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Trust in water

# G3 Freedom of Information & Environmental Information Regulations Policy

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## 1 Introduction

Ofwat takes its responsibilities with regard to the management of the requirements of the Freedom of Information Act 2000 and Environmental Information Regulations 2004 seriously.

## 2 Scope of the policy

This policy applies to all employees, Non-executive Directors, contractors, agents and representatives and temporary staff working for or on behalf of Ofwat.

The purpose of this policy is to ensure that Ofwat complies with the provisions of the Freedom of Information Act 2000 (FOI) and Environmental Information Regulations 2004 (EIR).

This policy does not cover Subject Access Requests (requests for access to personal data). Subject Access Requests (SARs) are exempt from the Freedom of Information Act under Section 40(1) and are processed in accordance with the [General Data Protection Regulations](#) (GDPR) 2016 and Data Protection Act (DPA) 2018.

## 3 Responsibilities

Ofwat recognises there is a corporate responsibility to provide the public with a general right of access to all information held by the organisation.

Each programme has an Information Asset Owner (IAO) who upon receiving a request for information from the FOI lead, will either provide a response to the FOI lead or delegate responsibility to a designated person.

The Information Governance Manager (IGM) is responsible for drawing up guidance on Freedom of Information and promoting compliance with this policy in such a way as to ensure the easy, appropriate and timely retrieval of information.

The IGM is responsible for monitoring and reporting performance to the Security Information Assurance Group (SIAG) regarding responses to requests for information internally. Statistical data is also provided within Ofwat's Annual Report and Accounts, and provided as part of the Business Improvement's quarterly checks and externally to the Ministry of Justice both quarterly and annually.

The IGM will also provide an advisory service to the remainder of the organisation.

Resource Managers must ensure that all staff are aware of the requirements of the legislation and that all new staff receive an introductory briefing on access to information procedures. Induction training is undertaken regularly for all new staff, with existing staff invited to attend as a refresher.

All staff must recognise that all recorded information may be provided to the public and that in every case the law requires that there will be full and unconditional disclosure unless one of the statutory exemptions/exceptions applies.

Relevant training for staff will be facilitated by the IGM. All Staff are required to complete the Freedom of Information training delivered by the IGM and the Civil Service Learning Information Management e-learning.

## **4 Available guidance**

Guidance on the procedures necessary to comply with this policy is available for staff from the IGM and on the Source, Ofwat's intranet.

## **5 Publication Scheme**

FOI requires Ofwat to adopt and maintain a publication scheme. A publication scheme is a commitment to routinely and proactively provide information to the public. Ofwat's Publication Scheme specifies:

- what information Ofwat will make routinely available to the public and how it will do so, and
- whether or not information will be made available free of charge or on payment of a fee.

## **6 Requests for information**

Information not already made available in the Publication Scheme is accessible through a specific request for information. In this regard the Freedom of Information Act establishes two related rights:

- the right to be told whether information exists, and

- the right to receive the information (subject to legal exemptions)

These rights can be exercised by anyone worldwide. Requests for access to information not listed in the publication scheme will be processed through Ofwat's access to information procedures.

All staff should follow the Freedom of Information Process Map for dealing with requests ([appendix 1](#)).

Requestors will be entitled to all the information unless one of the statutory exemptions (FOI) or exceptions (EIR) applies. However, only those specific pieces of information to which the exemption applies will be withheld. Further guidance on exemptions and exceptions can be found at the Information Commissioner's Office [web site](#) and in [appendix 3](#).

Where Ofwat has determined that an exemption/exception applies, we will consider the prejudice test and/or the public interest test where applicable, and may in some circumstances withhold the requested information. There may be an occasion where an absolute exemption is applicable and is not subject to a public interest test.

Ofwat aims to respond to all requests within 20 working days. If clarification of the request is sought, the response time frame will be suspended until this is received from the applicant. The applicant has 3 months in which to provide clarification, before their request is considered to be withdrawn.

## 7 Charges

Unless otherwise specified, information made available through the Ofwat's Publication Scheme will be free of charge. Ofwat reserves the right to charge an appropriate fee for dealing with a specific request for information in accordance with the [Schedule of Charges](#).

