

## **Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004**

### **Decision Notice**

**Date: 20 October 2009**

**Public Authority:** Department for Environment, Food and Rural Affairs  
**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

### **Summary**

---

The complainant requested a copy of the UK government's response to the European Commission's Reasoned Opinion concerning Whitburn storm water pumping station. As part of the first phase of infraction proceedings that can lead to a Member State being referred to the European Court of Justice, the Reasoned Opinion acts as a formal determination that a Member State, in this case the UK, is in breach of its obligations under EU law. The Department for Environment, Food and Rural Affairs ("Defra") refused the request under regulation 12(5)(a) and 12(5)(b) of the Environmental Information Regulations. The Commissioner considers that Defra was correct to withhold the information under 12(5)(a) and has therefore decided not to uphold the complaint.

### **The Commissioner's Role**

---

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

### **The Request**

---

2. On 1 August 2008, the complainant emailed the Department for Environment, Food and Rural Affairs ("Defra") to ask that, under the rights conferred to him by the EIR or the Act, he be provided with:

“...a copy of the UK [United Kingdom] response to the EU [European Union] Reasoned Opinion in regard to Whitburn Storm Water Pumping Station.”

This had been the culmination of earlier communications, in which the complainant had apparently tried to convince Defra of the deficiencies of Whitburn pumping station (“the station”).

3. Defra replied to the request on 28 August 2008. It informed the complainant that the UK government’s response was environmental information for the purposes of regulations 2(1)(a), 2(1)(b) and 2(1)(f) of the EIR. Defra then went on to explain that, although it had weighed up the public interest in disclosure, it had decided that the information was subject to the exceptions provided by 12(5)(a) and 12(5)(b) of the EIR, and was therefore not obliged to release the information. Later on 28 August 2008, the complainant emailed Defra to make an additional information request (which is not part of this case) and to ask that Defra review its decision to withhold the requested information.
4. In an email of 24 October 2008, Defra notified the complainant that, upon review, it considered the requested document to be environmental information by virtue of regulations 2(1)(a) and 2(1)(c) of the EIR. Defra then moved on to confirm that its original decision had been upheld, stating that currently:

“[t]he European Commission’s Reasoned Opinion and the UK’s response are part of the initial phase of live infraction proceedings. This can be followed by a second phase, should the Commission wish to refer a case to the European Court of Justice.”
5. In view of these ongoing infraction proceedings, Defra considered that to disclose the UK’s response would adversely affect international relations (regulation 12(5)(a)) and the course of justice (regulation 12(5)(b)). To support its view, Defra directed the complainant to two previous decisions that it thought pertinent to the matter:
  - European Court of Justice - *Petrie v European Commission*
  - Information Commissioner - Department for Constitutional Affairs (“DCA”)

## Background to the Request

6. The information requested relates to the implementation of the EU Urban Waste Water Treatment Directive (91/271/EEC) (“the Directive”). The aim of the Directive, introduced in 1991, was to “protect the environment from the adverse effects of...waste water discharges.” Each EU member state then adopted a national legislation in accordance with the Directive.
7. In April 2003, the European Commission (‘EC’) issued written warnings to the UK about what it considered to be violations of the Directive in the areas of Torbay, Whitburn and Kilbarchan. Although the UK government responded on how it planned to remedy the violations, the EC later judged that the problems remained.
8. In a statement of 4 April 2006 (ref: IP/06/444), the EC advised that it had:

“...decided to pursue legal action against the United Kingdom over a breach of EU rules for the collection and treatment of urban waste water. The UK has received a final warning before possible Court action for a case which concerns insufficient collection and treatment facilities... This results in untreated urban waste water being discharged directly into rivers or sea, causing pollution of the environment and health hazards.”

9. In the event, the EC decided to address a Reasoned Opinion to the UK under article 226 of the Treaty Establishing the European Community (“the Treaty”). This set out the reasons why the EC considered there had been an infringement of EU law, and serves as a final written warning in the infraction proceedings being taken against the UK. If the UK fails to comply with the breaches addressed in the Reasoned Opinion, the EC may decide to bring the case before the European Court of Justice.

## The Investigation

---

### Scope of the case

10. On 8 November 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider the Council's decision to refuse to provide the information.

