

Environmental Information Regulations:

Guidance on the boundaries between
environmental and other information

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1. AIM OF THE GUIDANCE

This guidance is designed to help public authorities determine whether information should be defined as environmental within the meaning of EU Directive 2003/4 and, as a result, whether a request for it should be handled under the Environmental Information Regulations 2004 (EIRs) rather than the Freedom of Information Act 2000 (FOIA). In particular, this guidance provides a methodology which could be helpful for those cases where the distinction may not be clear. It also provides some worked examples describing how the information requested and that held can be tested against the definition of environmental information in Regulation 2(1) to determine whether it is subject to the EIRs.

2. FIVE KEY POINTS ABOUT HANDLING ENVIRONMENTAL INFORMATION

- If an authority can release the information in full and there are no other considerations such as charging or statistical record keeping there is no need to decide whether it is environmental or not – just provide the information and explain the complaints procedure.
- Each case must be treated on its own merits. It is best to avoid making automatic assumptions that a particular category of information is (or is not) always environmental information as this can be misleading.
- The scope of environmental information is wide as defined within the Regulations, but there are limits. It is important to look at the wording of the definition in the Regulations and to consider carefully whether information held which meets the terms of the request fits the definition in the EIRs.
- Requests under the EIRs need to be handled in a different way to FOI requests. The time limits and the reasons for withholding information are not always the same. See <http://www.justice.gov.uk/guidance/foi-procedural-request.htm> for the key differences.
- Though the nature of the exceptions and the tests may differ in some respects, the considerations about the public interest in favour or against disclosure are likely to be the same, whether the information is environmental or not.

3. DEFINITION OF ENVIRONMENTAL INFORMATION

Article 2(1) defines environmental information for the purposes of Directive 2003/4/EC. This definition is repeated in Regulation 2(1)(a) to (f) of the Environmental Information Regulations.

It is very important to note the linkages between some parts of the definitions at Regulation 2(1)(a) to (f) which limit their application. These need to be checked carefully as in some cases only the information qualifying under both parts will meet the definition of environmental under the Regulations. These cross references are shown **in bold** below.

Regulation 2(1) of the EIRs states that: environmental information is **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)*

Regulation 2(1)(b) factors	→	Affects or is likely to affect the elements of the environment in Regulation 2(1)(a)
Regulation 2(1)(c) measures ... and activities	→	Affects or is likely to affect the elements and factors in Regulations 2(1)(a) and (b)
Regulation 2(1)(e) cost-benefit and other economic analyses ...	→	used within ... measures ... and activities in Regulation 2(1)(c)
The elements of the environment in Regulation 2(1)(a) or through those elements the matters in Regulations 2(1)(b) and (c)	→	affect or may affect Regulation 2(1)(f) state of human health and safety ...

4. PROXIMITY/REMOTENESS OF INFORMATION TO THE DEFINITION OF ENVIRONMENTAL INFORMATION

Environmental information can be defined widely. Case law on what definition should be used for the Regulations is very limited and restricted to challenges under the previous EU Directive on access to environmental information. Both the Information Commissioner and the Information Tribunal, however, are increasing their scrutiny of the regimes being applied by Departments and the basis for their decisions. They are also tending towards a wider definition of environmental information than has been the case hitherto. This means that environmental information is beginning to be better defined, but it is difficult to draw out any clear guiding principles at present.

However, in two cases *Mecklenburg*¹ and *Eva Glawischnig*² the European Court of Justice (ECJ) recognised that, although environmental information should be given a wide interpretation, it is nonetheless circumscribed in certain ways. In particular in *Glawischnig*, the ECJ stated that the previous Directive (90/313/EEC) was not intended to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in the Directive. To be covered by the right of access it establishes, such information must also fall within one or more of the three categories set out in that provision³.

