

NERC POLICY FOR IMPLEMENTING THE FREEDOM OF INFORMATION ACT 2000 AND ENVIRONMENTAL INFORMATION REGULATIONS 2004

1 INTRODUCTION

Rationale

1.1 The Government has implemented a new and wide-ranging information access regime within which the Research Councils operate. The **Freedom of Information Act 2000**ⁱ, (the Act), creates a statutory right for individuals to request information held by public authorities and aims to embed a culture of openness within the public sector. As a listed public authority, NERC fully supports the aims of the Act.

1.2 The main features of the Act are:

- A general right of access from 1 January 2005 to recorded information held by public authorities, subject to certain conditions and exemptions.
- A duty on every public authority to adopt and maintain a Publication Scheme, which identifies information that is already publicly available, and how this may be obtained.
- The creation of a new office of Information Commissioner with powers to enforce the rights created by the Act and to promote good practice, and of a new Information Tribunal

1.3 A general right of access to environmental information also came into force on 1 January 2005, under the amended **Environmental Information Regulations 2004**ⁱⁱ (the Regulations). These Regulations provide broadly similar rights as the Act but relate specifically to information about the environment. This document covers NERC's approach to both the Act and the Regulations – where key differences arise, these are indicated within the Policy. Official guidance on the Regulations is still being developed under consultation as of January 2005 but further details relating to the Environmental Information regulations are provided in Appendix C.

Scope

1.4 This Policy:

- This Policy is a statement of what NERC intends to do to ensure compliance with the Act and the Regulations. It is not a statement of how compliance will be achieved; this will be a matter for operational procedures.
- The Policy will apply to all NERC employees.
- The Policy will provide a framework within which NERC will ensure compliance with the requirements of the Act and the Regulations.
- The Policy will underpin any operational procedures and activities connected with the implementation of the Act and the Regulations.
- The Policy is subject to change as the legislation develops in case law and operation.

Principles

- 1.5 The Policy builds on the principle that openness is the norm in public life. NERC supports a climate of openness and dialogue with all stakeholders and believes that improved access to information about the NERC will enhance the nature of its relationships.
- 1.6 NERC believes that individuals have a right to privacy and confidentiality. This Policy respects the common law duties of confidence and statutory provisions that prevent disclosure of personal identifiable information, covered by the **Data Protection Act 1998** ⁱⁱⁱ. NERC is committed to being as open as possible, however, there may be circumstances in which it must withhold information if it is to be able also to discharge its functions.
- 1.7 The Regulations have their own set of exemptions, referred to as ‘exceptions’. In this Policy, the use of the term ‘exemptions’ refers to both the Act’s exemptions and the Regulations’ exceptions.

2 POLICY ON ACCESS TO INFORMATION

Policy Statement

- 2.1 NERC will use all appropriate and necessary means to ensure that it complies with the Freedom of Information Act 2000, the Environmental Information Regulations 2004, and all associated **Codes of Practice** ^{iv}.

Publication Scheme

- 2.2 NERC has a Publication Scheme developed in consultation with the Office of Science and Technology, and approved by the Information Commissioner in December 2002.
- 2.3 NERC’s Publication Scheme details the information that NERC already publishes and the information the Council intends to publish in the future. It sets out the format in which the information is available and states whether or not a charge will be made for the provision of that information. The Publication Scheme is available in hard copy on request and through the NERC website (foi.nerc.ac.uk). It is subject to regular review and will be formally reviewed by the Information Commissioner in 2007.
- 2.4 Applications for information listed in the Publication Scheme may be written or oral.

General Rights of Access

- 2.5 The Act gives a general right of access to recorded information held by NERC, subject to certain conditions and exemptions. A request for information under the general rights of access must be made in writing, stating the name of the applicant and an address for correspondence, and setting out the information requested; requests must be legible and accessible for subsequent reference. For the purpose of general rights of access, under the Act, a request is treated as made in writing if it is sent electronically. Under the Regulations, a request for environmental information does not need to be in writing.
- 2.6 Any person making a request for information to NERC is entitled to be informed in writing:
- whether NERC holds the information specified in the request;

- whether the information can be made available, or whether it is exempt under the Act;
- if NERC holds the information, and it is not exempt, to have the information communicated to them.

