



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

**IN THE MATTER OF A PROPOSED APPEAL BY DAVID HOLLAND AGAINST
THE INFORMATION COMMISSIONER**

RULING ON PRELIMINARY ISSUE OF JURISDICTION

1. The Appellant is concerned at a perceived lack of transparency within the Intergovernmental Panel on Climate Change (“IPCC”), a body in which the UK government participates. In particular, he believes that the UK Government, in the form of the Department of Energy and Climate Change (“DECC”), has been wrong to co-operate in maintaining confidentiality during the process by which the IPCC gathers and assesses evidence for climate change and its effects and prepares assessment reports on its findings and on policy options that may be available to governments in this area.
2. The Appellant complained to the Information Commissioner that the government had failed to comply with its obligations proactively to disseminate certain information, which he specified, concerning the assessment process leading up to the IPCC Fifth Assessment Report. He said that this was contrary to its obligations under regulation S4(a) and (b) of the Environmental Information Regulations 2004 (“EIR”) to disseminate information particularly by electronic means. The Information Commissioner wrote to the Appellant on 29 November 2011 explaining why he considered that the DECC was not in breach of regulation 4. His reasons are not relevant to this ruling. What is relevant is the final two paragraphs, in which he wrote:

“Finally, I should perhaps explain that a decision notice has not been served as your complaint does not relate to a request for information and therefore does not fall within section 50 of the [Freedom of Information Act 2000]. Had the Commissioner found DECC in breach of its duties under regulation 4 of the EIR he would have had to consider serving an enforcement notice under section 52.

“In addition, as the Commissioner has not made a decision under section 50, there is no right of appeal to the Information Tribunal against his decision. The only route of legal challenge to the Commissioner’s decision would be a judicial review.”

3. The Appellant disagreed with the Information Commissioner’s view. He believes that judicial review places an unreasonable burden on anyone attempting to force a public authority to comply with its regulation 4 obligations, especially as information created during the process of, or leading to, policy formulation, needed, in his view, to become available to the public during the course of that process, so that the public had an opportunity of fully informed participation in it.
4. The Appellant believes that, on a proper construction of the relevant provisions, a decision by the Information Commissioner in respect of regulation 4 (proactive dissemination of information), should be capable of being appealed to this tribunal in the same way as a regulation 5 decision (making information available on request). The Information Commissioner considers that the appeal process via this Tribunal applies only to the latter.
5. The text of regulations 4 and 5 is set out in the Schedule to this ruling.
6. The Appellant lodged an Appeal on 23 December 2011 in which he acknowledged that an issue arose as to whether or not this Tribunal had jurisdiction to consider the substance of his appeal. I therefore directed that the jurisdiction issue should be considered, as a preliminary issue in the Appeal, in compliance with the Tribunal’s obligation to strike out an appeal under the Tribunal Procedure (First-

tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the Rules”). I invited both the Information Commissioner and the Appellant to lodge written submissions on the issue, which they both did.

7. The appeal process from a decision of the Information Commissioner under the EIR is governed by regulation 18, which reads:

“(1) The enforcement and appeals provisions of the [FOIA] shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in this regulation.”

8. Regulation 18(4) then provides that the enforcement and appeals provisions of the FOIA shall be adapted in certain respects, for the purposes of an EIR appeal. The effect is that FOIA section 50(1) must be read as follows for the purpose of this ruling:

*“Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of **Parts 2 and 3 of [EIR].**” [the bold print indicates the text substituted in order to give effect to regulation 18(1).]*

9. The Appellant acknowledges that section 50 is limited to a complaint about the manner in which a “request for information” has been dealt with, but he stresses the words “in any specified respect” and argues that this should mean that any provision appearing in Parts 2 or 3 is one to which the right of complaint applies. He points out that both regulation 4 and regulation 5 fall within Part 2 of EIR.

10. I do not think that the Appellant’s proposed interpretation is correct. The adapted form of section 50 means that a complaint to the Information Commissioner under EIR may be made only if it satisfies two requirements. First there must have been a request for information and, second, the request must have been dealt with in a manner that is inconsistent with a requirement imposed on the relevant public

authority by one or more of the regulations set out in Part 2 or Part 3 of EIR. This is consistent with the content of those two parts of EIR, which include a number of provisions regarding the handling of a request.

11. The Appellant argues that if, as I have found, it is necessary to find that there has been a request before a complaint may be made to the Information Commissioner, he satisfies the requirement because he carried out online searches of the DECC records for the information he felt the DECC should have published. He argues that each search, conducted through the DECC website, did constitute a “request”.

12. I do not believe that activating a search facility made available to website visitors may properly be characterised as a “request”. It is an electronic process by which a visitor may access all the information that has been included among the published, searchable information. Describing that process as a request strains the natural meaning of the word and renders meaningless the distinction, which EIR is clearly intended to create, between the obligation of a public authority to store information in a place where it may be browsed or searched (regulation 4), and the obligation to respond to a member of the public who asks it to locate and provide information that it holds (regulation 5). It is a distinction that forms the basis for the right of a public authority (implicit in regulation 6(1)(b)) to simply refer a requester to the publicly assessable information if the requested information is already available there.

13. Both the Appellant and the Information Commissioner place reliance on the EU Directive which EIR is designed to implement (Directive 2003/4/EC) and the Aarhus Convention to which both the UK and EU have signed up. However, I believe that the language of EIR and FOIA is clear enough to interpret, without the need to look elsewhere for guidance, and I do not believe that the mechanisms for review or appeal, embedded in our national law, are inconsistent with the

requirements placed on the UK. Nor do I think that the importance of the subject matter (which the Information Commissioner acknowledged and I accept) may be taken as justification for simply overruling the clear language of EIR, as the Appellant appears to suggest.

14. The outcome of an investigation into a complaint brought under FOIA section 50 is that (subject to exceptions that are not relevant here) the Information Commissioner is required to make a decision (FOIA section 50(2)) and to serve on the complainant and the relevant public authority a “decision notice” (section 50(3)(b)).

15. An appeal to this Tribunal from a decision notice is governed by FOIA section 57 which provides:

“(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.”

16. An appeal only lies, therefore, against a decision notice created under section 50 at the end of an investigation under that section. And, as I have already concluded, a section 50 investigation may only be undertaken if there has first been a request for information. For the reasons given there has been no request in this case.

17. It follows that the letter written by the Information Commissioner to the Appellant on 29 November 2011 was not a “decision notice” and accordingly this Tribunal has no jurisdiction to determine the Appellant’s claim that the conclusions recorded in it are wrong. I therefore strike out the appeal pursuant to my power to do so under rule 8(2)(a) of the Rules.

Chris Ryan
Judge

22 February 2012

SCHEDULE

EIR Regulation 4

“4(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds—

- (a) progressively make the information available to the public by electronic means which are easily accessible; and*
- (b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.”*

(2) For the purposes of paragraph (1) the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1st January 2005 in non-electronic form.

(3) Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.

(4) The information under paragraph (1) shall include at least—

- (a) the information referred to in Article 7(2) of the Directive; and*
- (b) facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.*

EIR Regulation 5

5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used.

(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.