If a fee is required, Ofwat will issue a fees notice. The applicant has 3 months in which to pay, before their request is considered as being withdrawn.

## 8 Complaints

Complaints can be made about the procedural aspects of the way that Ofwat has handled a request or about a decision to withhold some or part of the requested information.

The first stage of the FOI/EIR complaint process is an internal review conducted by an Ofwat Director or Principal who has not previously been involved in the original request for information. Following the internal review, the complaint may be referred to the Information Commissioner, if the requestor remains dissatisfied.

## 9 Policy compliance

Non-compliance with this policy will leave Ofwat’s reputation vulnerable to damage and/or may result in a failure to meet our legal obligations. Breaches of this policy will be considered on a case-by-case basis by the Programme Management Office and reported/referred to other relevant officers as appropriate. Potential sanctions may be imposed by the Information Commissioner’s Office (ICO) including formal monitoring, practice recommendations and monetary penalties.

## 10 Policy governance

The following table identifies who within Ofwat is Accountable, Responsible, Informed or Consulted with regards to this policy. The following definitions apply:

- Responsible – the person(s) responsible for developing and implementing the policy.
- Accountable – the person who has ultimate accountability and authority for the policy.
- Consulted – the person(s) or groups to be consulted prior to final policy implementation or amendment.
- Informed – the person(s) or groups to be informed after policy implementation or amendment.

Responsible	Accountable	Consulted	Informed
IGM	Director PPM	General Counsel SIAG	All employees, contractors, agents and representatives, and temporary staff working for or on behalf of Ofwat

## **11 Review and revision**

This policy will be reviewed as it is deemed appropriate, but no less frequently than every 2 years.

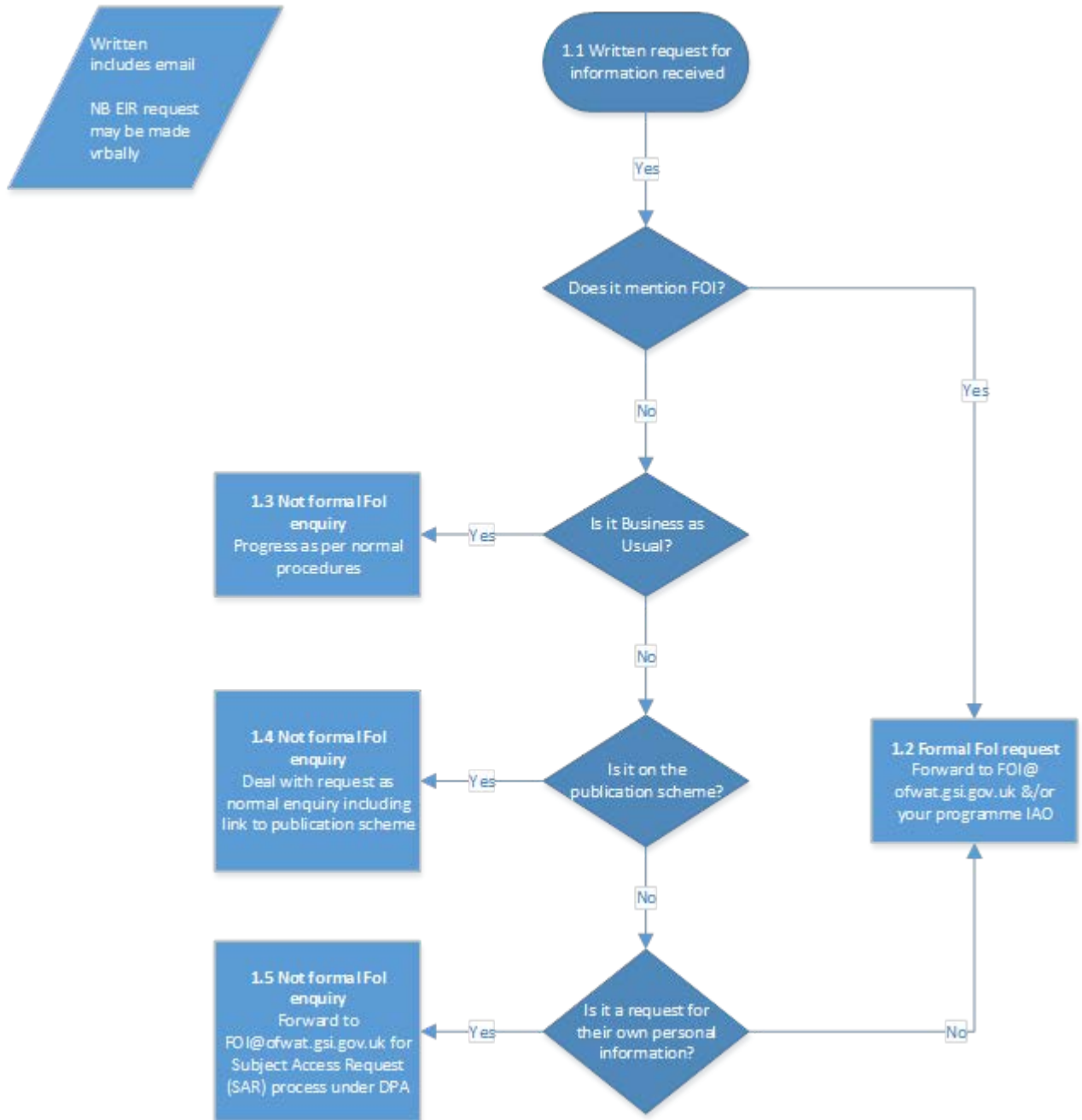
Policy review will be undertaken by the IGM in consultation with the Director, Programme and Project Management.

