

Schools Partnership Trust Academies  
Answering Information Requests under DPA and FoIA  
Phil Tompkins and Rebecca Procter

17 July 2015

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# Housekeeping

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# Data Protection Act – Subject Access Requests – Rebecca Procter

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## Background – What does the Data Protection Act 1998 do?

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- » Governs use of personal data by data controllers
- » Data must be processed using the 8 principles
- » The Act grants data subjects rights
- » If you get it wrong?
  - » Fines and enforcement

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## What data is covered by DPA?

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- » What is data?
  - » Electronic data
    - » Word documents/emails/pdfs
    - » Digitally recorded files e.g. photo/video
  - » Manual data
    - » Relevant filing system

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## What is personal data?

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- » Data relating to a living individual who can be identified by it
- » Relates to individual in personal, business or professional life
- » Biographical in a significant sense
- » Data subject is focus

- » What is processing?
  - » Anything you do with personal data will be processing for purposes of DPA
  - » Includes collection, organisation, adaptation, alteration, retrieval, consultation, use, disclosure, alignment, blocking, erasure or destruction

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## Data Protection Principles

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- » All personal data must be processed in accordance with the 8 data protection principles
- » Failure to process in accordance with the 8 principles can lead to fines



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# The Eight Principles

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- » Fair and lawful processing
- » Lawful purpose
- » Adequate and not excessive
- » Accurate and up to date
- » Kept no longer than necessary
- » Processed in accordance with data subject rights
- » Processed using appropriate security
- » Restrictions on transfers outside the EEA

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## Handling Personal Data

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- » All personal data held is potentially disclosable
- » Think about information you record in writing (manually or electronically)
- » Consider: would I want this information to be accessed by the data subject?

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## Subject Access Request

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- » Data subjects have right of access to their own personal data
- » Must provide:
  - » Permanent copy of all personal data held at time of request unless:
    - » Disproportionate effort
    - » Data subject waives right
  - » Recipients and source
  - » Description of data
  - » Purpose of processing
- » Request must be in writing
- » Charge
- » Not a right to see documents but information within them

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## Recognising Requests

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- » What is a subject access request?
  - » Written request e.g. email, fax, via social media
  - » For information held about them
- » No need for applicant to state it is a subject access request
- » Valid even if refers to other legislation e.g. FoIA
- » Use standard form
  - » Can't be compulsory
- » How to respond to oral requests
- » Third party requests

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## Nature of the Request

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- » No requirement for applicant to inform you of reason for request
- » Request must provide sufficient information to:
  - » Identify data subject
  - » Locate personal data requested
- » The data controller can ask for more information to help it identify information requested
- » Obligation to authenticate requestor

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## Information Requests about Children

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- » A child's personal data belongs to the child (not parent or guardian)
- » Young children's rights exercised by their parent or guardian
- » Does child understand their rights (competency)
  - » Child's maturity/views on parent/guardian access
  - » Nature of data
  - » Duty of confidentiality
  - » Consequence of allowing parent/guardian access

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## Timing of Response

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- » Personal data to be provided as soon as possible and in any event within 40 days
- » 40 day limit starts:
  - » Receive fee
  - » Any location data
  - » Identification
- » If request submitted as FoIA request as Trust is covered by FoIA, good practice to inform applicant within 20 working days that request being dealt with under DPA

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## What data do I provide?

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- » Applicant only entitled to their personal data
  - » Contents of emails they send
  - » Documents they create
- » Third party data
- » Exempt data
- » No exemption for:
  - » Difficult to access information
  - » Embarrassing information



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## Third Party Data

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- » Data subject not automatically entitled to third party data within information requested
- » Where third party personal data involved:
  - » Do you have consent?
- » Is it reasonable in circumstances to disclose
  - » Redact data
  - » Is there an express refusal of consent
  - » Duty of confidentiality
  - » What is nature of data
  - » Information generally known by applicant
  - » Circumstances relating to applicant
  - » Be able to justify any disclosure

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## Data held by Third party Processor

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- » What is a data processor?
- » Personal data held by your data processor is held by you
  - » It must be disclosed on receipt of a SAR
  - » No extension to 40 day limit

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## Exempt Data

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- » Confidential references
- » Crime and taxation
- » Management information
- » Negotiations with requester
- » Legal advice and proceedings
- » Social work records
- » Health records
- » Education records

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## Disproportionate Effort

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- » Exemption on obligation to provide copies if involves disproportionate effort
- » Disproportionate, unreasonable effort
  - » Safeguarding systems, even if labour intensive or inconvenient is not disproportionate or unreasonable
  - » Abuse of process

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## What to do on receipt of a request

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- » Log SAR
- » Send acknowledgement
  - » Time period for response
  - » Contact point
  - » Complaint mechanism
- » Authenticate identity of requestor (if required)
- » Clarify request (if needed)
- » Request fee (if asking for one)
- » Confirm if the information is held
- » Consider whether the information will be changed
- » Determine whether it includes information about other people
- » Consider whether any exemptions apply
- » Explain complex terms or codes
- » Prepare a response

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## To what extent must I search our files?