The Court ruled in this case that the purpose of the rules on labeling of foodstuffs produced from genetically modified organisms 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 that were penalised for improper marketing, was about marketing controls and was not environmental information. Consequently this case introduced the concept that, despite an appearance of being environmental, the information held should be tested for its degree of remoteness or proximity to environmental information as defined in that Directive.

Under current legislation, Article 2(1)(a) – (f) interprets what environmental information means for the purposes of Directive 2003/4/EC. Regulation 2(1)(a) – (f) is a direct copy of this, which means that, for information to fall within the scope of the Regulations, it must be information **falling within** at least one of the six limbs at 2(1)(a) – (f).

However, it is not always easy to interpret precisely how widely "on" should be considered and it is particularly difficult with regard to the limbs at (b), (c), (e) and (f). These first three limbs ((b) (c) and (e)) provide for information to be considered environmental not because it is information on a factor, measure, or economic analysis, but **because of the effect** (or likely effect) those factors and measures etc. will have on the state of the elements of the environment described in (a). In the

¹ C-321/96 *Wilhelm Mecklenburg v Kris Pinneberg* [1998] ECR I-3809.

² C-316/01 *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [2001] ECR I-05995.

³ The categories were information on the state of water, air, soil, fauna, flora, land and natural sites, on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes.

case of (f), information could be considered environmental because of the effect (or likely effect) these elements will have on conditions of human life or the built environment.

At its most remote, a measure at limb (e) would be considered to be environmental information only if it is information on cost benefits or other economic analysis used within the framework of a measure at (c) which in its turn is likely to affect or affects a factor in (b) which in its turn is likely to affect or affects the elements in (a).

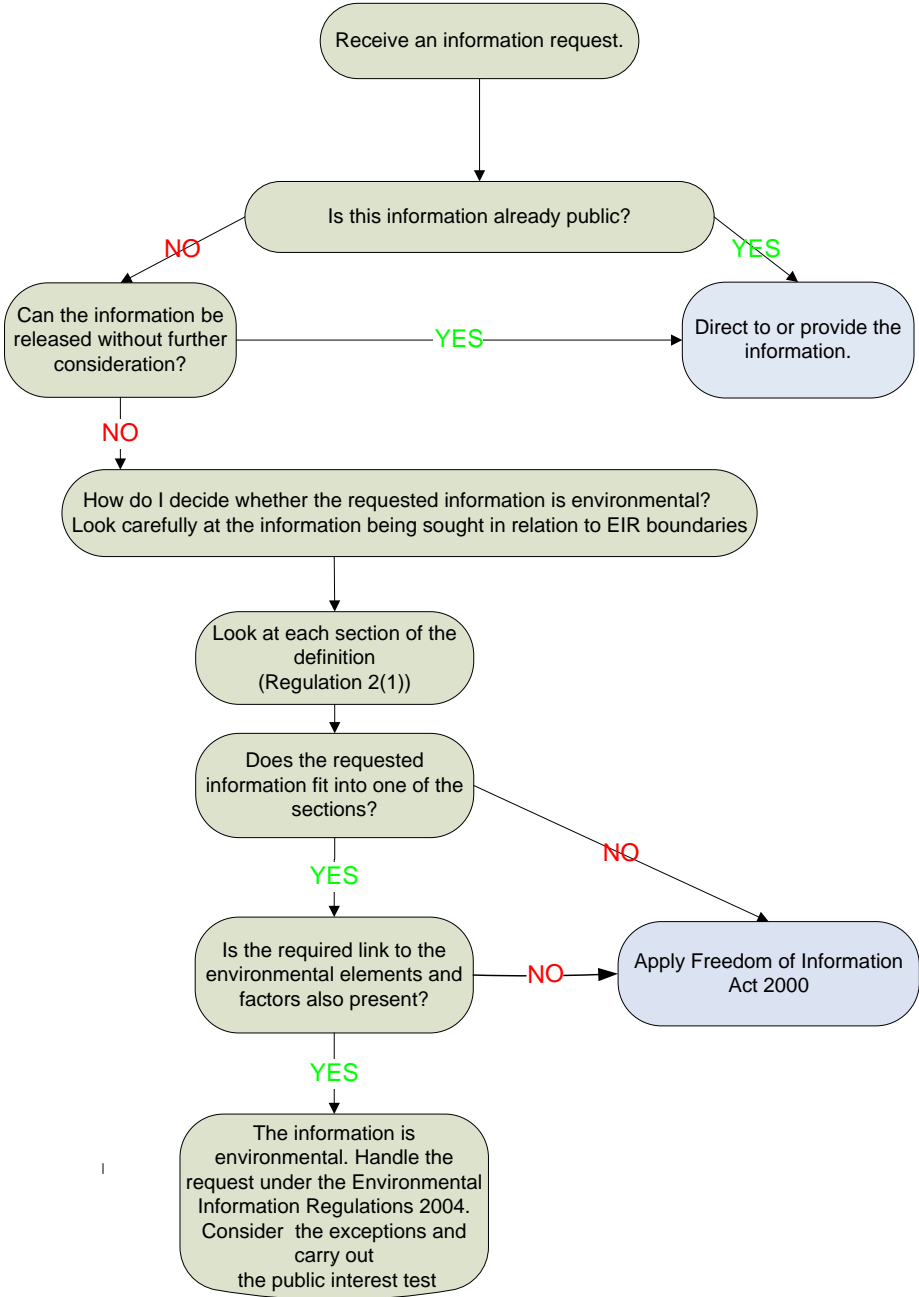
The worked examples in the annex demonstrate how to consider proximity/remoteness to test whether information held should be defined as environmental or not.

