

PUBLIC CONSULTATION EXERCISE - NEW DRAFT ENVIRONMENTAL INFORMATION REGULATIONS

1 SUMMARY

- 1.1 The Government has published a consultation paper on the proposals to replace the existing Environmental Information Regulations 1992.
- 1.2 The main changes proposed to the regime are:
- The definitions of the scope of the regulations and the bodies affected are clarified
 - The time limit for response to a request is reduced to 1 month in most cases
 - A public interest test is to be introduced which is the same test as applies under the Freedom of Information Act, and
 - The Information Commissioner and Information Tribunal will provide a strengthened means of review for applicants.

2 INTRODUCTION

- 2.1 Since 1992 there has been a regime for accessing environmental information, and arrangements for providing such information upon request are already established. However, developments since 1992 necessitate an update of the environmental information provisions.
- 2.2 The new draft Regulations are a step towards full implementation of the Freedom of Information Act 2000 (FOIA). They are also necessary to fulfil commitments under the Aarhus Convention on Access to Information, Public Participation Decision-making and Access to Justice in Environmental Matters, and the forthcoming European Directive on Public Access to Environmental Information.
- 2.3 The consultation has been sent to organisations that are likely to be affected by the regime and invites comments on the new draft Environmental Information Regulations (EIR).
- 2.4 There has been a previous consultation on proposals for a revised environmental information regime. This consultation takes account of the responses to the initial consultation, changes to the new draft Directive and modifications to harmonise provisions for environmental information with the FOIA.

- 2.5 The draft regulations bring the regime in line with the provisions of FOIA, for example the offence of altering records with the intent to prevent disclosure will be extended to environmental information. The view has been taken that there is no case for treating environmental information in any respect less favourably than other information.

3 SUMMARY OF PROPOSALS

Definition of 'environmental information'

- 3.1 The definition of environmental information proposed in the new draft EIR Regulations is broad and includes information on
- The state of elements of the environment, such as air, water, land, biological diversity including genetically modified organisms (GMO's)
 - Activities or measures including administration measures, environmental agreements, policies, plans and programmes, affecting or likely to affect elements of the environment
 - Cost benefit and other analyses and assumptions used in environmental decision making; and
 - The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the above:
- 3.2 This expands and clarifies the existing definition and is in line with Aarhus Convention and draft Directive definition of environmental information.

Definition of 'public authority'

- 3.3 This defines the bodies that will be covered by the new EIR Regime. The proposed definition includes private bodies performing public administration functions under national law (e.g. private water authorities and power companies) as well as Government at national, regional and other levels including Local Authorities. The Aarhus Convention definition has been used together with a statement that includes the FOIA definition of a public authority. This ensures conformity with the FOIA and also allows for the EIR regime to apply more widely as intended by the Convention.

Response Form or Format

- 3.4 The draft Environmental Information Regulations (EIR) requires public Authorities on receiving a request, to provide environmental information

in the form or format requested, unless it is reasonable for the authority to make the information available in another form or information is already publicly available in another form. Hence, if information is already publicly available, (e.g. available on the Internet, and the public authority is willing to supply a hard copy to those who do not have access to the Internet) the authority would not have to supply environmental information in the form requested. The aim is to encourage authorities to make as much environmental information available proactively so the number of cases where they will need to comply with a request in a specific format can be minimised.

Time limits

- 3.5 The existing regulations give the authority 2 months to provide environmental information following a request. The Aarhus Convention requires information to be provided within 1 month of the request or notification of refusal if this is being considered. This may be extended to 2 months if the volume or complexity of the information requested means it is not possible to provide the information within a month. The FOIA specifies a maximum of 20 working days to respond to requests or notify refusals. This would usually be slightly less than a month.
- 3.6 The draft EIR proposes to use a 20 working day time limit that could be extended to 2 months for voluminous and complex requests. This was considered to have the advantage of ensuring conformity with the FOIA.
- 3.7 When an authority is asked for information that is held by another authority it is obliged under the Convention and in the new draft Regulations to inform the applicant or to transfer the request to that other authority and inform the applicant accordingly. Both these options have been maintained because in some circumstances it may be appropriate to obtain the applicant's consent prior to transferring the request.

Charging

- 3.8 The Convention, draft directive and FOIA all allow a reasonable charge to be applied to requests for information. This is also proposed in the new draft EIR regime.
- 3.9 The issue of charging is one that is still under negotiation on the draft directive. The European Parliament has proposed the replacement of the principle of 'reasonable charge' with 'actual costs of reproduction.' The UK is negotiating for the retention of 'reasonable charge' and is optimistic that it will be maintained.

