



Freedom of Information Act 2000 Environmental Information Regulations 2004

Introduction

This document is a briefing paper published by the SBWWI for the benefit of its members. It is based on a seminar presentation by Rosemary Jay (Pinsent Masons) and additional research by the paper's author, John Batty (Bluejohn Marketing Ltd).

The paper is not comprehensive. It seeks to identify the principal elements of the Freedom of Information Act (FOIA) and the Environmental Information Regulations (EIR) that could impact on SBWWI members. The paper highlights some of the steps that members can take to minimise the impact of the legislation on their own organisations, and shows how the legislation can assist members in such areas as market research.

Executive Summary

- The work undertaken by SBWWI members falls within the remit of the EIR.
- The EIR are based on a European Directive and override other legal barriers to disclosure.
- Much of the information submitted by SBWWI members to water companies –or held on behalf of water companies - could be disclosed to third parties if requested e.g. information submitted as part of a tender.
- There is a list of exemptions which define information which does not have to be disclosed. These exemptions include trade secrets, intellectual property, and information whose disclosure would prejudice the commercial interest of any person. However, these exemptions may be overridden if it is felt that disclosure is in the public interest.
- Writing 'confidential' on a tender submission does not preclude disclosure i.e. blanket confidentiality clauses are invalid.
- SBWWI members should review the information provided in tender submissions and identify those elements which are genuinely confidential. Note - There will be information you might prefer your competitors not to know which is not confidential.
- When compiling tender submissions, SBWWI members should make clear which information they wish to remain confidential and identify which EIR exemption applies.
- SBWWI member companies should consider developing 'Information Policies/ Guidelines' so that all employees are aware of the impact of the EIR and understand the steps to take to maintain confidentiality. The Office of Government Commerce (OGC) has published guidance to assist companies identify which information is confidential. This document can be downloaded from the OGC or SBWWI websites. The guidance includes model contract terms.

- The intended impact of the FOIA and the EIR is to increase the availability of information. If in doubt, assume information may be disclosed or seek legal advice.
- ‘Save where personal information is concerned, the default position is that the public interest is best served by openness and transparency’ – Pinsent Masons
- The EIR should facilitate market research by forcing water companies and Ofwat to disclose more information than at present. For example, I can see no reason why the projects listed on the Early Start programme should not be disclosed.
- When submitting a request for disclosure be as specific as possible. A ‘general’ request will lead to a ‘general’ answer.

Background

The FOIA and EIR do not apply to information held about an individual, where that individual is the applicant. Access to such information is covered by the Data Protection Act.

Although full implementation of the FOIA is timetabled for November 2005, for most practical purposes it has been active since January 2005.

The FOIA applies to public bodies such as local authorities, Quangos, and regulators.

The EIR, which has a broader scope than the FOIA (see below), also applies to certain private companies which, according to Rosemary Jay, will almost certainly include water companies.

In the five years between enactment and implementation, public authorities have had to:

- Sort out their records to make finding information easier and cost-effective
- Develop publication schemes which list published information and advise how it can be obtained.
- The Ofwat publication scheme can be downloaded from the Ofwat website (www.ofwat.gov.uk) or the SBWWI website.

FOIA – The fundamentals

The FOIA is designed to facilitate ‘Open Government’. It allows any person to access recorded information held by or on behalf of a public authority. Applications must be made in writing.

There are practical and legal constraints:

- As a general rule, public authorities cannot charge for FOIA requests, although they can charge for disbursements (postage, CDs etc). To ensure the financial burden on public authorities is not onerous the following rules apply:

- Published material is provided up to the ‘appropriate limit’.
- There is a ceiling on the administration time allocated to any request of 14 hours.
- The principle of ‘aggregation’ applies to limit the number of requests an organisation/ individual can make to a public authority
- Any charges that do apply should be noted in the publication scheme (Ofwat charges for certain information, for example some reports commissioned from consultants.)
- Huge amounts of public information are already published under statute. If an applicant requests information which is readily accessible elsewhere, the public authority does not have to supply the information but does have to explain how it can be obtained.
- There are a large number of ‘absolute’ and ‘qualified’ exemptions which constrain the information which can be accessed.

