

Freedom of Information Act 2000 Environmental Information Regulations 2004

Decision Notice

Date: 25 January 2010

Public Authority: Department of Energy & Climate Change
Address: 3 Whitehall Place
London
SW1A 2HD

Summary

The complainant requested information regarding the cost of nuclear plants and the management of radioactive waste and decommissioning. The public authority initially applied a number of exemptions under the Freedom of Information Act ("the Act") to the requested information. However, it also recognised that in the event that some of the information was environmental, a number of exceptions under the Environmental Information Regulations 2004 ("the EIR") would apply. During the course of the Commissioner's investigation the public authority argued that some of the information it had initially considered to be relevant in fact fell outside of the scope of the request. The Commissioner has concluded that some of the information identified by the public authority did fall outside of the scope of the request but that other material fell within it. He has found that all of the information within the scope of the request should have been considered under the EIR and that some of it constitutes information on or relating to emissions.

The Commissioner has concluded that the exceptions in Regulations 12(5)(e) to (g) cannot be relied upon as a basis for withholding the information by virtue of Regulation 12(9). In relation to the independent consultant reports, the Commissioner has found that they were incorrectly withheld on the basis of 12(4)(e) as they do not constitute internal communications. The Commissioner has concluded that the remainder of the withheld information did constitute internal communications and therefore the exception in Regulation 12(4)(e) was engaged. However, he has found that the public interest in maintaining this exception at the time of the request did not outweigh the public interest in disclosure. The Commissioner also finds that disclosure of personal data identified by the public authority would not have breached the data protection principles and therefore Regulation 13(1) did not apply. The Commissioner has ordered the public authority to disclose the information within the scope of the request that has not already been provided to the complainant within 35 days from the date of this Notice.

The Commissioner's Role

1. The Environmental Information Regulations (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.

Background

2. The complainant made his information request to the Department of Trade and Industry (DTI). This organisation subsequently was incorporated within the Department of Business and Regulatory Reform (BERR) in June 2007. Following a Ministerial announcement in October 2008, the responsibility for energy and climate change policy was passed respectively from BERR and the Department for Environment, Food and Rural Affairs (Defra) to the newly created Department of Energy and Climate Change (DECC). Responsibility for two Departmental Strategic Objectives, relating to energy security and supply, and managing energy liabilities, passed from BERR to DECC.
3. In light of the above, the public authority in this case is actually DECC. For consistency and ease of reference, the Commissioner has referred to DTI in relation to the initial handling of the request. However, the subsequent complaint to the Commissioner was handled by DECC and therefore the remainder of the notice refers to DECC as the public authority.
4. In November 2005 the Government announced a review of progress against the UK's medium and long-term energy policy goals set out in the 2003 Energy White Paper. As part of the Energy Review, the Government launched an Energy Review consultation on 23 January 2006. The consultation ran for three months and finished on 14 April 2006. The Energy Review report entitled, 'The Energy Challenge', was published on 11 July 2006. Subsequently the DTI commissioned the Energy White Paper in 2007. This report, which was published in May 2007, set out the Government's international and domestic energy strategy in four separate areas:
 - aiming to cut CO₂ emissions by some 60% by about 2050, with real progress by 2020;
 - maintaining the reliability of energy supplies;
 - promoting competitive markets in the UK and beyond;
 - and

- ensuring that every home is heated adequately and affordably¹.
5. This paper also showed how the Government had implemented the measures set down in previous reports, including those in the 2006 Energy Challenge report². Alongside the Energy White Paper 2007, DTI issued the consultation document on the siting of new nuclear power stations. This was subsequently published by the BERR in January 2008 as the Nuclear White Paper³.

The Request

6. On 24 February 2007 the complainant submitted the following request to DTI:

"I would like all of the reports and advice prepared in association with the Energy Review and follow-up activities for the Government by departmental officials and consultants contracted by the DTI or other government Departments or non-departmental public bodies reporting to the DTI, Defra or the Devolved Administrations on the costs of prospective new nuclear plants and the full management of radioactive waste arising and decommissioning, including financial projections of security costs, and any fiscal incentives or subsidies envisaged for nuclear plant construction and waste management. I would request each of these documents in full un-redacted form".

