

## Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004 (Regulation 18)

### Decision Notice

Date 1 April 2009

**Public authority:** Department for Environment, Food and Rural Affairs  
**Address:** Nobel House  
Service Standards Unit, Room 540  
17 Smith Square  
London  
SW1P 3JR

### Summary

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The complainant requested from the Department for Environment, Food and Rural Affairs (DEFRA) the advice upon which the Minister for Local Government, Marine and Animal Welfare had made a decision relating to a limited decommissioning scheme for fishing vessels. DEFRA refused the request citing section 35 of the Freedom of Information Act 2000 (the 'Act'). During the course of the Commissioner's investigation DEFRA disclosed most of the requested information but continued to withhold some information by virtue of section 35 or, to the extent that the Environmental Information Regulations (EIR) applied, the exception in regulation 12(4)(e). It later introduced the exceptions in regulations 12(5)(a) and 13. The Commissioner concluded that the withheld information constitutes environmental information and that DEFRA should therefore have dealt with the request under the EIR. In failing to address the request under the EIR regime and thereby failing to specify the relevant exceptions, DEFRA breached regulation 14(3) of the EIR. In addition, it breached regulation 7(1) in exceeding the allowable extension period of 40 working days. Finally, since the Commissioner has concluded that some of the withheld information was not exempt under regulations 12(4)(e) and 12(5)(a), DEFRA therefore breached regulation 5(1) in failing to disclose this information, and regulation 5(2) by failing to provide it within the statutory time limit. The Commissioner decided that some of the requested information was properly withheld by reference to regulation 12(4)(e).

### The Commissioner's Role

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1. The Environmental Information Regulations 2004 (the '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

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2. The complainant wrote to the Minister for Local Environment, Marine and Animal Welfare on 17 May 2006 to express concerns about a recent decision with regard to a decommissioning scheme for fishing vessels. The letter contained a request for *'sight of the advice on which you made this decision'*.
3. On 13 June 2006 the relevant public authority, the Department for Environment, Food and Rural Affairs (DEFRA), informed the complainant that it was considering using the exemption in section 35 of the Act to withhold the requested information, but that it needed further time to consider the public interest test.
4. DEFRA issued a refusal notice on 26 July 2006 in accordance with section 17 of the Act, stating that the exemption at section 35(1)(a) of the Act applied to all of the requested information. The letter also set out in some detail the Minister's reasons for reaching his decision in relation to the decommissioning scheme. DEFRA explained that this letter was a confirmation of issues discussed between the Minister and the complainant on 10 July 2006.
5. On 4 August 2006 the complainant wrote again to the Minister, setting out his dissatisfaction with both the decision in relation to the decommissioning scheme, and the response to his request for information.
6. The complainant contacted the Commissioner on 23 August 2006 to complain about the way in which his request had been handled.
7. However, the Commissioner informed the complainant on 4 September 2006 that he should first request an internal review from DEFRA.
8. The complainant did so on 11 September 2006.
9. On 31 October 2006 DEFRA informed the complainant that, following the internal review, it had upheld its previous decision to withhold the requested information on the basis of section 35(1)(a) of the Act.

## The Investigation

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### Scope of the case

10. On 10 January 2007 the complainant contacted the Commissioner again to complain about the way his request for information had been handled. He expressed his view that there is a genuine public interest in understanding the reasoning for what he

considered to have been a radical shift in government policy relating to decommissioning.