## **12 Related corporate policies**

The following Ofwat and national policy documents are directly relevant to this policy:

- G1 Access to Information Policy
- G2 Data Protection Policy
- ICT 4 Retention and Disposal Policy
- ICT 8 Information and Records Management Policy
- Government Classification Scheme
- Reuse of Public Sector Information Regulations

## Appendix 1 – Information requests process





## Appendix 2 – Handling a request for information

Detailed guidance on recognising and handling requests for information can be found on the Source.

It is important to consider the Equality Act 2010 when receiving a request and to take into account any factors that may affect an applicant's capability of submitting a written request (FOIA), before issuing a refusal notice.

If a requestor is asking for their own information the request is exempt from disclosures under the FOIA pursuant to section 40(1), but it must be considered as a Subject Access Request (SAR) under the GDPR and DPA (2018). The FOI lead will handle these requests as per Ofwat's SAR request procedure. If the request is for environmental information it should be treated under the Environmental Information Regulations (EIRs). This is similar legislation to FOI but requests can be received orally and there are fewer exemptions on prohibiting disclosure called exceptions. Again any request should be sent to the FOI mailbox.

### Logging and monitoring

All enquiries are logged and monitored by the IGM. If a request is unclear or ambiguous Ofwat has a responsibility under [S16 of the FOIA](#) to provide advice and assistance to the applicant. This includes asking the applicant to clarify any request and/or to provide further information in order to locate the information to be able to respond.

The IGM will assess whether a request falls under FOIA or EIR and allocate the request to the relevant Information Asset Owner (IAO). The IAO may respond or delegate the request to a team member (s). All staff are required to use their out of office (ooo) tool to direct potential requests to the FOI mailbox and IAO's should include a suitable alternative to receive and manage requests in their absence. An example ooo can be found in Ofwat's [Access to Information](#) training guidance.

The IGM will inform the IAO of the target date to comply with the request and a date when they require a response at the latest in order to draft a reply to the applicant. This will normally be 5-7 days prior to the target date to enable the IGM to discuss any issues with the IAO before disclosure.

**NB. If you are asked to deal with a request please ensure that the IAO views the data/information you intend to disclose first. This will highlight whether other senior staff members need to be notified prior to disclosure.**

## Managing and responding to requests

If a request is likely to exceed the statutory limit of three and half days employee time or £600 costs to comply with the request, we can refuse it and ask the applicant to refine their request so that it falls under the limit.

It is Ofwat's preference to respond to requests and provide any supporting information electronically unless an applicant specifies other means.