5. STEP-BY-STEP GUIDE TO DEALING WITH EIR/FOI REQUESTS FOR INFORMATION

- The authority should first look at the request carefully to determine exactly what information is being requested. If it is unclear, the authority should seek clarification from the applicant.
- The authority should then check whether the information is held, whether it is already publicly available or whether it can be released without further consideration.
- If the information is held but cannot be released without considering a refusal, the authority should then consider if the information is environmental information.
- The authority should determine whether the information covered by the request falls under the EIRs or FOIA, setting out its reasoning if necessary, and then apply the correct exceptions/exemptions, together with the public interest test, where applicable.
- In certain circumstances the information held within scope of a request may be made up of both environmental and non-environmental elements. In these circumstances consideration should be given to applying both regimes, where possible identifying the separate information as subject to either the EIRs or FOIA. Where a document divides easily into parts where the subject matter of each part is easily identifiable, this should enable the document to be considered in parts so as to decide which information is caught by each regime. Where this is not the case, the document will need to be reviewed in detail to decide which parts or even paragraphs or sentences are subject to the EIRs or FOIA.
- If it is not possible to distinguish exactly, we should rely on both regimes in the alternative, stating that to the extent that the information is “environmental information” it is exempt under the EIRs and to the extent that it is not “environmental information” it is exempt under FOIA, stating the exceptions or exemptions and the public interest arguments in each case.
- It is important that the public authority demonstrates that it has carried out its duty to attempt to identify the appropriate regime and, where it has withheld

information, engaged the correct exceptions/exemptions and given proper consideration to the public interest balance.

**FLOWCHART
WHEN TO THINK EIR OR FOIA**



WORKED EXAMPLES OF CASES

FINANCING OF A PROJECT

Example 1

REQUEST

Department/Authority (x) is asked for all papers relating to financing of a pipeline by the UK and foreign governments and a major private company.

FOI SCENARIO

The authority holds information on how much might be raised by refinancing an existing pipeline or a new share issue on the part of the governments and the company involved: this is an economic analysis in the sense of Regulation 2(1)(e) and relates to a measure (refinancing a pipeline) as in 2(1)(c). However, because there is no direct impact on elements of the environment from the refinancing activity, there is no consequential link between the activity in (c) and its effect or likely effect on the elements and factors at (a) or (b) and the information is not environmental. The request should be dealt with under FOIA.