### **Chronology of the case**

11. On 12 November 2007 the Commissioner contacted the complainant, seeking confirmation that he wished to pursue his complaint.
12. The complainant confirmed on the same day that he did.
13. The Commissioner contacted DEFRA on 13 December 2007, requesting a copy of the withheld information and seeking its views on whether, given the subject matter of the request, the request may have been more appropriately dealt with under the EIR rather than the Act. The Commissioner also asked whether, given the passage of time that had elapsed following the request, DEFRA would now consider disclosing the withheld information.
14. On 22 January 2008 DEFRA stated that it was now reconsidering its application of the section 35 exemption. It also provided a copy of the withheld information.
15. The Commissioner wrote to DEFRA again on 15 February 2008 to express his view that the withheld information appeared to constitute environmental information within the definition given by regulation 2(1) of the EIR.
16. On 20 February 2008 DEFRA informed the Commissioner that, having reviewed the case, it would now disclose the withheld information, subject to a number of redactions. It stated that, while it was content to continue to rely on section 35 of the Act, it could '*see there is a strong case for considering this request under the EIRs*', and to the extent that the EIR applied it would therefore rely on the exception in regulation 12(4)(e).
17. The Commissioner advised DEFRA on 29 February 2008 that it should disclose the (redacted) information directly to the complainant.
18. The Commissioner then asked the complainant on 18 March 2008 to confirm whether he was satisfied with the information which had been disclosed.
19. On 22 April 2008 the complainant replied that he remained dissatisfied with the partial disclosure.
20. The Commissioner contacted DEFRA on 30 May 2008 with various points.
21. On 26 June 2008 DEFRA responded. It agreed to disclose some further information, and provided additional arguments for withholding the remainder. In particular, it explained that the names of some officials had been withheld because they constituted personal data and therefore the exception in regulation 13 should have been cited. DEFRA also indicated that for some of the information it now wished to rely on regulation 12(5)(a) in addition to regulation 12(4)(e).

22. During a telephone conversation on 7 July 2008 the complainant agreed to withdraw the complaint in respect of the information comprising the names of officials which had been withheld by virtue of regulation 13, since his interest was in the information which consisted of advice. Accordingly, the application of regulation 13 has not been considered further in this Decision Notice.

### Findings of the case

23. The withheld information consists of a single submission dated 27 April 2006 put forward by officials to the Minister for Local Environment, Marine and Animal Welfare, which requests that the Minister make a decision about proposals for a decommissioning scheme for fishing vessels. The Minister's decision was announced on 11 May 2006. There followed a consultation conducted by DEFRA from 9 August to 20 September 2006.

### Analysis

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#### Procedural matters

##### *Access regime*

24. The first issue the Commissioner has considered is whether the request should have been dealt with under the Act or the EIR. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

*'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;...*

*...(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;...*

*...(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)...'*

25. The Commissioner notes that the purpose of any decommissioning scheme is to attempt to reduce capacity in the United Kingdom fleet. One reason for reducing capacity is to relieve pressure on existing fish stocks and so ensure a sustainable future for the fishing fleet. Taking this into account, the Commissioner considers that the decommissioning scheme constitutes a 'measure' affecting or likely to affect the

elements of the environment referred to in regulation 2(1)(a), and accordingly any information on the scheme will fall within the definition of environmental information in regulation 2(1)(c).

26. Accordingly, the Commissioner considers that the information withheld constitutes environmental information and should have been dealt with under the EIR.

#### *Refusal to disclose information*

27. Regulation 14 sets out what a public authority must do if it refuses a request for environmental information:

*'The refusal shall specify the reasons not to disclose the information requested, including -*

*(a) any exception relied on under regulations 12(4), 12(5) or 13...'*

In this case, DEFRA sought to rely on the exemption at section 35 of the Act, rather than any provisions of the EIR, and therefore failed to specify which exception applied to each element of the requested information. As the Commissioner has taken the contrary view that the request is for environmental information, he has therefore concluded that DEFRA breached the requirements of regulation 14(3) of the EIR.

#### *Exceeding allowable extension*

28. In addition, after receiving the request dated 27 May 2006, DEFRA wrote to the complainant on 13 June 2006 explaining that it needed more time to consider the public interest test in relation to the application of the section 35 exemption. The final refusal notice was not issued until 26 July 2006, 42 working days later. Under the EIR regime which applied in this case, regulation 7(1) provides that:

*'Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.'*

29. Since DEFRA exceeded the total of 40 working days allowable if an extension is claimed under regulation 7(1), it acted in breach of that regulation. (The Commissioner recognises that DEFRA was at that stage mistakenly dealing with the request under the Act rather than the EIR.)