When dealing with a request staff are asked not to make the decision to withhold any information. All information should be disclosed to the FOI lead, but you should indicate if you have any concerns with disclosing any or all of the information. A list of all the exemptions and exceptions can be found in Appendix 4.

It may be necessary for Legal Services to check or comment on the request in order to ensure that the information we are disclosing is accurate and appropriate to disclose. Other legislation such as the Water Industry Act 1991 (WIA) are factors to consider as this may result in prohibitions on disclosure (S44 FOIA).

The IGM will confirm whether an exemption/exception is applicable and will propose a draft for signing off by the IAO before responding to the applicant. The IGM will retain a copy of all working emails and responses which will be kept in line with Ofwat's [retention and disposal schedule](#).

## Complaints

If an applicant is dissatisfied with any aspect of a FOI/EIR request, they have the right to request an Internal Review (IR). The request will be centrally logged on the Internal Review section. The IGM will request an independent Director or Principal undertake the review in line with Ofwat's Internal Review policy.

Once a review has been completed, if the applicant remains dissatisfied the final recourse is for the applicant to contact the [Information Commissioner's Office](#). The ICO will correspond directly with the IGM to assess the request and any nondisclosure reasoning. After the assessment the ICO will issue a decision notice stating either:

- To uphold Ofwat's initial decision
- Instructing Ofwat to disclose further information to the applicant

Both Ofwat and the applicant have the right to appeal against the decision notice to the First Tier Tribunal (FTT) Information Rights and subsequently the Upper Tribunal (UT) Administrative Appeals.

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The ICO has powers to issue an enforcement notice and fine public bodies if they are found to have breached the FOIA. The ICO can also issue practice recommendation's in order to improve services. There are no financial or custodial penalties for failure to provide information on request to them or for failure to publish information, however organisations could be found to be in contempt of court for failing to comply with a decision notice, enforcement notice, or information notice. This could lead to a fine or, in theory, jail for a senior officer of the authority.

## Appendix 3 – Exemptions and Exceptions

The Freedom of Information Act limits the circumstances in which information can be withheld from an applicant by defining a number of exemptions (exceptions under EIR). Exemptions must not however be applied if there is a stronger public interest in favour of disclosure of information. The spirit of the Act is to encourage openness and transparency. Ofwat publish routine publications to its website to encourage and promote transparency.

We should however be aware that sometimes it would be imprudent to release information into the public domain where harm may be caused as a result. Under FOI, we cannot “classify” documents as exempt; for one thing, information may move in and out of exemption over time; and for another, a document cannot be exempt just because a small part of it contains exempt (e.g. personal) information.

There are a number of exemptions under the Act where we are not required to provide information requested.

**Section 12** - Permits us not to comply with a request for information if we estimate that the cost of complying would exceed the [appropriate limit](#).

**Section 14** - Means that we are not obliged to comply with a [vexatious](#) or [repeated](#) request. Part II of the Act provides certain general exemptions, some of which are only applicable to Central Government.

**Section 21 - Information accessible to applicant by other means (Absolute exemption)**  
Information which has already been made available by Ofwat does not have to be passed on. Instead we have a duty to advise where the information can be located and provide a link wherever possible.

**Section 22 - Information held with a view to publication at some future date whether determined or not.** Information which at some point will be made publicly available e.g. Consultation documents. We do not need to supply a date, however as part of our duty to advise and assist we will inform the applicant where and when the information is expected to become available or supply them with a copy when it is published.

**Section 22A - Research Information** This exemption applies if:

- you hold information on an ongoing programme of research;
- there is an intention by someone –whether an individual or organisation, private or public sector - to publish a report of the research; and
- disclosure of the information would or would be likely to prejudice the research programme, the interests of participants in the programme, or a public authority holding or intending to publish a report of the research.

So long as the research programme is continuing, the exemption may apply to a wide range of information relating to the research project. There does not have to be any intention to publish the particular information that has been requested, nor does there need to be an identified publication date.