Exceptions to the right to environmental information

3.10 The Convention and draft directive clarify the substantive exceptions that may justify a refusal of a request for information. The main points that have been applied to the new draft EIR regime are:

- Legal proceedings/course of justice exception – an exception is provided ‘where disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.’
- Commercial confidentiality – this exception has been limited within the new regime. The exemption is in order to protect a legitimate economic interest and information on emissions, which is relevant for the protection of the environment, shall be disclosed.
- Public interest test – the new regime makes specific provision for a public interest test to be applied in each case of potential refusal. This is in line with the public interest test provision provided in FOIA.
- The information is not held or the request for it is manifestly unreasonable or the request is formulated in too general a manner;

The requirements of the Data Protection Act would need to be considered in applying these points, particularly when the request relates to personal data.

Review and Enforcement

3.11 The Convention that the applicant must have a right to appeal where he considers his application has been wrongfully refused or inadequately dealt with. Under the new regime, like the existing regime, the applicant should first appeal to the refusing Authority. The provisions have then been topped up so if the applicant is still not satisfied he can appeal to the Information Commissioner, an independent review body who will also review FOIA cases. The decision of the Information Commissioner will be binding on both parties, unless it is appealed to the Information Tribunal.

4 COMMENTS ON DRAFT PROPOSALS

4.1 The Department for Environment Food and Rural Affairs has requested comments on these proposals particularly with reference to the following questions:

- Do the Draft Regulations meet international and European obligations?
- Is this an effective approach to stream lining the EIR and FOIA regimes?
- Are there any difficulties arising from the new regime?

Suggested comments on these proposals are given below:

Time limits

- 4.2 Reduction of the time limit from 2 months to 1 month is an effective approach to streamline the EIR and FOIA regimes. However, the proposed retention of the extended time period for complex requests will be essential for some cases.

Transfer of requests

- 4.3 The retention of two options for the transfer of requests (i.e. inform the applicant and/or transfer the request direct to the authority) could cause some difficulties as, it is assumed, the clock will still be ticking. This could make it difficult for authorities to meet the required time limit particularly if the transfer of the request is delayed. If only the obligation to inform the applicant was retained the applicants would receive the necessary information without causing confusion or imposing unrealistic time limits on the Authorities.

Publicity

- 4.4 The new regime should be advertised through estate agents, solicitors and other relevant bodies involved in the house buying process, in addition to the general media.

General

- 4.5 It is considered the new draft Regulations comply with international and European obligations and would be an effective way to streamline the EIR and FOIA procedures.

5 ENVIRONMENTAL IMPLICATIONS

- 5.1 The proposed regulations will clarify and build on existing legislation enabling residents to obtain information on environmental matters.

6 RESOURCE IMPLICATIONS

-
- 6.1 The introduction of the new Regulations and their promotion will heighten the public's awareness of the information available and could lead to a significant increase in the number of enquiries received. The local Authority needs to be sure the information given is an accurate reflection of the data held by the Council to avoid any liability claims for supplying incorrect information. This is a time consuming process requiring historical files to be reviewed with technical data often retained by various different departments.
- 6.2 This is particularly relevant for information requests regarding contaminated land. Work has already commenced to build up a database of environmental information. This work involves painstaking reconstruction of historical records and it will be appreciated that there is still a significant amount of work needed to ensure that requests can be answered accurately and efficiently.
- 6.3 The draft Directive emphasises the need for public authorities to make more environmental information publicly accessible. The Council would not be required to provide information where it is already available in a publicly accessible form (e.g. on the Internet). Therefore the Council may need to increase the amount of information available on the website in order to minimise the number of formal requests for information.
- 6.4 It may be necessary to purchase additional insurance cover to indemnify the Council against any claims which may arise due to the possible legal implications commented on below.

7 LEGAL IMPLICATIONS

- 7.1 In addition to general environmental interest and the work of environmental action groups, environmental information requested will also be used, both by commercial businesses and the general public, to inform them of potential risks when purchasing property. If incorrect or incomplete information is given this could lead to future liability claims against the Council. In some instances where the information provided could blight the property this may result in claims against the Local Authority.

8 RECOMMENDATION

It is proposed that the Committee **RESOLVES**

That, subject to Members' comments, the responses detailed within this report are made to the consultation paper 'New Draft Environmental Information Regulations'. (HHHCC)

Graham Woolhouse

Head of Housing, Health & Community Care

Background Papers

Public Consultation Exercise – New Draft Environmental Information
Regulations, DEFRA, July 2002

For further information please contact Joanne Ellis on:-

Tel: (01702) 318036

E-Mail: joanne.ellis@rochford.gov.uk