This is referred to as the “duty to confirm or deny”. These provisions are fully retrospective.

Charges and Fees

2.7 NERC makes information on its Publication Scheme available either free of charge or for a reasonable charge in line with HM Treasury guidelines. NERC will follow the national Fees Regulations for general rights of access under the Act. Where NERC charges, a fees notice is issued to the applicant as required by the Act. Applicants must pay the fee within a period of three months beginning with the day on which the notice is issued. Under the Regulations there is no fees limit as under the Act and NERC can make reasonable charges in line with HM Treasury guidelines where applicable. Applicants must pay the advised fee within a period of sixty working days.

Conditions and Exemptions

2.8 The duty to confirm or deny does not arise:

- where NERC reasonably requires further information to clarify the request, and has informed the applicant of that requirement; NERC makes reasonable efforts to contact the applicant for additional information when this situation arises;
- if the information is exempt under the Act, which confers either an absolute exemption or a non-absolute exemption. A non-absolute exemption is applied if the public interest in withholding the information outweighs the public interest in disclosing it. NERC uses non-absolute exemptions in the spirit of openness and justifies the use of such exemptions. The exemptions specified in the Act are listed at Appendix A
- if a Fees Notice has been issued to the applicant and the fee has not been paid within the period of three months under the Act, or sixty working days under the Regulations, from the day on which the fees notice is given to the applicant;
- if NERC estimates that the cost of compliance with the request would exceed the appropriate limit established in national Fees Regulations. NERC works with applicants to keep compliance costs to a minimum but reserves the right either to refuse or to charge for providing information where costs exceeds this limit. No ‘appropriate limit’ is set for requests being dealt with under the Regulations: environmental information requests cannot be refused on the basis of cost.
- if the request is manifestly unreasonable or vexatious; where NERC has previously complied with a request for information the Council is not obliged to comply with any subsequent identical or similar request from the same person unless a reasonable interval has elapsed between the requests. NERC logs requests for information for monitoring purposes.

Time Limits for Compliance with Requests

- 2.9 The Act specifies that information must be provided by the twentieth working day following receipt of the request. If the Council is charging a fee, the working days in the period from when the applicant receives the fees notice to when he or she pays is disregarded when calculating the twentieth working day following the original receipt of the request. Where a request falls under the Regulations and the request is complex, NERC has the option of extending the time limit to forty working days. Should this happen, NERC will inform the applicant of the extension within the original twenty working days.
- 2.10 If NERC chooses to apply an exemption to any information or to refuse a request, the Council informs the applicant of this decision in writing within twenty working days.

Means by which information is conveyed

- 2.11 Applicants may ask for information to be provided by one or more of the following means:
- a copy of the information in permanent form or another form acceptable to the applicant,
 - by inspection of a record(s) containing the information, and/or
 - as a digest or summary in permanent form or in another form acceptable to the applicant.
- 2.12 Wherever practicable, NERC provides the information in the form requested. In determining whether it is practicable to communicate information by a particular means, NERC considers all the circumstances, including the cost. If NERC decides that it is not reasonably practicable to comply with the request, the Council explains why and provides the information in a form it deems reasonable.

Refusal of Requests

- 2.13 If NERC chooses to refuse a request for information, the applicant is informed of the reasons for this within twenty working days. The applicant is also informed of the procedures for making a complaint about the discharge of the duties of NERC.
- 2.14 If NERC is claiming an exemption, the notice: states the fact, specifies the exemption in question, and states why the exemption applies. If NERC is unable to determine immediately whether the information requested should be exempt, the notice explains this and provides an estimate of the date by which NERC expects a decision to be made. As set out in the Lord Chancellor's Code of Practice issued under the Act, estimates are realistic and reasonable and should be met. If an estimate is exceeded, the applicant is given the reason for the delay and offered an apology by NERC. If NERC finds, while considering the public interest, that the estimate is proving unrealistic, the applicant is kept informed. Should this happen more than occasionally, the Council takes steps to identify the problem and, where practical, rectify it. Responses to requests under the Regulations will be completed within the timescale already indicated to the applicant by NERC, i.e. either twenty or forty working days.
- 2.15 If applying a non-absolute exemption NERC states the reasons, explaining why the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The statement should not involve the disclosure of information which would itself be exempt information.