7. DTI contacted the complainant on 20 March 2007 as it wished to clarify the nature of the complainant's request. It asked the complainant to confirm whether, within the terms of his request for 'advice ... by departmental officials', he meant formal advice provided to Ministers. DTI confirmed its understanding of the request to be for reports and advice about the following:

- costs of prospective new nuclear plants,
- costs of the full management of radioactive waste arising[s],
- costs of decommissioning,
- financial projections of security costs, and
- fiscal incentives or subsidies envisaged for nuclear plant construction.

¹ http://www.decc.gov.uk/en/content/cms/publications/white_paper_07/white_paper_07.aspx

² <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk//energy/review/page31995.html>

³ <http://www.berr.gov.uk/files/file43006.pdf>

DTI also advised the complainant that it had published information on nuclear costs, waste and decommissioning on its website⁴.

8. The complainant contacted DTI on 22 March 2007 to clarify his request. He advised DTI that in terms of 'advice', he meant formal advice such as internal memoranda or informal advice, such as 'post-it notes' on Ministerial papers. He also confirmed that the categories of information listed by DTI as those of interest to him were correct. He also indicated that, if the DTI was unable to collate information from the devolved administrations or the Department for Environment, Food and Rural Affairs (Defra), then he would still like it to consider reports prepared by DTI officials, consultants to DTI, or consultants to DTI's NDPBs.
9. On 25 April 2007, DTI contacted the complainant, advising that it had decided to refuse his request. It explained that the information was being withheld on the basis of sections 22, 41 and 43 of the Act. It also cited section 35(1)(a) and in the event that section 35(1)(a) did not apply, sections 36(2)(b) and 36(2)(c) would apply in the alternative. DTI took the view that if any information contained within the withheld information was environmental, it would be withheld on the basis of regulations 12(4)(e), 12(5)(e), 12(5)(f) and 12(5)(g) of the EIR. DTI considered the public interest test where relevant and found that it favoured maintaining the exemptions and exceptions cited. DTI limited its consideration to reports prepared by its officials, consultants to the DTI or consultants to the DTI's NDPBs.
10. On 3 May 2007, the complainant requested that DTI review its decision to withhold the requested information.
11. On 23 May 2007, DTI disclosed a document it had previously withheld under section 22 of the Act to the complainant. This was the report prepared by Jackson Consulting.
12. On 5 June 2007, DTI contacted the complainant to confirm that an internal review had been carried out as requested. DTI confirmed that a decision had been made to uphold the original decision not to release the requested information.

The Investigation

Scope of the case

13. On 28 June 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He advised the Commissioner that the information requested related to

⁴ <http://www.dti.gov.uk/energy/review/page31995.html>.

a consultation by DTI in relation to nuclear policy. This consultation was to conclude in October 2007.

14. During the course of the Commissioner's investigation DECC released a number of documents to the complainant. However the complainant asserted that he ought to have been provided with all the information at the time of his request. The Commissioner is required to consider whether the public authority appropriately dealt with the request at the time it was submitted. Therefore he has focussed his investigation on whether DTI (now DECC) was correct to refuse to disclose the information within the scope of the request at the time it was submitted.
15. As outlined above, the public authority provided the complainant with a copy of the report prepared by Jackson Consulting on 23 May 2007. The complainant advised the Commissioner that he was satisfied with the release of this report and did not wish to pursue the issue of its disclosure as part of his complaint. Therefore the Commissioner has excluded the Jackson Consulting from the analysis and findings below and has not commented on it further in this decision notice.
16. When the public sought clarification of the complainant's request, the public authority advised the complainant that they would only be required to provide him with information that they held and not information which may be held by other public authorities such as Defra or the Devolved Administrations.
17. In response to this, the complainant accepted that separate information requests may have to be lodged to these authorities. However, the complainant asked the public authority to provide him with reports prepared by DTI officials and consultants to NDPB's of DTI.
18. Given that the complainant acknowledged that all the information he requested may not actually be held by DTI, and the fact that this was not raised as an issue during the course of the Commissioner's investigation, he has only considered the information actually held by DTI for the purposes of his investigation and not any information that may have been held by Defra or the Devolved Administrations.

Chronology

19. Regrettably there was a delay of 20 months before the Commissioner's investigation began. On 14 April 2009, the Commissioner contacted the complainant and DECC in relation to this case. The Commissioner asked DECC to provide him with copies of all of the withheld information in this case.
20. On 29 May 2009, the Commissioner received all the withheld information from DECC. This comprised a total of 26 documents, although as noted above one of the documents was released to the

complainant in May 2007. Accordingly, the outstanding withheld information comprises 25 documents.

