



Environment briefing note | January 2017

## **#10thingsSH on the risks posed to businesses by the Environmental Information Regulations, and how to avoid unwanted disclosures**

**For businesses, the unwanted release of sensitive environmental information can be troublesome. Even where there are no skeletons in the closet, businesses will be reluctant to reveal commercial or trade-related environmental information.**

**Environmental information, the right to request it, and the right to withhold it when faced with a request, is governed by the Environment Information Regulations 2004 (EIR). The EIR runs in parallel with the Freedom of Information Act 2000, which covers all other types of information.**

There are two main types of businesses that are "at risk" of having environmental information disclosed:

1. Private businesses that are found by the courts to be 'public authorities', and therefore legally bound by the requirements of the EIR. For example, water companies have been determined to be public authorities. Being classified as a 'public authority' is a possibility for businesses that have special statutory powers and that carry out public administration functions.
2. Businesses that contract with public authorities, and therefore share environmental information with public authorities. If a public authority has in its possession environmental information, and it receives a request for that information, the public authority will usually be required to disclose that information.

If a business falls into one of the two categories above, then that business should consider taking some of the steps below in order to avoid the unwanted disclosure of environmental information.

3. Businesses that are at risk of being classified as public authorities or that deal with public authorities regularly should put in place information management procedures, including staff guidelines about documents that may or may not be provided to public authorities. Records should be kept of those documents already provided to public authorities.
4. Clearly identify confidential or commercially-sensitive information.
5. Use a targeted approach when identifying confidential information, and be careful not to rely on blanket confidentiality clauses. Blanket-type confidentiality clauses are less effective.

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6. Factor the potential disclosure of information into a decision to provide information in the first place.
7. Take particular care with the following types of information, which are 'high risk': information provided to regulators (e.g. the Environment Agency); information provided in the context of public consultation; and, information relating to planning procedures and proposed developments.
8. Secure better contractual protection and duties. A public authority's duty to disclose environmental information under the EIR overrides other legislation and common law. This means that it will override standard contractual confidentiality clauses. In reality, the most protection that a business can hope for is fair warning that the public authority has received a request, giving the business time to react.
9. Once a business becomes aware that a public authority has received a request relating to its environmental information, that business should take pro-active steps to protect itself by making legal arguments to the public authority, or in the most serious cases, considering injunctive relief.
10. Evaluate the risks of sharing information with public authorities. Agreeing contracts and day-to-day operations will inevitably mean sharing information. If a public authority has environmental information in its possession that is then subject to an information request, under the EIR there is a presumption that the public authority must disclose that information.

The Environment and Planning Group at Stephenson Harwood is a contributor to LexisPSL on the EIR, and we have experience acting for both public authorities and private businesses.

### How can Stephenson Harwood help?

More than ever, environment and planning issues are at the heart of law and policy, impacting every business sector - Stephenson Harwood's Environment and Planning Group helps its clients successfully navigate these complex regulatory frameworks. For further information please contact us.



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