### Chronology

11. On 16 January 2009, the Commissioner wrote to the complainant stating that, from the arguments he had before him, his preliminary assessment of the case had found that regulation 12(5)(a) of the EIR was engaged and that the public interest was in favour of maintaining the exception. The Commissioner therefore supported Defra's refusal to release the requested information.
12. The complainant telephoned the Commissioner on 19 January 2009 to voice his disagreement with the Commissioner's findings. Specifically, the complainant took the view that the Commissioner had failed to give due attention to the alleged inaccuracy of the information that the UK government was presenting to the EC in response to the EC's Reasoned Opinion. It was agreed that the complainant would send the Commissioner an account of his additional arguments before any further action was taken.
13. On 25 January 2009, the complainant emailed the Commissioner a summary of his arguments, citing conditions attached to the functions of the station as evidence, and including various emails received from Defra in the course of his recent communications. The spine of the complainant's arguments was:

- that it was intuitively wrong for the Commissioner to consider that the future ability of the UK to negotiate with the EC on this issue should supersede “the interests of the people of the UK and their wellbeing.”
- that the “UK government had lost their ability to negotiate with the EC a long time ago, when in 2001 the UK Secretary of State decided to reduce the scope of the Public Inquiry (into pollution at Whitburn) under pressure from barristers employed by the Environment Agency and the Water Company.”
- that the position of the government was guided by information obtained from Northumbrian Water (“NW”) via the Environment Agency (a non-departmental body of Defra). The complainant questioned the objectivity of NW as it represented a profit-making company that, as the overseer of the sewage treatment system, would be affected by any decisions made in this regard. The complainant therefore argued that the information should be open to challenge.
- that the station was built under conditions of licence that have found to be not fit for purpose, and which have therefore allowed pollution problems to continue in breach of EU regulations.
- that the length of time it is taking for the EC to conclude a negotiated settlement is unhelpful given the danger caused by the pollution problems. The complainant therefore argued that the disclosure would help focus attention on the UK government’s position in this matter and thereby increase public pressure on the UK government to improve its performance.

## Analysis

---

14. In determining this case, the Commissioner has taken into account the submissions of both the public authority and the complainant. Full extracts of the relevant legislation considered in this case can also be found in the Legal Annex to this Notice.
15. However, the Commissioner has not deemed it necessary to view the withheld information as he believes the substantive issues are comparable to cases he has previously explored. Accordingly, the Commissioner’s understanding of whether regulation 12(5)(a) of the EIR applies here, revolves around whether it is reasonable to argue that the UK government should be allowed the space to negotiate with the EC.

## Procedural Matters

### Interpretation - the EIR

16. The Commissioner has firstly had to establish whether it is appropriate for the information to be dealt with under the provisions of the EIR. Defra has stated, in its internal review of 24 October 2008, that the UK government’s response falls

within the definition of environmental information set out at regulations 2(1)(a) and 2(1)(c) of the EIR.

17. Given the nature of the information, coupled with the lack of any objection in this regard, the Commissioner is satisfied that the EIR is the correct access-regime. However, the Commissioner feels that regulation 2(1)(b) would serve as a more encompassing definition of the information, providing that:

“environmental information’ has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).”

18. The Commissioner is aware that the UK’s response to the Reasoned Opinion directly concerns, and may come to affect, the way in which the station continues to operate. For that reason, the Commissioner considers that the requested information falls within regulation 2(1)(b) as it relates to waste and other releases into the environment.

#### **Environmental Information Regulations 2004**

19. In order to judge whether Defra was correct to withhold the requested information under conditions provided by the EIR, the Commissioner has been mindful of Regulation 12(2), which states that:

“A public authority shall apply a presumption in favour of disclosure.”

#### **Regulation 12 - Exception to the duty to disclose environmental information**

##### **Regulation 12(5)(a) - International Relations**

20. Under the EIR, a public authority may refuse to disclose information if one or more exceptions apply and if, in all circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in disclosing the information.

21. Regulation 12(5)(a) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

“international relations, defence, national security or public safety.”

In this case, Defra has maintained that disclosure would adversely affect international relations, represented here by the UK government’s exchanges with the EC in regards to the infraction proceedings.