EIR SCENARIO

On the other hand, the information held is on the financing or economic benefits of a new pipeline, and may include the effect of the pipeline on supplies to industry; possible changes in fuel costs; the economic impact on arable land or the cost of damage to the soil from leakages: it is therefore likely to fall under the definition in Regulation 2(1)(e) which relates to “cost-benefit and other economic analyses”.

However, in this case the information also relates to the measures and activities referred to in 2(1)(c) (the pipeline project) which in turn refer back to the elements or factors referred to in 2(1)(a) or 2(1)(b) because of the clear impact of the new pipeline on the elements of the environment.

CLOSURE OF A FACILITY

Example 2

REQUEST

Authority (x) was asked if the Audit Commission recommended that it close any public toilets. If so, why did it make this recommendation?

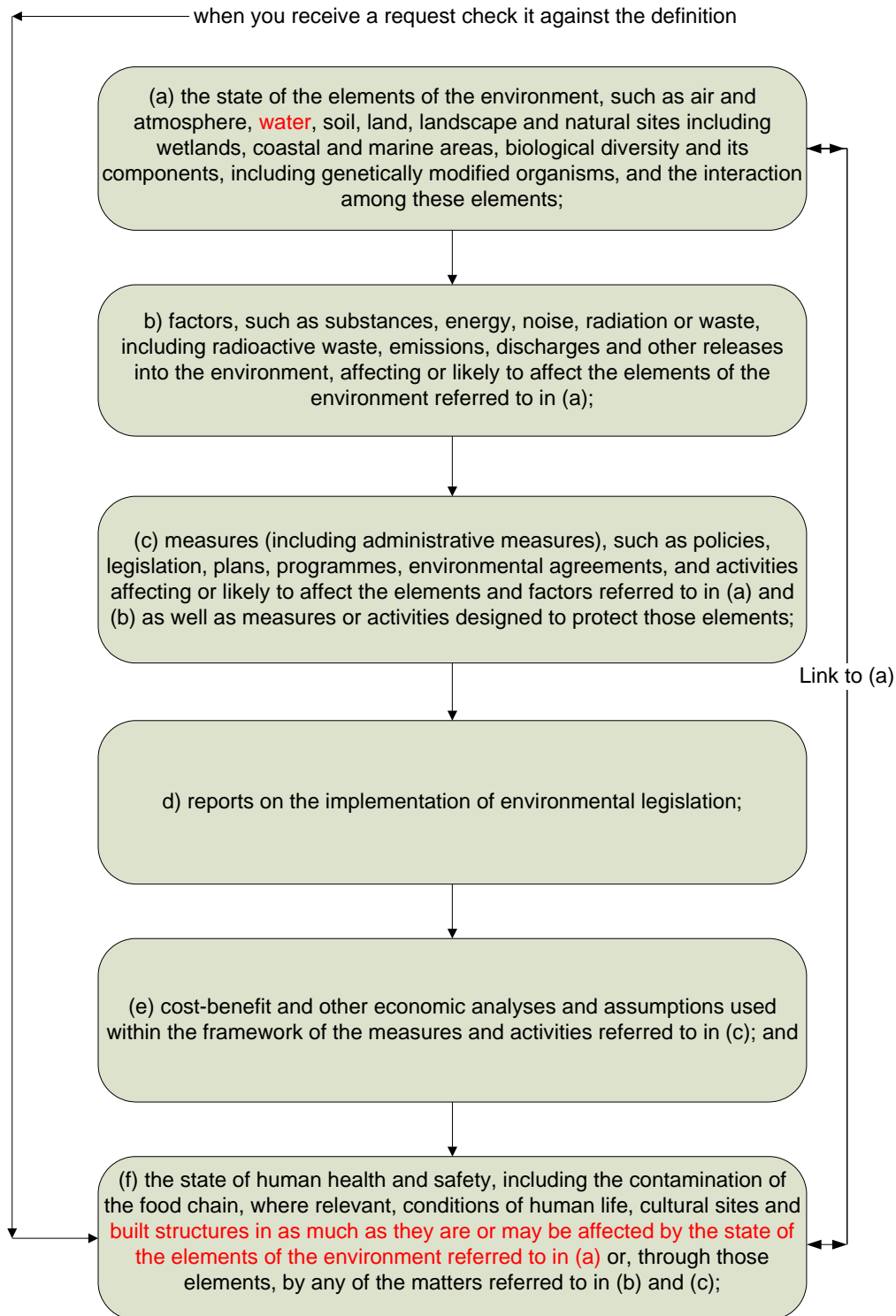
FOI SCENARIO

In this example an authority would need to consider the information held before it could assess whether it fell under the EIRs or FOIA. If the information relates to financial issues or problems with use of the building as the reasons for closure it is unlikely to be EIRs. This can be checked by looking at the definition of environmental information in Regulation 2. As “built structures”, public toilets fit into Regulation 2(1)(f). In this case neither finances nor problems associated with particular use of the building are elements of the environment as defined in Regulation 2(1)(a). The request should be treated under FOIA.

EIR SCENARIO

If, for example, the information held relates to reasons which involved old and corroded pipework leading to problems with the water supply or drainage, or problems with the foundations – subsidence or similar - then the information relates to the effects by an environmental element, namely water or soil, on a built structure. The link to 2(1)(a) therefore exists and the request is one about environmental information. This example is illustrated in the following flowchart:

Working through the Definition of Environmental Information



LICENSING

Example 3

REQUEST

Department / Authority (x) is asked for information about licensing of domestic pet fairs.

FOI SCENARIO