Absolute and qualified exemptions

A qualified exemption is one where a ‘public interest’ test is applied i.e. if the public interest is greater than the case for confidentiality then the information should be released.

In the case of absolute exemptions no public interest test is applied.

Absolute exemptions include:

- Legal prohibitions on disclosure e.g. contempt of court
- Information dealing with security matters
- Information provided in confidence where disclosure must give rise to an actionable breach of confidence. In most part this does not apply to commercial confidentiality.
- Personal data where disclosure would breach any of the standards set out in the data protection principles.

Qualified exemptions include:

- Information intended for future publication.
- Various political areas of activity – International relations, the economy etc. Note, however, that the public interest test still applies.
- Personal data about a third party
- Information whose disclosure would be prejudicial to law enforcement.
- Information whose disclosure would be prejudicial to commercial interest.

Note – These lists are not comprehensive. For further details consult the Information Commissioner’s website: www.informationcommissioner.gov.uk

EIR

The definition of environmental information is broad and includes:

- The state of air, atmosphere, water, soil, land, living creatures, plants etc
- Substances, energy, noise, waste etc that affect the environment
- Policies, legislation plans etc that affect the environment
- Cost benefit and other economic analyses relevant to the above.

The Environmental Information Regulations (EIR) are based on a European Directive and are more 'liberal' than the FOIA.

The main differences between the EIR and the FOIA are:

- The EIR apply to some private organisations (e.g. water companies) as well as public authorities.
- The EIR overrule other legal barriers to disclosure i.e. the public interest test applies to areas which under the FOIA are covered by absolute exemptions.
- The request for disclosure can be oral as well as written.
- A 'reasonable' charge may be made.

Making a request for disclosure under FOIA or EIR

A request for disclosure under the EIR can be oral. FOIA requests must be submitted in writing – this can include email; contain a name and address for correspondence; describe the information in such a way that the public authority can locate it within the prescribed time limits. If the information is required in a specific format then this should also be noted in the request e.g. preference for electronic format.

A public authority must provide the information requested within 20 working days (in the case of the EIR this may be extended to 40 working days if the request is 'complex or voluminous').

If access to information is refused on the basis of an exemption, a refusal notice must be issued which states which exemption applies and why, and provides details of any complaints procedures and the right of appeal to the Information Commissioner.

Where an information search takes longer than the 14 hours (FOIA) or 16 hours (EIR) allocated under the legislation the public authority may still decide to disclose the information but it has the option of not doing so.

The implications for FOIA and EIR on contracts

Blanket confidentiality clauses, or writing 'confidential' on a document, are not sufficient to prevent disclosure.

For information which SBWWI members consider genuinely confidential – i.e. disclosure would have an ‘adverse impact’ on the organisation which outweighs the ‘public interest’ – they should be proactive.

Assuming information has been submitted to a water company as part of a tender, possible steps include:

- Identifying for the water company that information which:
- Can be freely disclosed
- You would like to be consulted about prior to disclosure
- You would like notice of disclosure
- Is confidential and covered by an exemption (give details of the exemption which applies).

The OGC has published model ‘information’ clauses for contracts. Rosemary Jay highlighted that the clause stating that ‘confidentiality is indicative only’ should be struck out.

The temptation is to make as much information as possible ‘confidential’. There are however implications:

- If you indicate that you wish to be consulted prior to disclosure this will impose a cost on your organisation in terms of time to respond.
- If you wish to withhold information then the applicant may appeal e.g. use the ‘public interest’ test to gain disclosure. This could have major cost implications and disrupt ongoing commercial activities.

If you are holding information on behalf of a third party such as a water company it is important to ensure that it is readily accessible and well organised to minimise the potential cost of searches.

Further sources of information

- Pinsent Masons – Freedom of Information – Briefing Paper
 - Provides a well-written introduction to the Act.
 - Document available to members on the SBWWI website
- OGC - Guide and model clauses
 - Document available to members on the SBWWI website
 - www.ogc.gov.uk
- Department of Constitutional Affairs (DCA) – Code of Practice
 - www.dca.gov.uk
- DEFRA Code of Practice
 - www.defra.gov.uk
- Office of the Information Commissioner (OIC) Guidance
 - www.informationcommissioner.gov.uk