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- » Do I need to search archived data
  - » Data archived to storage or in back up data is disclosable
  - » Acknowledgement that search of archive may be more rudimentary
  - » No specific right to access to back up
- » No requirement to recover “deleted” data
- » Data held on private systems

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## Sending Information

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- » Check you send to right email/postal address
- » Form of information sent
- » Sending information electronically
- » Requests for data in specific format
- » No obligation to provide original documents

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## Repeated or Unreasonable Requests

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- » Discretion to deal with requests at unreasonable intervals
- » Consider
  - » Nature of data
  - » Purpose of processing
  - » Frequency of alternation of data
- » Negotiate with requester



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# Third Party Data Requests

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- » Authorised persons
  - » Authentication
- » Other requests
  - » Police
  - » Tax authorities
  - » Others
    - » FoIA
    - » EIR

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## Pupil Information

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- » Gives parents of pupils right to access their children's educational records
- » Parental responsibility
- » 15 school days
- » Maintained schools only (not applicable to academies)
- » Different to DPA
  - » Pupil cannot prevent a parent from accessing their educational record
  - » Pupil may object under DPA if sufficiently mature

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# ICO Enforcement Powers

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- » Compliance assessment
- » Information notice
- » Undertakings
- » Enforcement notice
- » Fines
- » Court orders
- » Compensation

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Any questions?

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# Freedom of Information Act – Handling Information Requests – Phil Tompkins

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# Aims

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- » Recognising Freedom of Information Requests
- » Understanding access regime
- » Understanding information available through Act
- » Why Act introduced
- » Understanding when the Trust can refuse access to information
- » Different information regimes

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## Views on FOIA

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- » “There is no turning back. We have crossed the Rubicon” - Lord Falkner
- » Tony Blair’s thoughts on the Act:- “You idiot. You naïve foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.”
- » “It’s like saying to someone who is hitting you over the head with a stick, “Hey try this instead” and handing them a mallet.”

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## Overview – What is freedom of information about?

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- » Came fully into force 1 January 2005
- » Right of access to information held by public authorities
- » Aim was to increase:-
  - transparency and accountability and improve decision making process
  - public understanding, participation and trust in government, local authorities and other public authorities



» Section 1(1)

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds the information of the description specified in the request;
- (b) if that is the case, to have that information communicated to him.”

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## What information can the public get?

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- » Provides right of access to all information held by the public authority
- » Information accessible:
  - access to any information held at time of request
  - right is access to information not documentation

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## Making a request

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- » Who can make a request?
  - No need to demonstrate why applicant wants the data
  - Applicant blind
- » Who can you make a request to?
- » What information can you get?

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## Recognising Requests

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- » Any request for information from the Trust can be a Freedom of Information request
  - » No requirement to mention the Freedom of Information Act
- » Applicant blind – implications
- » Pass request on to core team immediately!

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## Valid requests

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- » Trust only needs to answer valid requests
- » Request must:-
  - » Be in writing
  - » Include requestor's real name
    - » Use of pseudonyms
  - » Address for correspondence
  - » Describe information requested
- » If request invalid – give advice and assistance

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## What to do on receipt

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- » Read request!
- » Do not get diverted by language used
- » Check request is clear. Can you identify information requested?
  - » Answer request
  - » Provide advice and assistance

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## Answering request

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- » Recognise request is covered by the information access regime
- » Which regime?
  - » DPA
  - » EIR
  - » FOIA
  - » Other
- » Make sure request is clear and you can identify information requested
- » Identify you hold the information requested
  - » Is it in the publication scheme?

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## Duty to advise and assist

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- » On receipt of a request the Trust must:
  - Inform applicant if it holds information
  - Provide advice and assistance to applicants (s16):-

“to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”
  - Provide information held within 20 working days unless exempt



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## What information is held by the Trust?

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- » All documents, emails, recorded information is held
- » Requirement to carry out a reasonable search
- » Information held if on Trust's systems unless they merely store it
- » Personal emails
- » Facebook and twitter
- » Information held by contractors

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## Information held by contractors

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- » Information held by contractors is held by the Trust. For example:
  - contractor providing information storage services
  - service provider (outsourcing)
- » Is information processed by the contractor on behalf of the Trust?
- » Review contract terms to establish if information held on behalf of the authority
- » Do contract terms entitle Trust to access and use data held by the contractor?

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## Who can you make a request to?