2.16 If NERC is claiming that the request is vexatious, manifestly unreasonable or repeated the notice states this.

2.17 NERC keeps a record of all notices issued to refuse requests for information.

Transferring Requests for Information

2.18 Where NERC receives a request for information which it does not hold, but which is held by another public authority, NERC may transfer the request to the other authority. If NERC holds some of the information requested, a transfer can be made in respect only of the information NERC does not hold. NERC recognises that, under the Act, “holding” information includes holding a copy of a record produced or supplied by another person or body, but does not include holding a record on behalf of another person or body. NERC processes any information it holds in accordance with the Act, and determines the most helpful way of assisting the applicant with the request. In most cases this involves: contacting the applicant and informing him or her that the information may be held by another public authority, suggesting that the applicant re-applies to that authority, and providing the applicant with contact details for that authority. The Regulations cover information held on behalf of another person or body; NERC would therefore provide such information, if requested under the Regulations, unless it was exempt for other reasons.

2.19 NERC may consider it to be more appropriate to transfer the request directly to the other authority. If so, NERC consults the other authority to ascertain whether it holds the information. No request is transferred without confirmation by the second authority that it holds the information. If NERC considers that the applicant is unlikely to object, the Council transfers the request, and informs the applicant. Where there are grounds to believe an applicant will object, or NERC is unsure, the applicant is contacted to suggest that a new request be made to the other authority.

2.20 All transfers of requests take place as soon as is practicable, and the applicant is informed as soon as possible once this has been done.

Consultation with Third Parties

2.21 NERC recognises that in some cases the disclosure of information may affect the legal rights of a third party, for example where information is subject to the common law duty of confidence or where it constitutes “personal data” within the meaning of the Data Protection Act 1998 (the DPA). Where information constitutes “personal data” within the meaning of the DPA, NERC endeavours to ensure that it meets its obligations under both Acts.

2.22 There may be circumstances where disclosure of information cannot be made without the consent of a third party, for example, where information has been obtained from a third party and the disclosure of the information without their consent would constitute an actionable breach of confidence. In such cases, wherever practicable, NERC consults the third party with a view to seeking their consent to disclosure. NERC may choose to consult the third party even if disclosure does not give rise to legal rights.

2.23 NERC consults where:

- the views of the third party may help NERC to decide whether an exemption applies to the information requested, or

- the views of the third party may help NERC to decide where the public interest lies.

Where the cost of consulting with third parties is disproportionate, NERC may decide not to consult. In such cases, NERC takes the most reasonable course of action in light of the Act and the individual circumstances of the request.

- 2.24 Where the interests of a number of third parties may be affected by a disclosure, and those parties have a representative organisation which can express views for them, NERC consults that organisation. If there is no representative organisation, NERC may decide that it is sufficient to consult a representative sample of the third parties in question.
- 2.25 NERC cannot refuse to disclose information, or miss the deadline for reply, because a third party has not responded to the consultation. In all cases involving consultation, NERC, not the third party decides whether or not information should be disclosed. A refusal by a third party to consent to disclosure does not, in itself, mean information should be withheld.

Contracts with third parties

- 2.26 When entering into contracts NERC cannot agree contractual terms designed to restrict the disclosure of information relating to the contract beyond the restrictions permitted by the Act and the Regulations. Unless an exemption is applicable to requested information, NERC can disclose that information, regardless of the terms of contract.
- 2.27 When entering into contracts with non-public authority contractors NERC wherever possible, as recommended by the Department of Constitutional Affairs, rejects any confidentiality clauses. Where, exceptionally, it is necessary to include non-disclosure provisions, NERC discusses with the contractor how best to identify information that should not be disclosed. NERC is aware that any restrictions on disclosure could potentially be overridden by obligations under the Act. Any acceptance of such confidentiality provisions must be for good reasons and capable of being justified to the Information Commissioner.
- 2.28 NERC will not agree to hold information “in confidence” which is not confidential in nature. The Department of Constitutional Affairs advises that exemptions in relation to information provided by third parties only apply if the disclosure of the information to the public would constitute a breach of confidence actionable by that, or any other party.
- 2.29 Under the Act, NERC, not the contractor, is responsible for disclosing information. NERC takes steps to prevent contractors from disclosing information which NERC provided to them and which is exempt from disclosure under the Act, by appropriate contractual terms. To avoid unnecessary secrecy, any such constraints are drawn as narrowly as possible. Apart from such cases, NERC does not impose terms of secrecy on contractors.

