own countries.

The AIG notes that “*Unlike later parts of the Convention, the word ‘significant’ is not used to quantify the level of effect required., where information is concerned, efficiency is served not by imposing a threshold, but by including everything that is relevant. Thus, ‘significance’ is inappropriate in the definition of ‘environmental information’.*”

Air should be taken to include the air within buildings and other natural and man-made structures above or below ground, i.e. not only ambient air but indoor and workplace air as well.

Water should be taken to include underground and surface waters (both natural and in man-made structures) sewage and foul water; the latter to include inland waters (i.e. rivers, canals, lakes), estuaries and seas; water table and aquifers.

Soil should be taken to include the *in situ* upper layer of the mantle rock in which plants grow.

Land and Landscape should be taken to include all land surfaces, caves and underground strata. Land covered by water is also included.

A **natural site** should be taken to include areas identified by reason of their flora, fauna, geological or physiographical features (e.g. Sites of Special Scientific Interest) or general environmental quality (e.g. Areas of Outstanding Natural Beauty). This could also include for example a tree or park of local significance.

Radiation may also be considered as an element of the environment.

Biological diversity should be taken to include species of flora and fauna
The AIG refers to “*Article 2 of the Convention on Biological Diversity [which] gives the following definition of biological diversity: “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems”. Biodiversity includes, but is not limited to, ecosystem diversity, species diversity and genetic diversity.*”

[courts] have information on the environment obtained outside their judicial activities” (para. 24).

⁶ The Aarhus Convention: An Implementation Guide ECE/CEP/72

Human health and safety and conditions of human life covered by EIR include human response to physical, chemical and biological agents delivered through environmental media of water, air, land, and biodiversity etc. Thus the incidence of disease such as skin cancer which is linked to exposure to the sun might be environmental information, whereas incidence of a cancer that does not have an environmental link is unlikely to be environmental information.

The AIG provides one view of the extent to which information on human health is covered by EIR:

“Human health and safety are not identical to the terms ‘environmental health’ or ‘environment and health’. Human health may include a wide range of diseases and health conditions that are directly or indirectly attributable to or affected by changes in environmental conditions. Human safety may include safety from harmful substances, such as chemicals, factors, such as radiation, or other natural or man-made conditions that affect human safety through manipulation of environmental elements. ‘Conditions of life’ in a general sense may include quality of air and water, housing and workplace conditions, relative wealth, and various social conditions.”

Built structures should be taken to include structures, roads and other infrastructure created by mankind and includes ancient and historic monuments.

The **state** should be taken to include physical, chemical, electromagnetic, radiological and biological conditions at any moment in time.

Emissions are not defined in either the Regulations or in the Directive on Public access to environmental information.,⁷ The Aarhus Implementation Guide⁸ takes its definition from the Integrated pollution and control (IPPC) Directive⁹ and defines emissions as a “direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land”.

Measures could include administrative measures and environmental management programmes such as permit schemes, management contracts, land-use planning regimes and permits, regeneration and transport development plans and proposals. The measures or activities may not be labelled as environmental.

Environmental agreements: this phrase could cover voluntary agreements such as those negotiated between government and industry, and may also apply to bilateral or multilateral environmental agreements among States.

Economic analyses could include financial analyses.

⁷ Council Directive 2003/4/EC on public access to environmental information

⁸ The Aarhus Convention: An Implementation Guide ECE/CEP/72

⁹ This definition is taken from Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC Directive)

3.6 Environmental information can be in any recorded format; written, visual, audio taped or database form. It includes information contained in documents, pictures and records, where records are taken to include registers, reports, returns, computer records and other non-documentary records. Maps will often contain environmental information. No types of information are excluded from the potential ambit of environmental information. It includes, for example, information contained in all types of documents such as decision letters, applications, inspection reports, concession agreements, contracts, tables, databases, spreadsheets, e-mails, photographs, sketches and handwritten notes or drawings and covers opinions and advice as well as facts. Information in raw and unprocessed form is capable of being environmental information as well as documents.¹⁰