21. On 2 June 2009, the Commissioner contacted DECC to ascertain why the requested information was considered exempt under the Act instead of the EIR. The Commissioner contacted DECC on 24 June 2009 and on 3 August 2009 to request a response to his enquiries.
22. On 4 August 2009 DECC responded to the Commissioner. It confirmed that it was of the view that some of the withheld information was not 'environmental information' within the meaning of the EIR. DECC provided the Commissioner with a schedule of documents that showed which documents fell within the EIR and which were exempt under the Act. These documents consisted of communications between Ministers and Government as well as a number of reports carried out by independent consultants. DECC advised that it had reviewed whether or not further information could now be released to the complainant in light of the passage of time since the request was submitted. It concluded that one of the 25 documents (item 16 in the confidential annex to this decision notice) could now be released but maintained that at the time of the original request it had been appropriately withheld. DECC provided this information to the complainant on 22 September 2009.
23. The Commissioner contacted DECC on 4 September 2009 with further enquiries about why the Commissioner deemed all the withheld information to fall within the EIR. In relation to the independent reports he asked for more details about the circumstances in which they were commissioned. He also drew DECC's attention to regulation 12(9), which prevents public authorities from citing regulations 12(5)(d) to (g) in relation to environmental information relating to information on emissions, and asked for further representations on this point.
24. DECC contacted the Commissioner by telephone on 1 October 2009. It advised him that it had completed another review of the requested information and was seeking further advice in this matter. DECC indicated to the Commissioner that it felt that it may be possible to resolve the case by way of informal resolution. It asked for further time to provide its submissions.
25. Further correspondence and communications were exchanged between the Commissioner's office and DECC in relation to this matter. On 10 November 2009, DECC provided the Commissioner with its final submissions.
26. DECC advised the Commissioner that, following its lengthy review of the withheld information, a number of documents that had previously been withheld were now considered to be outside the scope of the complainant's request. It provided the Commissioner with a schedule

indicating which documents or sections of documents were now deemed to be irrelevant.

27. DECC also explained that it had reconsidered the information in view of the passage of time since the request and in light of the fact that most of the material had now been set out in the Nuclear White Paper. It concluded that the public interest balance had now changed and was now in favour of releasing much of the information that came within the scope of the request. However, DECC specifically explained that it still believed it was correct to withhold the requested information at the time that the information request was initially submitted. Nevertheless it was prepared to release some of the withheld information on a voluntary basis, having completed the review of the information, in an attempt to informally resolve the complaint.
28. DECC provided the Commissioner with a schedule outlining the documents that it considered could be released either in full or in part, with exempt information redacted. This schedule also contained details of information that DECC deemed to fall within the scope of the Act rather than the EIR and where relevant which exemption under the Act applied. DECC also provided arguments in the alternative about which exceptions would apply, if the withheld material was deemed to fall within the EIR.
29. In relation to the documentation that was still to be withheld, DECC reiterated the arguments previously made about why it should be withheld. DECC also advised the Commissioner that where the information was subject to a qualified exemption or exception, the public interest test had been considered but it was found to still favour maintaining the exemption rather than disclosing the information.
30. The Commissioner notes that DECC considered some of the information could not be disclosed on the basis of section 40(2) of the Act or, in the alternative, 13(1) of the EIR. The Commissioner notes that no reference to section 40(2) or 13(1) was made by DECC until the Commissioner's investigation was at a very advanced stage.
31. DECC also provided the Commissioner with representations regarding the application of regulation 12(9) and why it was not considered to be relevant. These representations will be discussed in greater detail below.
32. The complainant contacted the Commissioner on 18 November 2009 to confirm that he had received copies of the requested information that DECC considered could be released. He highlighted that DECC had not altered its view that the material had been appropriately withheld at the time of the request. On 19 November 2009 the complainant indicated that he required a decision notice setting out the Commissioner's conclusions about the public authority's original decision to withhold the requested information.