Licensing is an administrative measure under Regulation 2(1)(c). However, an authority also needs to consider whether this measure, for instance, is designed to affect or protect those elements of the environment such as biological diversity and its components (Regulation 2(1)(a)) before deciding whether the requested information held on licensing qualifies as environmental under the Regulations.

Regulation 2(1)(a) refers specifically to biological diversity. Information on the licensing regime itself, even, as in this case, where domestic animals are involved, is not a measure designed to protect the environment or biodiversity as in Regulation 2(1)(a). This request should therefore be dealt with under FOIA.

EIR SCENARIO

However, if the requested information relates to a licensing regime with regard to endangered species, it both is a measure in Regulation 2(1)(c) and affects or protects the elements of the environment in Regulation 2(1)(a), in particular, biological diversity. Because of this, the information request should be dealt with as an EIR request.

HOUSING

Example 4

REQUEST

Department /Authority (x) is asked for all correspondence about housing policy but with specific emphasis on the composition of housing – affordable v market.

FOI SCENARIO

In this case, if the information held is on the composition of housing in a given area, the ratio between affordable or non-affordable, what the policy objective in social housing should be, or how they will be marketed and/or allocated, then the nature of the information held is on social and economic matters which will not affect the elements of the environment as defined in Regulation 2(1)(a). It should be handled under FOIA.

EIR SCENARIO

Where the information held relates instead to housing development plans, aspects of the differences between affordable and non-affordable housing such as the density of the housing and the effect of this on noise and waste services in the area, this information would be likely to be environmental. The information held would be on a measure covered by Regulation 2(1)(c) (housing development plans) which would be likely to affect the elements and factors listed in Regulations 2(1)(a) and (b). For this reason the request should be handled under the EIRs.

Where information held covers both these aspects of housing policy, consideration should be given to applying both regimes, identifying each piece of information separately.

PLANNING AND LAND USE

Example 5

REQUEST

Department (x) is asked for recommendations made to the Minister on a planning application.