**Section 23 - Information supplied by various security authorities (Absolute exemption).**

**Section 24 - Information required for the purpose of safeguarding national security.**

**Section 26 - Information prejudicial to defence.**

**Section 27 - Information prejudicial to UK international relations and interests.**

**Section 28-29** - relations between the UK government, the Scottish Executive, the Welsh Assembly and the Northern Ireland Executive (section 28); the economy (section 29); or the financial interests of the UK, Scottish, Welsh or Northern Irish administrations (section 29)

**Section 30 - 1.** Where information has at any time been held for the purpose of specified criminal and other investigations or proceedings; and where information relates to the obtaining of information from confidential sources and was obtained or recorded for a number of specified investigations or proceedings.

**Section 31- Law enforcement**

**Section 32 - Court records (Absolute exemption).**

**Section 33 - Audit functions**

**Section 34 – Parliamentary Privilege**

**Section 35 – Government policy**

**Section 36- Prejudice to effective conduct of public affairs (Absolute exemption).** If releasing information would inhibit the free & frank provision of advice or exchange of views for deliberation in the opinion of a qualified person then this information may be exempt. Under the Act, the qualified person is the Chief Executive.

**Section 37 - Royal Communications or matters relating to honours and dignities conferred by the Crown.**

**Section 38 - Health and Safety.** Information liable to endanger the physical or mental health of any individual or endanger the safety of any individual.

**Section 39 - Environmental information.** If information relates to the definition of [environmental information](#) then it must be treated under the EIR 2004.

**Section 40 - Personal information.** Regulated by the GDPR and DPA principles and procedures (Absolute exemption)

**Section 41- Information provided in confidence.** Information obtained by us from any other person, including another public authority, and if the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person (Absolute exemption).

### **Section 42 - Legal Professional Privilege**

**Section 43 - Commercial interests.** Information is exempt if it constitutes a trade secret and/or information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person including the public authority holding it.

**Section 44 - Prohibitions on Disclosure.** The FOIA states that information is absolutely exempt if its disclosure has been forbidden by other statutes. (See sect. 2)

## **Public Interest Test**

Qualified exemptions and exceptions under EIR are all subject to the public interest test, in which the authority must weight the public interest in maintaining the exemption against the public interest in disclosing the information, bearing in mind that there is always a general public interest in transparency. In some instances it may be appropriate to extend the timescale to consider the public interest test. (Normally under FOIA there is no allowance to extend the statutory timescale). In this instance Ofwat will write to the applicant informing them of this decision.

## **Exceptions**

- **Regulation 12(4)(a) Information not held**

Wherever possible the organisation should provide a link or details to any relevant organisation that may hold the information being requested.

- **Regulation 12(4)(b): Manifestly unreasonable requests**

An organisation can refuse a request if it is deemed to be manifestly unreasonable. This may be where the cost of compliance is too great or on the grounds that the request is vexatious (similar to S14 (2) of FOIA).

- **Regulation 12(4)(c): Requests formulated in too general a manner**

A request can be refused if it is too general in manner and the organisation has fulfilled its obligations under regulation 9, the duty to advise and assist.

- **Regulation 12(4)(d): Material in the course of completion, unfinished documents and incomplete data**

Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete. Draft documents are unfinished even if the final version has been produced. Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later.

- **Regulation 12(4)(e): Internal communications**

An 'internal' communication is a communication within one public authority. All central government departments are deemed to be one public authority for these purposes. A communication sent by or to another public authority, a contractor or an external adviser will not generally constitute an internal communication.

Public interest arguments should be focused on protecting the public authority's private thinking space. Other arguments will not be relevant to this exception. There is no automatic or inherent public interest in withholding an internal communication. Arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.

- **Regulation 12(5)(a): International relations, defence, national security or public safety**

There can be a significant overlap between the four interests protected by regulation 12(5) (a). International relations describes our relations with other states and international organisations. An adverse effect on international relations does not have to be tangible or immediate. It includes situations where a diplomatic response is required to limit the damage to a relationship. Another country's response to a disclosure will depend on the culture and traditions of that country. The exception can protect the UK's negotiating position with other members of the international community.

Defence refers to the protection of the UK Islands and any colony. There are many threats to national security. It protects the UK, its people and our legal and democratic institutions. National security involves the cooperation with other states in the fight against global terrorism. Consideration should be given to whether the requested information could be pieced together with other information to reveal something that would undermine national security – the mosaic argument.