22. The Commissioner has determined that regulation 12(5)(a) is engaged and that the requested information should not be disclosed. The Commissioner has therefore not gone on to consider whether regulation 12(5)(b) also applies in this case.
23. In coming to his decision, the Commissioner has found the two cases referred to by Defra (Petrie v EC; the ICO ruling of a decision by DCA to withhold information) particularly instructive.

### **European Court of Justice - Petrie v European Commission**

24. Mr Petrie held a post as a lecturer of 'foreign mother tongue' at an Italian university. He took the view that that, despite previous rulings by the Court of Justice, discrimination against lecturers of 'foreign mother tongue' still persisted.
25. Following a number of complaints, the EC initiated infraction proceedings against the Italian Republic, under Article 226 of the Treaty. The EC subsequently set out its views on the complaints in the form of a Reasoned Opinion. Following the Italian government's response and further procedural elements, the EC brought the matter before the European Court of Justice in June 1999.
26. However, Mr Petrie believed that the "situation presented to the Commission did not reflect the true state of affairs" and therefore requested access to a number of documents involved in the infringement proceedings. The EC had refused this request under the Code of Conduct associated with the Treaty, stating that:  
  
"it is vital that the Commission should be able to conduct investigations into issues in which it has a direct interest...while at the same time respecting the intrinsic nature of such proceedings."
27. The grounds of Mr Petrie's arguments for disclosure that are relevant here, were:
  - that there was an essential democratic basis for transparency allowing "greater confidence of citizens in the [European] Community institutions and a greater closeness of those institutions to citizens.
  - that there should not be an "unduly strict interpretation of the exception" to disclosure as this risks diminishing the principal objectives of Community policy on document access. Notably, Mr Petrie argued that the exception was based on "an absolute presumption of genuine cooperation and confidentiality in the relations between a Member State and the Commission." However, Mr Petrie stated that this spirit of cooperation was not evident in significant aspects of this case and so should not be relied on to promote confidentiality.
  - that the presumption of cooperation and confidentiality should be disregarded "if the request for the documents is made in cases in which the decision to open infringement proceedings has already been adopted' and publicised.
28. The European Court of Justice dismissed all of the arguments presented by Mr Petrie and, consequently, found in favour of the EC.

## ICO Decision Notice (“DN”) - Department for Constitutional Affairs (FS500110720)

29. To quote the opening lines of the summary decision, the “complainant requested a copy of a letter from the European Commission to the UK government regarding alleged deficiencies in the implementation of Directive 95/46/EC...the Commissioner took the view that the DCA was correct not to communicate the requested information to the complainant.”
30. DCA had initially refused the complainant’s request under a number of exemptions, including section 27(1)(c) of the Act. Amongst other arguments tailored to the case, the complainant stated that DCA was incorrect to withhold the information because:
- “The wide impact of the implementation of the Directive means the debate should not go on behind closed doors.”
  - “The request for information is limited to the complaint from the Commission and the government’s response to it. The requested information does not concern the subsequent iterative process.”
  - “Given the subject matter of the requested information, i.e. an internal dispute on the implementation of a...directive, it is not credible that its release would prejudice international relations.”
31. The Commissioner took the view that exemption provided by section 27(1)(c) of the Act was engaged. This section is the closest relative of regulation 12(5)(a). Section 27(1)(a) states that:
- “Information is exemption information if its disclosure under this Act would, or would be likely to, prejudice—
- (c) the interests of the United Kingdom abroad.”

### Considerations of the case

#### Adversely affect

32. For regulation 12(5)(a) to be engaged, it is necessary to establish that international relations would be adversely affected through disclosure. In his guidance on the subject, the Commissioner has commented that adversely affect “can be regarded as working as a harm test...[and that] some harm must be probable rather than merely likely.”
33. The Commissioner finds that the term international relations includes relations with the EC.
34. In previous cases involving section 27(1)(c) of the Act, the Commissioner has stated that harm, in the form of prejudice, can “be real and of substance if it makes relations more difficult.” Again, whilst acknowledging the manifest

differences in the legislation, the Commissioner believes that looking at whether disclosure would make relations more difficult serves as a useful standard when trying to determine whether disclosure would have an adverse affect. Section 27(1)(c) was considered in the Information Tribunal appeal *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040). The Tribunal stated that they:

“do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty”.