Accepting Information in Confidence from Third Parties

- 2.30 NERC only accepts information in confidence from third parties if obtaining that information is essential for the Council to operate effectively and the information would or could not be provided otherwise. NERC will not agree to hold information received from third parties “in confidence” which is not confidential in nature. Acceptance of any confidentiality provisions must be for good reasons, and be capable of being justified to the Information Commissioner.

Complaints about the Discharge of the Duties of NERC under the Act

2.31 NERC has a Complaints Officer and has procedures for dealing with all complaints, including those concerning the discharge of NERC's duties under the Act as listed under the NERC Publication Scheme. The procedure states applicants' rights to apply to the Information Commissioner if they remain dissatisfied with the conduct of NERC, following attempts at local resolution of their complaint.

3 IMPLEMENTATION AND COMPLIANCE

Responsibilities of NERC Staff

3.1 All staff are obliged to adhere to this Policy and it will form part of their formal duties as defined in the NERC staff appraisal system. A failure to adhere to this Policy and its associated procedures may result in disciplinary action. Managers at all levels are responsible for ensuring that the staff for whom they are responsible are aware of and adhere to this Policy. They are also responsible for ensuring staff are updated in regard to any changes in this Policy.

Responsibility for FOI Policy

3.2 A named person is identified for NERC and listed under the NERC Publication Scheme. This person ensures that this Policy is accessible and up-to-date.

Corporate Responsibility

3.3 The Chair of NERC's Information Strategy Group will oversee the implementation of this policy and has delegated responsibility from the NERC Chief Executive. NERC's Information Strategy Group will establish systems and procedures that will support the implementation of this Policy.

Training

3.4 Awareness of and training on the Act is available to staff who require it.

4 REFERENCES

- i) Freedom of Information Act 2000
- ii) Environmental Information Regulations 2004
- iii) Data Protection Act 1998
- iv) Codes of Practice:
 - Lord Chancellor's Code of Practice on the Discharge of Public Authorities' Functions under Part I of the Freedom of Information Act 2000, issued under section 45 of the Act, November 2002
 - Lord Chancellor's Code of Practice on the Management of Records under section 46 of the Freedom of Information Act 2000, November 2002.
 - Secretary of State's Code of Practice on the Discharge of the Obligations of Public Authorities under the Environmental Information Regulations 2004.

5 VALIDATION & REVIEW

5.1 This Policy was approved on ____8th April 2005

5.2 This policy will be reviewed in the light of experience, and at least annually.

APPENDIX A

EXEMPT INFORMATION UNDER PART II OF THE FREEDOM OF INFORMATION ACT 2000

There are two types of class exemption:

- (a) absolute, which do not require a test of prejudice or the balance of public interest to be in favour of non-disclosure.
- (b) non-absolute which are qualified by the public interest test and require the public body to decide whether it is in the balance of public interest to not disclose information.

With the exception of S21 (information available by other means) exemptions decide whether it is in the balance of public interest to not disclose information.

The absolute exemptions under the Act are:

- Section 21, Information accessible to applicant by other means
- Section 23, Information supplied by, or relating to, bodies dealing with security matters
- Section 32, Court Records
- Section 34, Parliamentary Privilege
- Section 36, Prejudice to effective conduct of public affairs (so far as relating to information held by the House of Commons or the House of Lords)
- Section 40, Personal Information (where disclosure may contravene the Data Protection Act 1998)
- Section 41, Information provided in confidence
- Section 44, prohibitions on disclosure

The non-absolute exemptions that are qualified by the public interest test are:

- Section 22, Information intended for future publication
- Section 24, National Security
- Section 26, Defence
- Section 27, International Relations
- Section 28, Relations within the United Kingdom
- Section 29, The Economy
- Section 30, Investigators and proceedings conducted by public authorities
- Section 31, Law Enforcement
- Section 33, Audit Functions
- Section 35, Formulation of Government Policy
- Section 36, Prejudice to effective conduct of public affairs (for all public authorities except the House of Commons and the House of Lords)
- Section 37, Communications with Her Majesty, etc and honours
- Section 38, Health and Safety
- Section 39, Environmental Information
- Section 42, Legal Professional Privilege
- Section 43, Commercial Interests.