Public safety describes injury to the physical or mental health of the public or any section of the public. It extends to the safety of a particular individual. Worry or stress is not considered an adverse effect on mental health. Under regulation 12(6) a public authority does not have to confirm or deny that it holds information in response to a

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request, if doing so would adversely affect one of the interests within regulation 12(5)(a).

- **Regulation 12(5)(b): The course of justice and inquiries exception**

Regulation 12(5) (b) provides an exception from the disclosure of environmental information which would adversely affect: the course of justice;

- the ability of a person to receive a fair trial; and
- the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

The course of justice has a wide meaning and public authorities may wish to consider claiming this exception when they get requests for:

- court or tribunal records;
- material covered by legal professional privilege; and
- information whose disclosure would prejudice investigations and proceedings of either a criminal or disciplinary nature.

- **Regulation 12(5)(c): Intellectual property rights**

Intellectual property (IP) rights arise when owners are granted exclusive rights to certain intangible assets. To establish that there would be an adverse effect on IP rights a public authority must demonstrate that:

- the material is protected by IP rights;
- the IP rights holder would suffer harm. It is not sufficient to merely show that IP rights have been infringed;
- the identified harm is a consequence of the infringement or loss of control over the use of the information; and
- the potential harm or loss could not be prevented by enforcing the IP rights

- **Regulation 12(5)(d): Confidentiality of proceedings**

This exception should be considered if disclosing the information would adversely affect the confidentiality of a public authority's proceedings where the confidentiality arises from statute or common law. The term 'proceedings' is not restricted to meetings, but it does imply some formality.

The exception can only apply if it is more probable than not that the adverse effect would occur. Also, for disclosure to adversely affect the confidentiality of proceedings, the information must be part of the business of those proceedings. The adverse effect can also be on the proceedings of another authority. Even where the exception applies, the public authority must still make the information available unless the public interest in maintaining the exception outweighs the public interest in disclosure in all the circumstances of the case. There is a presumption in favour of disclosure.



- **Regulation 12(5)(e): Confidentiality of commercial or industrial information**

To refuse environmental information under this exception the organisation will need to establish that: the information is not on emissions;

- the information is commercial or industrial in nature;
- it is confidential under either the common law of confidence, contract, or a statutory bar;
- the confidentiality is protecting a legitimate economic interest; the confidentiality will be adversely affected by disclosure; and
- the public interest in maintaining the exception outweighs the public interest in disclosing the information.

- **Regulation 12(5)(f): Interests of the person who provided the information to the public authority**

To refuse environmental information under this exception in regulation the organisation will need to establish that: the information is not on emissions;

- the interests of the person providing the information to the public authority will be adversely affected by disclosure;
- the person providing information was not under any legal duty to provide it; the public authority is not entitled to disclose the information provided; the person providing the information has not consented to disclosure; and the public interest in maintaining the exception outweighs the public interest in disclosing the information.

- **Regulation 12(5)(g): Protection of the environment**

Information is exempt from disclosure if it would harm the protection of the environment. The definition is quite broad here but an organisation would need to establish that:

- that the information in question relates to the aspect of the environment that is being protected;
- how and to what extent the protection of the environment would be affected; and that the information is not on emissions

- **Regulation 12(9): Information on emissions**

The definition of emissions is consistent with the European Directive 2003/4/EC and Aarhus Convention

- **Regulation 13: personal information**

The organisation will need to consider the definition and apply the principles as in Section 40 of FOIA.

# 1. Document control

## Version history

Version	Status	Date	Author	Summary of changes
0.1	Draft	06.04.2016	SA FOI	
0.2	Draft	20.04.2016	Dir PPM	Minor amendments, formatting and content
0.3	Draft	25.04.2016	SA FOI	Minor amendments
0.4	Final draft	25.05.2016	SA FOI	Minor amendments after legal comments
0.5	Revisions	15.12.2018	IGM	Minor amendments
0.6	Redraft	22.07.2019	IGM	
1	Final draft	23.07.2019	Dir PPM	Minor amendments and formatting

## Sign off

Job Title	Date	Version No.	Date of Next review
Director PPM	September 2019	1	September 2021