#### **Exceptions**

30. As a result of the Commissioner's investigation, DEFRA has now disclosed the bulk of the requested information. However, it has made a number of redactions. The Commissioner considers that the remaining withheld information falls within the following categories:

- i) information that DEFRA believes may affect its relationship with international institutions, which it has withheld by reference to regulations 12(4)(e) and 12(5)(a);
- ii) information on the impact of DEFRA's decisions on representative bodies and others within the fishing industry, which it has withheld by reference to regulation 12(4)(e);
- iii) details of other policy options that were not taken forward at this stage but remain active and may be brought forward in the future, withheld by reference to regulation 12(4)(e).

31. The Commissioner has considered the exceptions cited by DEFRA for each category.

### **Exceptions – category (i)**

32. This is information the disclosure of which DEFRA believed '*may affect [its] relationship with international institutions with regard to the applicability and non-discrimination of measures*'. It cited the exceptions at regulations 12(4)(e) and 12(5)(a) to justify withholding this information.

#### *Regulation 12(4)(e)*

33. Regulation 12(4)(e) of the EIR states:

*'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -...*

*...(e) the request involves the disclosure of internal communications.'*

The Commissioner takes the view that 'internal communications' will encompass any information intended to be communicated to others or placed on file for others to consult.

34. The Commissioner notes that the document containing this information was produced by officials of DEFRA for consideration by a Minister. The Commissioner accepts DEFRA's argument that it constituted an internal communication. He therefore believes that the exception at regulation 12(4)(e) is engaged for this part of the information.

35. Since regulation 12(4)(e) is a class-based exception there is no need for a public authority to demonstrate that disclosure will cause any prejudice. However, it is a qualified exception and therefore subject to a public interest test, as set out in regulation 12(1)(b) of the EIR, which states that a public authority may refuse to disclose requested environmental information if:

*'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.'*

36. The Commissioner takes the view that there is a strong inherent public interest in releasing environmental information. It has long been recognised that in order to protect the environment it is important for people to have access to environmental information, to be able to participate in environmental decision making and have access to justice. In the words of the European Directive (2003/4/EC) from which the EIR derives:

*'Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.'*

37. The Commissioner accepts that the withheld information does relate to international issues, in that it discusses the impact of various options in the light of the wider economic benefits they may bring.

38. DEFRA has argued that there is a strong public interest in maintaining the exception in this case. This is because disclosure would damage the relationship between the United Kingdom government and the European Commission and other member states, and any such damage would not be in the public interest. In particular, DEFRA argued that disclosure would have a detrimental effect on the United Kingdom's relationship with other member states whose nationals might consider that they have or may be disadvantaged by any policy decisions made.

39. The Commissioner does not consider that DEFRA has made arguments that are relevant to the 12(4)(e) exception; these arguments are more relevant the exception under 12(5)(a). The Commissioner believes that damage to international relations as a standalone argument is not linked to the intention of the exemption, which is to allow space for internal discussion and deliberation and the impact of disclosure of internal communications on the outputs based informed by discussion and deliberation. The Commissioner has also taken into account Article 4(2) of Directive 2003/4/EC from the which EIR are derived, it states that grounds for refusal must be interpreted in a restrictive way.

40. Even if these arguments were relevant the Commissioner does not believe these arguments are persuasive. In determining what options to take forward, the Commissioner recognises that the United Kingdom government is entitled to consider its own national interest but in doing so cannot discriminate against foreign-owned vessels.

41. The Commissioner acknowledges that the issue of vessels flagged in the United Kingdom but owned by individuals from other member states has been a controversial one for many years. However, he notes that DEFRA has already disclosed the broad options considered, and the applicability of any option as regards foreign-owned vessels appears to be a valid and legitimate consideration that formed part of the decision-making process.

42. Regulation 12(2) of the EIR directs public authorities to apply a presumption in favour of disclosure. The Commissioner recognises that there is a generic public interest in

adding to the understanding of Ministerial decisions on important policy matters that have a significant impact on individuals and involve the expenditure of public money.