More information on the exemptions can be found on the Information Commissioner's website at www.informationcommissioner.gov.uk

APPENDIX B

GLOSSARY OF TERMS

Applicant - The individual(s), group or organisation requesting access to information under the Freedom of Information Act 2000 (FOI) or under the Environmental Information Regulations 2004 (EIRs). An applicant can be from outside the UK.

Data Protection Act 1998 - The Data Protection Act 1998 (DPA) came into force on 1 March 2000. It sets rules for processing personal information and applies to some paper records as well as those held on computers. From 1st January 2005 the DPA will be amended by FOI to include “unstructured personal data” held by public authorities.

Department of Constitutional Affairs - Responsible for the efficient administration of justice in England and Wales. The Information Commissioner operates within a framework which has been drawn up with the Department for Constitutional Affairs.

Duty to Confirm or Deny - Any person making a request for information to a public authority (the applicant) is entitled to be informed in writing by that authority whether the public authority holds the information specified in the request or not. However, the information may be covered by an exemption which removes the requirement to confirm or deny if, by doing so, that information would itself release exempt information.

Environmental Information Regulations 2004 (EIRs) - It is expected that all environmental information will fall outside FOI but come under the amended EIRs which provide for environmental information held by public authorities to be made accessible to any applicant making a request for such information, subject to various exceptions. All exceptions under EIRs are subject to the Public Interest Test. NERC is specifically listed under the Regulations.

Exception - Applied to information that does not have to be released to the applicant under the EIRs. Information to which an exception applies requires a public authority to take a test of prejudice or to demonstrate that the balance of public interest is in favour of non-disclosure.

Exemption (Absolute) - Applied to information that does not have to be released to the applicant under FOI, either through a Publication Scheme, or through a general right of access under the Act. Information to which an absolute exemption applies does not require a public authority to take a test of prejudice or a public interest test to be in favour of non-disclosure.

Exemption (Non-absolute or Qualified) - Information to which a non-absolute exemption applies requires a public authority to take a test of prejudice or to demonstrate that the balance of public interest is in favour of non-disclosure under FOI.

Fees Notice - A written notification issued to an applicant stating that a fee is payable and exempts public authorities from being obliged to disclose information under FOI until the fee has been paid. The applicant will have three months (60 working days) from the date of notification to pay the fee before his request lapses.

Fees Regulations - National regulations that will prohibit a fee with regard to certain types of request, set an upper limit on amounts that may be charged and prescribe the manner in which any fees are to be calculated. The regulations will not apply where provision is made under another Act as the fee that may be charged for the provision of particular information. i.e. these Regulations do not apply to EIRs which, in theory, set no upper limit for charging.

Freedom of Information Act 2000 - An Act to make provision for the disclosure of information held by public authorities or by persons providing services for them. It amends the Data Protection Act 1998 and the Public Records Act 1958 (*relaxation of the rules on releasing historical records*).

General Right of Access - Section 1 of the FOI Act confers a general right of access to information held by public authorities. Subject to any exemptions, an applicant has a right to be told whether the information requested is held by that authority and, if it is held, to have it communicated to them. A similar right exists under EIRs for environmental information.

Information Commissioner - The Information Commissioner enforces and oversees the Data Protection Act 1998, the Freedom of Information Act 2000, and the amended Environmental Information Regulations (2004). The Commissioner is a UK independent supervisory authority reporting directly to the UK Parliament and has an international role as well as a national one. In the UK the Commissioner has a range of duties including the promotion of good information handling and the encouragement of codes of practice for data controllers, that is, anyone who decides how and why personal data, (information about identifiable, living individuals) are processed.

Public Authority - The FOI Act is intended to have wide application across the public sector at national, regional, and local level. In view of the large number of bodies and offices intended to fall within the scope of the Act it is not feasible to list each body individually. All the Research Councils fall under the designation of a Public Authority.