FOI SCENARIO

If the information held is confined to matters about ensuring due process and the proper procedures around ministerial decision making, it is unlikely that this would be a request for environmental information. Although a ministerial decision is a measure covered under Regulation 2(1)(c), in this case the information held by the public authority is about the procedures for ministerial decisions, not about a particular planning application. It is therefore unlikely to be information on a measure which will affect or be likely to affect the elements and factors in Regulations 2(1)(a) and (b). In this case the request would be handled under FOIA.

EIR SCENARIO

Planning is covered under (administrative) measures in Regulation 2(1)(c). Where the information held relates to the proposed outcome of the planning application and the possible options for a ministerial decision, it is information on a measure likely to affect both the elements of the environment in Regulation 2(1)(a) (such as land, landscape) and the factors (such as energy, waste, emissions) in Regulation 2(1)(b). This request should be treated as one for environmental information.

PLANNING AND LAND USE

Example 6

REQUEST

Department (x) is asked for all the facts, policy documents and other matters relied on by the Secretary of State in making a Direction to a local authority to amend its scheme for earmarking land for gypsies and travellers.

FOI SCENARIO

The key deciding factor in this case is the nature of the information held by the public authority on which the Secretary of State relied in making his Direction on a scheme which is a measure within the terms of Regulation 2(1)(c). Where the information held is on the powers of Direction available to the Secretary of State, how they can be exercised, what the limits are, whether it can be appealed against or judicially reviewed, the information is about an administrative measure but one too remote in this instance from an effect on either the elements or the factors in Regulation 2(1)(a) and (b) to be considered as environmental information within the meaning of the Regulations. The information relates to the operation of an administrative mechanism.

EIR SCENARIO

Where information held relates to land use, amenities, noise levels or fires this will be information on an administrative measure as defined in Regulation 2(1)(c) which is likely to affect the elements and factors in Regulation 2(1)(a) and (b).

PLANNING AND LAND USE

Example 7

REQUEST

Department (x) is asked for its detailed response to a Judicial Review Pre-Action Protocol letter after a planning application is called in by the Secretary of State.

FOI SCENARIO

In this scenario, the Judicial Review was refused or the application was withdrawn and no Judicial Review took place. There could therefore be no further effect on the elements of the environment and hence the pre-action protocol letter relates to a purely administrative/judicial matter. This request should be handled under FOIA.

EIR SCENARIO

The Judicial Review took place and could have had, as one outcome, an effect on the planning decision, which is an administrative measure falling within Regulation 2(1)(c). Because it relates to the planning function, it constitutes a measure which is likely to have an effect on the elements of, and factors impacting, the environment in Regulation 2(1)(a) and (b). Where the Judicial Review went ahead, it would be appropriate to treat this as an environmental request.

GM CROPS

Example 8

REQUEST

Department (x) was asked for all communications, briefing notes, background and legal advice regarding liability for losses caused by cross-contamination from genetically modified crops.

FOI SCENARIO

Although the subject matter of the request deals with issues relating to GM crops and their co-existence with other crops, the information held is about how farmers of non-GM crops might be compensated if their crops were to become contaminated. Although the source of contamination may be environmental, the information held relates to the range of options for redress arising from that contamination regardless of its source, and therefore the request should be handled under FOIA.

EIR SCENARIO

However, had the information held, for example, concerned how GM crops can cross-contaminate conventional crops or other plants as part of any consideration of liability, the information would have come within the definition of Regulation 2(1)(a) in particular on “the state of the elements such as ... biological diversity ... including genetically modified organisms and the interaction among these elements”. The information would therefore be handled under the EIRs.

LISTING A BUILDING

Example 9

REQUEST

Government Department (x) was asked to provide all the paperwork concerning the decision not to list a building.