Analysis

33. It is important to re-iterate at the outset that the Commissioner is required to consider the way in which the public authority processed the request at the time it was made. In this case he has considered the following:
- What information was within the scope of the request?
 - Whether any, or all, of the information within the scope of the request is environmental?
 - Whether or not the public authority was correct to rely upon the exemptions or exceptions cited as a basis for refusing the request?
34. Where a public authority introduces new exemptions or exceptions during the course of the Commissioner's investigation which it deems would have applied at the time of the request, the Commissioner does have discretion as to whether he should consider those provisions.

What information is within the scope of the request?

35. DECC informed the Commissioner that, following a review of the withheld information, 7 documents which were previously considered to be within the scope of the complainant's request were no longer deemed relevant. These documents were considered irrelevant in their entirety. DECC also considered that a number of other documents originally deemed to fall within the scope of the request contained information which was not in fact relevant to it. DECC informed the Commissioner that each document had been considered on a paragraph by paragraph basis to decide whether or not the information was relevant.
36. The Commissioner considered each document at length in order to determine whether or not the document fell within the remit of the request as confirmed by the complainant on 22 March 2007. For the avoidance of any doubt, the request has been interpreted as covering information within reports or advice, prepared in association with the Energy Review or follow up activities and created by DTI officials, consultants to the DTI or consultants to the DTI's NDPBs on the categories the complainant agreed were of interest to him in his email dated 22 March 2007. These categories focussed on costs, financial projections and incentives associated with various aspects of the nuclear proposals.
37. The Commissioner concluded that 5 documents were correctly identified by DECC as being entirely outside the scope of the complainant's request. He has reached this conclusion on the basis that the information within those documents is not in fact about the issues outlined above. Where DECC identified only certain sections of

particular documents as being relevant to the complainant's request the Commissioner has considered whether that assertion is correct. He has concluded that some sections do contain material on costs or financial projections as specified by the complainant and therefore these fall within the scope of the request. However he has equally concluded that some information is not about these issues and therefore is indeed irrelevant to the request. The Commissioner cannot provide further details in this regard without revealing the content of the withheld information. Therefore he has indicated in the confidential annex (to be served on DECC) which information is within the scope of the request and which is not.

38. The Commissioner also identified some information in the course of reviewing the withheld information, namely the advice elements, which he considered fell outside the scope of the request on the basis that it was very similar to the material that DECC had identified and which he had agreed was irrelevant. This was again because the material was not about the topics identified in the complainant's request. He also identified that one document was outside the scope of the request because it was created after the date that the request was clarified. The Commissioner has identified this information in the confidential annex. As he does not consider that the material is covered by the request, it follows that the obligation under Regulation 5 (1) of the EIR does not apply. Therefore he has not considered the additional information he has identified as being outside the scope of the request further in this decision.
39. Where, following its review, DECC did not consider the information to fall within the scope of the request, it did not specify whether or not deemed that material to fall within the Act or the EIR, nor did it clarify its position on any exception or exemption. However as all of the information was originally considered relevant the Commissioner did have some details of the exemptions or exceptions that were deemed to apply at the time of the request. Therefore, where he has disagreed with DECC and taken the view that material is within the scope of the request he has gone on to consider whether or not it is environmental and then whether the exemptions or exceptions originally cited were appropriate.
40. The Commissioner would point out that, where information within the scope of a request is contained within a document that includes other irrelevant material, there is no obligation under the Act or the EIR which compels public authorities to release the irrelevant information. Nor can the Commissioner order public authorities to release information which he deems to have been correctly identified as falling outside the scope of the request. If a public authority decides to release information that is technically outside the scope of a request because it is more efficient to do so than to extract only relevant material it does so on a voluntary basis.

Is the requested information environmental?

41. As DECC did not accept that all of the withheld information was environmental the Commissioner must first consider whether the information should be considered under the Act, the EIR or a combination of both pieces of legislation.
42. The definition of “environmental information” is set out in regulation 2(1) of the EIR. This states 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 –
- (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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).....”