Public Interest Test - The test which decides, on balance, whether information should be released to the public or remain exempt from release. The greater the possible impact on the public the information has, the more likely that the information will be released. Subject to case law and precedent as the legislation comes into force.

Publication Scheme - A scheme specifying the classes of information which NERC publishes or intends to publish, the manner of publication and whether the information is available to the public free of charge or on payment.

Right of Access Section 1 of the Act confers a general right of access to information held by *public authorities*. An *applicant* has a right to be told whether the information requested is held by that authority and, if it is held, to have it communicated to them. Provisions limiting an authority's duty under section 1 appear in sections 1(3), 2,9,12 and 14 and in Part II of the Act. The grounds in sections 9,12 and 14 relate to the request itself and the circumstances in which an authority is not obliged to comply it. The provisions of Part II relate to the nature of the information requested.

APPENDIX C

THE ENVIRONMENTAL INFORMATION REGULATIONS 2004

An access to environmental information regime has been in place in the UK since 1992, in the form of the Environmental Information Regulations 1992, as amended by the Environmental Information (Amendment) Regulations 1998. The introduction of replacement Regulations in England, Wales and Northern Ireland (and of similar regulations in Scotland) enables compliance with the UK's commitments under the UN's Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (the "Aarhus Convention), and with EU Directive 2003/4/EC.

The Environmental Information Regulations 2004 (the Regulations) are closely linked to the Freedom of Information Act 2000. Information relating to environmental information is considered exempt under the Freedom of Information Act, and can therefore be dealt with under the Environmental Information Regulations.

The main differences between the requirements under the Freedom of Information Act, and the Environmental Information Regulations are:

- The range of bodies covered by the Regulations is wider to allow for consistency with the EC Directive – *NERC is covered by the Regulations and the Act*
- Requests for environmental information need not be in writing
- The information held by a public authority includes holding information held on behalf of any other person
- The duty to provide advice and assistance requires a public authority to respond within twenty working days when requesting more particulars from the applicant
- The time limits for responding to a request apply to all requests including those involving consideration of the public interest test. Regulation 7 of the Regulations allows for an extension from twenty to forty working days for complex or voluminous requests
- No exception is made for requests that will involve costs in excess of the 'appropriate limit' within the meaning of the Fees Regulations made under sections 9, 12 and 13 of the Freedom of Information Act. Except in specified limited circumstances, all requests must be dealt with and any charges imposed must be reasonable
- The time limit for applicants responding to a Fees Notice is sixty working days under the Regulations, and 3 months under the Act
- There are differences in the exceptions available under the Regulations, and the exemptions available under the Act
- The requirement for public authorities to have in place a complaints and reconsideration procedure to deal with representations alleging non-compliance with the Regulations is mandatory – *NERC has a Complaints Officer who deals with all complaints received independently of the decisions made on release.*

APPENDIX D

EXCEPTIONS TO THE DUTY TO DISCLOSE ENVIRONMENTAL INFORMATION – as defined in Part 3 of the Environmental Information Regulations 2004

It should be noted that the public interest test (as defined by the Freedom of Information Act) applies to all exceptions under the Regulations.

The exceptions include:

- Personal data (with reference to the Data Protection Act 1998)
- The public authority does not hold the information requested when an applicant's request is received
- The request for information is manifestly unreasonable
- The request for information is formulated in too general a manner and the public authority has complied with its duty under regulation 9 (to provide advice and assistance)
- The request relates to material which is still in the course of completion, to unfinished documents or to incomplete data
- The request involves the disclosure of internal communications
- The disclosure of information would adversely affect international relations, defence, national security or public safety
- The disclosure of information 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 inquiry of a criminal or disciplinary nature
- The disclosure of information would adversely affect intellectual property rights
- The disclosure of information would adversely affect the confidentiality of the proceedings of a public authority where such confidentiality is provided by law
- The disclosure of information would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest
- The disclosure of information would adversely affect the interests of the person who provided the information where that person was not under any legal obligation to supply it, and has not consented to its disclosure
- The disclosure of information would adversely affect the protection of the environment to which the information relates