35. The Commissioner is aware that in government cases there will often be an element of controversy connected to an ongoing dispute or decision-making process. A critical part of the Commissioner's considerations then, has dwelt on judging what importance should be attached to the government having the opportunity to negotiate freely on behalf of the UK, with the EC. The timing of the request is therefore important. The Commissioner has concluded that to release the requested information at this time would adversely affect the ability of the UK government and the EC to work together effectively.

36. As the nature of the arguments are analogous, the Commissioner believes it is helpful here to quote directly from his DN involving the DCA:

“The DCA has argued that it is important that, during the process, the UK retains the maximum flexibility in negotiations with the Commission - this could involve the UK shifting its position from that adopted in its initial responses. The Commissioner accepts that disclosing the requested information at this stage...would make it more difficult for the UK to negotiate flexibly with the Commission...”

37. As implied, by disclosing information pertaining to live infraction proceedings there is a distinct likelihood that future relations between the government and the EC will become more difficult. The Commissioner considers that, as a consequence, the harm to the relations would be probable rather than just possible and therefore satisfies the test that disclosure would have an adverse affect.

### **The public interest**

38. Regulation 12(2) requires a presumption in favour to be applied to consideration of the public interest test under the EIR. The Commissioner also acknowledges that in the circumstances of this case, there is a strong public interest argument in favour of the release of the information.

39. The Commissioner has considered the arguments for disclosure including arguments the complainant has put forward. Whilst the Commissioner



recognises the validity of these arguments, he has felt that the most significant factor in favour of disclosure is the way in which individuals' way-of-life may be affected through problems arising from pollution and how this information may enable them to hold the government and other relevant bodies to account for their actions and debate how waste water treatment should be conducted in the future.

40. In this way, the Commissioner understands that the government's alleged infringement of European law may be having a direct impact on the local population of Whitburn and its surrounding areas. To have access to the information would allow scrutiny of the government's actions, and thereby increase the possibility of public participation in matters that directly concern them.
41. The Commissioner therefore appreciates that disclosure of the UK's response could facilitate greater public debate around this issue. Furthermore, the release of the information could potentially strengthen the public's trust in institutions that make decisions on environmental issues that have broad implications on local inhabitants.
42. However, underpinning the Commissioner's assessment is the knowledge that the EC has initiated a legal process to ensure that the UK government properly safeguards the locations in question. To influence the process at this stage may undermine the ability of the EC to expedite an outcome in line with its original aim. Consequently, the Commissioner is not convinced that the release of the information would ensure a more advantageous or speedy resolution to the issue. In terms of the public's interest in this environmental matter, an effective infraction process is also important.
43. Similarly, in reference to Petrie, the Commissioner does not feel that it has been "established that the Member State in question has acted in bad faith". As a result, the Commissioner does not accede to the complainant's position that the UK government has somehow undermined its right to privacy when negotiating with the EC.
44. Returning once more to the DN involving the DCA, the Commissioner accepts that:

"[t]here is a strong public interest in there being a stage of the infraction process during which the UK government and the Commission can exchange views in private and adopt different positions...Disclosure is likely to cause entrenchment and defensiveness in respect of the positions the two sides adopted initially...and would increase the likelihood of formal proceedings being initiated."
45. The Commissioner is mindful that the negotiation process may not necessarily lead to an amicable solution or further the co-operation between the two parties. Nevertheless, the Commissioner feels that it is important that the government is permitted space for free and frank communication with the EC, as this may encourage the dispute to be resolved in such a way that is of most benefit to the parties concerned.

46. On the basis of these considerations, the Commissioner has determined that regulation 12(5)(a) is engaged and that the public interest in favour of maintaining the exception outweighs the public interest in disclosure. The Commissioner therefore upholds Defra's decision not to release the requested information.

### **The Decision**

---

47. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the EIR.

### **Steps Required**

---

48. The Commissioner requires no steps to be taken.

## Right of Appeal

---

49. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 20th day of October 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Environmental Information Regulations 2004

#### Regulation 2 - Interpretation

##### Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

#### Regulation 12 - Exceptions to the duty to disclose environmental information

“**Regulation 12(1)** Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

“**Regulation 12(2)** A public authority shall apply a presumption in favour of disclosure.”

“**Regulation 12(5)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) 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.”