43. In addition, the Commissioner believes that there is a strong public interest in understanding the reasoning behind the decision in this case, as over-fishing and any decommissioning scheme remains an important public policy issue that could have major implications for the industry and those communities where the industry is economically significant.
44. Accordingly, the Commissioner believes that the public interest in maintaining the exception at regulation 12(4)(e) does not outweigh the public interest in disclosure.

*Regulation 12(5)(a)*

45. Regulation 12(5)(a) states:

*'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...'*

The relevant part of the exception in this case is 'international relations'.

46. The Commissioner believes that the threshold to justify non-disclosure because of adverse affect under regulation 12(5) is a high one. A public authority must demonstrate that disclosure would adversely affect international relations. There must be more than a theoretical risk of such adverse effect.

47. In a letter to the Commissioner DEFRA has stated:

*'Any consideration of policy with regard to fishing vessels therefore has to take careful account of the balance between ensuring that the economic benefits and value for money of domestic policy measures benefit the UK but are consistent with our obligations to avoid discriminating against EU partners. Disclosing information which reveals some of the policy thinking in fisheries... would, particularly given the history of this matter, affect the relationship between the UK and the European Commission as guardian of the Treaties. It would also have a detrimental effect on the UK's relationship with those member States whose nationals, they would argue, were disadvantaged by the chosen policy option.'*

48. The Commissioner accepts that policies in this particular area need to be considered in the light of ensuring both that the national economic interest is protected and that measures proposed do not lead to discrimination against foreign-owned vessels.
49. The Commissioner notes that issues relating to fishing policy (and in particular how to ensure that economic benefits from quotas and decommissioning schemes are kept within communities) are clearly valid ones for debate, and have been raised in public debate many times in recent years.

50. In the course of his investigation into this complaint, the Commissioner has seen no firm evidence to suggest that disclosure of the redacted information would adversely affect the UK government's relationship with the European Commission and other European Union member states. Whilst there may be a remote risk of adverse effect, this is not sufficient for the exception to be engaged.
51. For the reasons set out above, the Commissioner does not consider that the exception at regulation 12(5)(a) is engaged for the information withheld under category (i). Accordingly, he has not considered the public interest test.
52. Since regulation 12(5)(a) is not engaged by the information in category (i), and for this information the public interest test does not favour maintaining the exception in regulation 12(4)(e), the Commissioner has decided that this part of the withheld information should be disclosed.

### **Exceptions – category (ii)**

53. DEFRA also withheld information comprising the opinions of officials on the likely impact of any decision on representative bodies within the fishing industry, citing regulation 12(4)(e). The Commissioner understands that these bodies, as representatives of the fishing industry, are key partners for DEFRA.
54. DEFRA has cited regulation 12(4)(e) in order to withhold information in this category. For the reasons set out in paragraph 35 above, the Commissioner is satisfied that this exception is engaged for the entirety of the information. Accordingly, he has considered the public interest test in relation to this category of information.
55. DEFRA has argued that the public interest favours the maintenance of the exception because disclosure would be detrimental to the relationships between DEFRA itself and representative bodies in the industry. The authority has stated that such relationships are important and that it would not be in the public interest for such relationships to be jeopardised.
56. The Commissioner accepts that there are occasional statements made to and by Ministers whose disclosure might have an adverse impact on relationships between DEFRA and the industry. Furthermore, the Commissioner believes that such adverse impacts are not in the public interest, taking account of the need for protecting the space for Ministers and officials to discuss issues relating the impact of policy decision and their presentation, the Commissioner particularly notes the timing of the request (17 May 2006) was only days after the Minister announced the decision, and this would therefore still be a period during which the Minister and the government were entitled some space to defend the announced position..
57. In this particular case, the redacted information relates to the presentation of any decision and the possible political impact with regard to representative organisations. The Commissioner believes it is fair to assume that this information, if disclosed, could have an adverse effect on the relationship between public authorities and organisations within the industry.