3.7 Environmental Information could include information relating to the way information was obtained, and any guidance about its potential **accuracy** or potential to mislead. Public authorities are therefore advised to consider the accuracy of any information they hold. Regulation 5(4) requires that information made available be “up to date, accurate and comparable, so far as the public authority reasonably believes.” Information could include opinions rather than facts. If so, this should be made clear. In addition, information could be inferred, dependent on forecasts, or derived from samples. It could come from a third party and be of unspecified reliability or selected by a supplier in order to argue a particular point of view. In cases where validation could be costly, bodies would be well advised to protect themselves by issuing a disclaimer addressing issues to be taken into account in interpreting information released to the public – this could include its accuracy, its source and any other known limitations that would need to be taken into account in interpreting it. For example, where the information requested is derived from a very small statistical sample, it may be appropriate to make clear that this is the case and that it would be unwise to rely upon it. However, while the authority may give guidance on the accuracy of the information, it is not required to interpret the information itself, to draw its own conclusions or recommend action on information it supplies.

3.8 There is no time limit on historical data. If environmental information currently exists it is covered by the Regulations, no matter when the information was created or gathered.

3.9 There is no geographical restriction; the information may relate to anywhere in the world. So, for example, information on the estates of embassies or on overseas aid programme grants for schemes that impact upon the environment may come within the definition of environmental information for the purpose of these Regulations.

¹⁰ The Aarhus Convention: An Implementation Guide ECE/CEP/72

3.10 The Regulations apply to any information **held by or on behalf** of a public authority, whether or not it was obtained as a result of that authority's environmental responsibilities. Any information in the "possession" of the public authority or which is stored elsewhere and is held by a natural or legal person on behalf of a public authority is 'held' by it (Regulation 3). Therefore the EIR, unlike the FOIA, covers information that a public authority has received from a third party unless the information is not in the public authority's "possession". It thus can include information held within the authority's buildings or elsewhere, held on its own behalf, held because it has received the information from a third party and it includes information held by others if they are holding the information on behalf of the public authority (e.g. consultants, private companies or archives may hold environmental information on behalf of a public authority). It would not include information that had not been deemed to have been received by the public authority. Certain information might be held within a public authorities buildings or offices, but it is not considered that this, in itself, means the public authority 'holds' the information for the purposes of the EIR's. E.g. Staff working for the public authority may bring private papers such as bank statements, unrelated to the authorities work, to the office with them, but it is not considered that such items would be in the public authority's 'possession' or that the public authority had 'received' them for the purposes of the Regulations. It is the public authority's duty to respond to all requests for information that they "hold" wherever it lies.

3.11 Environmental information includes information collected before the Regulations came into force. It also includes information passed for safekeeping to the National Archives (TNA). Environmental information in transferred public records is covered by the EIRs because it is held by the TNA, which as a government body is an FOI Authority and hence subject to the EIRs. Ownership of transferred public records to TNA does not rest with providing bodies. In the case of records that are public records under the Public Records Act 1958, the records are Crown property but are held by TNA in their own right, as the Government's archives under the Public Records Act 1958. Records in the Public Record Office of Northern Ireland are held on a similar basis under their Act. Records held in places of deposit for public records, appointed under s 4 of the 1958 Act, are held on behalf of the Lord Chancellor, not on behalf of that providing body. Guidance in relation to private archives held by public authorities can be found at www.nationalarchives.gov.uk/

Other statutory provisions on environmental information

3.12 There are other statutory provisions relating to public access to environmental information. However, regulation 5(6) EIR of the EIR's provides that any enactment or rule of law that would prevent the disclosure of information in accordance with the Regulations shall not apply.¹¹ Of course, statutory bars are very useful indicators that

¹¹ Regulation 5 (6)

there is likely to be a strong public interest in withholding information and exceptions under Regulation 12 should be considered.

3.13 Environmental Information contained in documents of the institutions of the European Community is subject to EC Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents. In October 2003 the European Commission adopted a further proposal for a regulation to apply the Aarhus Convention to the Community institutions and bodies. This new Regulation (2003/0242) is currently being negotiated¹², which will complement 1049/2001 by providing interpretive provisions specifically on environmental information, reflecting the Aarhus Convention which has been ratified by the European Community.

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¹² www.defra.gov.uk/corporate/consult/aarhus/regulation.pdf