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- » Request can be made to public authorities
- » What is a public authority?
- » Schedule 1 listed bodies
- » Authorities designated by order as exercising functions of public nature or providing services under contract which are functions of a public authority
- » Publicly owned companies (Protection of Freedoms Act 2012)
- » Extension of the bodies covered

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## Responding to requests (1)

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- » Duty on Trust to provide the information subject to:-
  - exemptions
  - procedural reasons
- » Duty to provide information promptly and in any event within 20 working days
- » Extension to 20 working days
  - No obligation to provide information within that time period where:-
    - fees requested and not paid
    - further information requested to clarify request

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## Responding to requests (2)

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- » Applicant entitled to:-
  - copy of the information
  - reasonable opportunity to inspect the record
  - summary of the information

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## Consulting Third Parties

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- » No legal obligation to notify third parties but section 45 code of practice states it is good practice to do so where information likely to affect third party's interests
- » Trust should notify affected parties it has received a request
- » Request comments within limited period
- » Make decision on own conclusion but may take into account third party representations

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## Refusing requests

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- » The Trust can refuse a request if:-
  - Exemption applies
  - Costs exceed appropriate limit
  - Applicant refuses to pay charges
  - Applicant falls to provide further information when asked
  - Vexatious requests
  - Identical or similar requests

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## The exemptions

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- » Absolute and qualified exemptions
- » Absolute exemptions:-
  - Apply if information fits in exemption. No public interest test
- » Qualified exemptions apply where information fits within exemption and public interest in maintaining exemption outweighs interest in disclosing information
- » Some qualified exemptions also subject to a prejudice test (e.g. harm)
- » NB. No requirement on public authorities to rely on exemption even if one applies



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## Key Exemptions

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- » Section 21 – information accessible by other means
- » Section 22 – information intended for future publication
- » Section 36(2) – effective conduct of public affairs
- » Section 38 – health and safety
- » Section 40 – personal data
- » Section 41 – confidential information
- » Section 42 – legal professional privilege
- » Section 43(1) – trade secrets
- » Section 43(2) – commercially sensitive information

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## Section 40 – Personal Data (1)

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- » Applicant's personal data exempt (DPA)
- » If applicant not the data subject information exempt if:-
  - release would breach a data protection principle
  - release would breach section 10 DPA
  - data subject would not have access under section 7(1)(c) DPA

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## Section 40 – Personal Data (2)

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- » Do not disclose if valid breach of data protection principle
- » Principle 1 – is data fair and lawful and in accordance with a schedule 2 or 3 condition?
- » Schedule 2 conditions:
  - consent; or
  - legitimate interest

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## Section 40 – Personal Data (3)

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- » Legitimate interest:
  - legitimate public interest in disclosure
  - disclosure necessary to meet public interest
  - disclosure must not cause unwarranted harm to interest of individual
- » Factors to consider:
  - does information relate to public/private life?
  - seniority
  - potential harm or distress
  - objections made by individual to disclosure
  - reasonable expectations of individual

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## Section 41 – Confidential Information

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- » Obtained by public authority from a third party
- » Disclosure would be an actionable breach of confidence
- » High test – merely indicating information confidential not enough
- » Confidential nature of a document will change over time

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# Confidential Information Test

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- » Information has necessary quality of confidence
- » Obligation of confidence
- » Information used without owner's authority to their detriment
- » Public interest test (information should be withheld unless public interest in disclosure outweighs the public interest in maintaining it)
- » *Derry City v Information Commissioner*

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## Section 43(1) – Trade Secrets

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- » Information used in a trade or business
- » Disclosure would be likely to cause real or significant harm
- » Owner must limit dissemination

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## Section 43(2) – Commercial Interests

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- » Information which would prejudice (harm) someone's commercial interests if disclosed
- » Harm could be:-
  - damage to business reputation or investor confidence
  - determined impact on commercial revenue
  - weaken position in a competitive market
- » How was information obtained? Is there an expectation of commercial confidence?
- » Trust needs to demonstrate it is circulating/reflecting concerns of the contractor – Trust must not speculate



- » The refusal notice must:-
  - Be issued where refusing on grounds request is vexatious, repeated, where costs exceed the appropriate limit or an exemption applies
  - Be in writing and given within 20 working days
  - Identify the specific exemption used and explain why it applies

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## Refusal Notices (2)

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- » Refusing on basis of exemptions:-
  - Specify relevant exemption including section and sub-section
  - Give authority's full reasoning
  - For prejudice based exemptions, identify the harm
  - For qualified exemptions, explain the public interest test factors
  - Specify all exemptions that may apply
  - No need to specify exemptions if are neither confirming or denying you hold the information

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## Information Commissioner's Powers

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- » The ICO has a range of powers:-
  - *Assessments* – an assessment can be carried out with the assistance of the authority to assess compliance with the s45 and s46 codes of practice
  - *Decision notices* – individuals have a right to apply to the ICO for a decision as to whether the authority has processed the request in accordance with the Act – binding unless appealed
  - *Enforcement notices* – require an authority to take specified steps to remedy persistent failings e.g. IPCC 11 June 2010
    - Backlog of requests/many out of time
    - 9 complaints about failure to deal with requests in timescale
    - ICO feared IPCC would not comply with own proposals
  - *Practice recommendations*
  - *Undertakings*

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## Appeals on public authority decision

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- » Internal review
- » Information Commissioner decision notice
- » First Tier Tribunal
- » Upper Tribunal
- » Court of Appeal
- » Supreme Court

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# Environmental Information Regulations

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- » EIR provides alternative information access regime for environmental information
- » Wider definition of public authorities
- » Similar exemptions
- » 20 days to answer (40 if complex)

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Any Questions?

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