58. On the other hand, the Commissioner recognises that there is a public interest in the disclosure of information relating to the formulation of government policy. It aids public understanding and scrutiny of decisions and can improve public debate on important policy matters. However, the Commissioner accepts that the public interest in disclosure of presentational issues is less strong than the more substantive issues already disclosed or discussed elsewhere in this Decision Notice.
59. For this category of information, the Commissioner believes that the public interest in maintaining the exception does outweigh the public interest in disclosure.

### **Exceptions – category (iii)**

60. Finally, DEFRA withheld details of policy options not taken forward but remaining a future possibility, again citing regulation 12(4)(e). DEFRA expressed its view that this information highlights potential measures which have not been taken forward in this instance but might be pursued in the future.
61. As with categories (i) and (ii), the Commissioner is satisfied that the exception at regulation 12(4)(e) is engaged, and so he has considered the public interest test in relation to this category of information.
62. DEFRA has stated that the public interest favours maintaining the exception because the redacted options may well be considered at some unspecified time in the future.
63. The submission identifies three possible options for the proposed decommissioning scheme, the detail of which has now been released. Category (iii) comprises two further possible approaches; one has been disclosed but with the associated advice redacted, and the other has been withheld in its entirety.
64. The Commissioner considers that there is a clear distinction between the options considered and any advice/opinions given on the applicability of the options. DEFRA has already disclosed the details of the three options in paragraph 10 and the option at paragraph 11, and the Commissioner is satisfied that there is a strong public interest in disclosure of all the options considered. Indeed, it is not clear to him why, in respect of only one of the options, DEFRA has sought to redact not only the associated advice but also the option itself.
65. In relation to the redactions of advice/opinion, the Commissioner takes the view that there is a strong public interest in disclosure. As well as the generic arguments set out elsewhere in this Decision Notice, there is a public interest in ensuring that the government made its decision on the basis of rational factors and that all options were evaluated fairly.
66. In favour of the public interest in maintaining the exception, DEFRA claimed that the options might be considered again in the future, and that there is therefore a strong public interest in not disclosing its thinking in respect of those options. While it is true that the issue of decommissioning has been ongoing for many years and is very likely to be raised again in the future, this argument appears to be a generic one about government thinking space. The Commissioner notes that the Information Tribunal has in several cases considered points relevant to this issue. (While it was

the exemption in section 35 of the Freedom of Information Act, which relates to the formulation and development of government policy, which was at issue in some of these cases, the Commissioner considers that they are directly relevant to this case because the internal communications at issue relate to policy options).

67. In the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Tribunal stated that *'The timing of a request is of paramount importance'*. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the *'threat of lurid headlines depicting that which has been merely broached as agreed policy'*. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a *'parliamentary statement announcing the policy...will normally mark the end of the process of formulation'*.
68. In a further case, *The Secretary of State for Work and Pensions v The Information Commissioner* (EA/2006/0040), the Information Tribunal stated that section 35(2) *'seemed to envisage policy formulation as a series of decisions rather than a continuing process of evolution'*. In that case, at the time of the request a Bill had been presented to Parliament which established the principle of introducing identity cards and paving the way for secondary legislation to establish the details of the scheme. The Tribunal took the view that the process of policy formulation could be split into two stages: the high level decision to introduce identity cards, followed by policy decisions on the details of the scheme. The Tribunal considered that the public interest in maintaining the exemption for information relating to the high level decision was reduced, even though the information could be used to inform the more detailed policy issues that were still being considered, because that high level decision had already been taken in the case.
69. This importance of timing was also considered in the High Court appeal case of *Office of Government Commerce v The Information Commissioner* ([2008] EWHC 737 (Admin)) where the information related to the Government's gateway zero review into the introduction of an identity cards Bill. The Information Tribunal decision was appealed to the High Court and that court's ruling included the view that:
- 'the Tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Government had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished. I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in finding that the importance of preserving the safe space had diminished'*.
70. The Commissioner's view is that DEFRA has failed to demonstrate that disclosure of the category (iii) information would damage consideration of the policy options in the future. The submissions and evidence provided by DEFRA did not provide a convincing argument as to how the policy lifecycle related to the decommissioning issue would be likely to develop in the future or how the information in category (iii) would be of particular relevance to future policy considerations. Giving particular