FOI SCENARIO

Buildings can be listed for a number of reasons – age, rarity or architectural merit. The process of listing a building is an administrative measure and as such would fall under Regulation 2(1)(c) if the process itself affected or was likely to affect the state of the elements of the environment, such as land and landscape, listed in Regulation 2(1)(a). However, listing decisions as such could not and are not likely to affect the elements and factors in Regulations 2(1)(a) and (b). Requests for information about those decisions should therefore be treated under FOIA.

In addition, although buildings are built structures within the terms of Regulation 2(1)(f), a decision on whether to list a certain building or not is not affected by either the environmental elements in Regulation 2(1)(a) or, through those elements, the factors and measures at 2(1)(b) and (c).

EIR SCENARIO

If a government department had been asked for all the paperwork concerning the decision to demolish a building of significant historical interest, the request should be handled under the EIRs. The decision not to list and to demolish is a measure that would have an impact on the elements of the environment, such as land and landscape, in Regulation 2(1)(a).

WASTE FACILITY

Example 10

REQUEST

A local authority was asked for details of its procurement policy for a new incinerator. In responding to requests for information on this policy the authority had put together a number of documents, some of which were published on its website.

A further request asked how much it had cost the local authority to produce the documents about the proposed new incinerator to go on its website.

FOI SCENARIO

Where the information held is not specific about the items to be procured and incinerators are procured under the same departmental policy and criteria as any other major item of equipment, the measure (the departmental procurement policy), is not one which is likely to have an effect on the environment.

The information held in relation to the second request relates to the costs of the documents. The fact that the contents of the documents are about waste policy and procurement of incinerators is incidental and therefore too “remote” from the state of the elements of the environment in Regulation 2(1)(a) for this information to qualify as environmental under the terms of the Regulations.

EIR SCENARIO

If, however, in response to the first main request the information held centred on the procurement policy on incinerators to manage waste as a process distinct from general procurement, the information should be considered environmental. The procurement policy on incinerators is a measure which is intended, and likely, to have an effect on the state of the elements of the environment in Regulation 2(1)(a) and on emissions, discharges and other releases into the environment in Regulation 2(1)(b).

FOOD CONTAMINATION

Example 11

REQUEST

Authority (x) was asked for information about food inspections and salmonella cases in its area.

FOI SCENARIO

Where the information held is about how many food inspectors the authority has available to conduct investigations this is unlikely to be environmental information. Although Regulation 2(1)(f) covers the contamination of the food chain, the number of inspectors employed or available does not relate to the state of the elements of the environment in Regulation 2(1)(a), the factors in Regulation 2(1)(b) or the measures in Regulation 2(1)(c). This request should therefore be handled under FOIA.

EIR SCENARIO

Where the information held relates to food contamination arising from influxes of foul water and the incidence of salmonella cases, the information is likely to fall within the definition of environmental information, since it relates to contamination of the food chain. "The state of human health and safety including contamination of the food chain" falls under Regulation 2(1)(f). In this case, it has been affected by at least one of the elements of the environment - water in Regulation 2(1)(a) - making the request one for environmental information.

HUMAN HEALTH

Example 12

REQUEST

Health Authority (x) was asked about the incidence of skin cancer in its area.

FOI SCENARIO

Where the health authority holds information about the incidence of skin cancer as a proportion of types of cancer without reference to causality, the information is unlikely to be environmental. Although human health is covered by Regulation 2(1)(f), there is no direct link in this particular case to any of the elements in Regulation 2(1)(a) or, through those elements, to the factors in Regulation 2(1)(b). This request falls to be handled under FOIA.

EIR SCENARIO

However, where the information held is on, or also includes, information on the incidence of skin cancer caused by sun exposure, this part of the information is likely to be an environmental request because the cancer is related to an environmental factor. In this case the state of human health (skin cancer incidence) as defined in Regulation 2(1)(f) is affected by sun exposure, which is an environmental element in Regulation 2(1)(a), and/or through those elements by one of the factors (radiation) in (b). This information is therefore environmental for the purposes of the Regulations.