consideration to the fact that the policy decision had been taken at the time of the complainant's request, having regard to the other factors identified as being against and in favour of maintaining the exception, and bearing in mind the presumption in favour of disclosure, he has concluded that the information should be disclosed, on the basis that the public interest in maintaining the exception does not exceed the public interest in disclosure. Accordingly, the Commissioner has concluded that the information should be disclosed.

## The Decision

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71. The Commissioner's decision is that DEFRA did not deal with the request for information in accordance with the EIR, for the following reasons. In failing to address the request under the EIR regime and thereby failing to specify the relevant exceptions, DEFRA breached regulation 14(3) of the EIR. In addition, it breached regulation 7(1) in exceeding the allowable extension period of 40 working days. Finally, since the Commissioner has concluded that some of the withheld information was not exempt under regulations 12(4)(e) and 12(5)(a), DEFRA therefore breached regulation 5(1) in failing to disclose this information, and regulation 5(2) by failing to provide it within the statutory time limit. The Commissioner decided that some of the requested information was properly withheld by reference to regulation 12(4)(e).

## Steps Required

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72. The Commissioner requires DEFRA to take the following steps to ensure compliance with the Act:

- disclose the information falling within categories (i) and (iii) (outlined in paragraph 31 above, and specified in a separate Schedule which has been provided to DEFRA).

73. DEFRA must take the steps required by this notice within 35 calendar days from the date of this notice.

74. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

## Right of Appeal

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75. 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@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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 1<sup>st</sup> day of April 2009**

**Signed .....**

**Steve Wood**  
**Assistant Commissioner**

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

## Legal Annex

### Regulation 2 - Interpretation

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

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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

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- (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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (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);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and  
“working day” has the same meaning as in section 10(6) of the Act.

**Regulation 2(2)** Subject to paragraph (3), “public authority” means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
  - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
  - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
  - (i) has public responsibilities relating to the environment;
  - (ii) exercises functions of a public nature relating to the environment; or
  - (iii) provides public services relating to the environment.

**Regulation 2(3)** Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.

**Regulation 2(4)** The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(b), namely –

- (a) “data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
- (b) “the data protection principles”;
- (c) “data subject”; and

(d) "personal data".

**Regulation 2(5)** Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

### **Regulation 5 - Duty to make available environmental information on request**

**Regulation 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.

**Regulation 5(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.

**Regulation 5(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.

**Regulation 5(4)** For the purposes of paragraph (1), where the information made available is compiled by or on behalf of public authority it shall be up to date, accurate and comparable, so far as public authority reasonably believes.

**Regulation 5(5)** Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, 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 the standardised procedure used.

**Regulation 5(6)** Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

### **Regulation 11 - Representation and reconsideration**

**Regulation 11(1)** Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

**Regulation 11(2)** Representations under paragraph (1) shall be made in writing to public authority no later than 40 working days after the date on which the applicant believes that public authority has failed to comply with the requirement.

**Regulation 11(3)** public authority shall on receipt of the representations and free of charge –

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement.

**Regulation 11(4)** A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

**Regulation 11(5)** Where public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

### **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(3)** To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

**Regulation 12(4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

**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;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –

- (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
  - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

**Regulation 12(6)** For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

**Regulation 12(7)** For the purposes of a response under paragraph (6), whether information exists and is held by public authority is itself the disclosure of information.

**Regulation 12(8)** For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

**Regulation 12(9)** To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

**Regulation 12(10)** For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

**Regulation 12(11)** Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

## **Regulation 14 - Refusal to disclose information**

**Regulation 14(1)** If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

**Regulation 14(2)** The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 14(3)** The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

**Regulation 14(4)** If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

**Regulation 14(5)** The refusal shall inform the applicant –

- (a) that he may make representations to public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.