43. The Commissioner considers that the phrase “any information ... on” should be interpreted widely and that this is in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact⁵. Therefore ‘any information on’ will usually include information concerning, about or relating to a particular measure, activity, or factor in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
44. DTI had processed the request for information under the Act. However, it has explained that to the extent any of the information contained within the reports or advice requested was environmental, it had considered the EIR and the applicability of the exceptions in the alternative. During the course of the investigation, the Commissioner indicated to DECC that he considered all of the information should be treated as environmental information and therefore the request should have been dealt with under the EIR. DECC agreed that some of the material within the scope of the request was environmental but maintained that other information was not and should be considered under the Act.
45. Having inspected the withheld information, the Commissioner considers that it falls within regulation 2(1)(e) of the EIR. It can be divided into two categories. The first category is independent consultants’ reports which, in the Commissioner’s view, constitute economic assumptions that fed into the nuclear aspects of the Energy Review and ongoing energy policy. The reports assess the financial predictions and costs required for said nuclear projects subject to technologies and market requirements.
46. The second category is advice between Ministers and Government officials about the costs and fiscal incentives associated with proposed nuclear plant construction, waste management, decommissioning and security. This includes information that is specifically referred to as cost benefit analysis as well as more general economic analyses and assumptions.
47. Where information falls within regulation 2(1)(e) it must be used within the framework of the measures and activities referred to in 2(1)(c). A measure or an activity referred to in regulation 2(1)(c) (not the information in question) must affect or be likely to affect the elements in 2(1)(a) directly or via the factors set out in 2(1)(b), or be designed to protect the elements in (a).

⁵ 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.

48. The Commissioner is satisfied that in this case the relevant measure is future energy policy and particularly the aspects regarding nuclear power as a source of low carbon energy. The information that fed into the Energy Review was also used to inform the Government's future energy policy as did the other information that was created following the completion of the Energy Review.
49. As mentioned above the relevant measure in regulation 2(1)(c) must affect or be likely to affect the elements in 2(1)(a) directly or via the factors in 2(1)(b). The Commissioner is satisfied that the Government's energy policy and particularly the aspects regarding nuclear as a source of low carbon energy, is likely to affect the factors in regulation 2(1)(b) including energy, the level of CO₂ emissions, and radiation or waste, including radioactive waste. This in turn is likely to affect the air and atmosphere directly and the other elements indirectly as a result of climate change.
50. When reaching this conclusion the Commissioner has noted the approach and findings of the Information Tribunal in the case of *The Department for Business, Enterprise and Regulatory Reform and the Information Commissioner v Friends of the Earth [EA/2007/0072]*. The Tribunal concluded that information about energy supply, demand and pricing constituted environmental information. In doing so it agreed with the following assertions made by Friends of the Earth,
- "23. policies (sub-para (c)) on 'energy supply, demand and pricing' often will (and are often expressly designed to) affect factors (sub-para (b)) such as energy, waste and emissions which themselves affect, or are likely to affect, elements of the environment (sub-para (a)) including, in particular and directly, the air and atmosphere and indirectly (in respect of climate change) the other elements.*
- 24. He [Mr Michaels} provides by way of simple and practical example, national policy on supply, demand and pricing of different energy sources (e.g., nuclear, renewable, coal, gas) has potentially major climate change implications and is at the heart of the debate on climate change. Similarly, national policy on land use planning or nuclear power has significant effect on the elements of the environment or on factors (e.g. radiation or waste) affecting those elements".*
51. In addition to the above, the Commissioner also wishes to note that some of the information within the independent consultants' reports also falls directly within Regulation 2(1)(b) as it is information which specifically details emission rates.

Exceptions

Regulation 12(5)(e) – confidentiality of commercial or industrial information

Regulation 12(5)(f) – the interests of people who have supplied information to public authorities

Regulation 12(5)(g) – protection of the environment to which the information relates

52. The Commissioner has set out above why he considers the requested information to constitute environmental information. He is satisfied that all of the requested information falls within regulation 2(1)(e) and that the framework of measures in which it is used is likely to affect emissions and in turn the elements of the environment listed in Regulation 2(1)(a).
53. DECC withheld some of the information under the exceptions cited above, namely the reports numbered 1, 2, 2b, 3, 3b and 3c in the confidential annex as well as some sections of document 7. In view of this it is necessary to consider the provisions of Regulation 12(9) of the EIR. This states that,

“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 12(5)(d) to (g)”.

Does regulation 12(9) prevent DECC from relying upon the exceptions in the regulations 12(5)(e), (f) and (g)?

54. In its letter to the Commissioner dated 10 November 2009, DECC provided detailed arguments as to why it did not believe that the withheld information was information on emissions and why Regulation 12(9) was therefore not a relevant consideration in this case.
55. DECC took the view that for information to relate to emissions, it:
- must be on an emission which has occurred or is occurring and which has affected the environment;
 - does not extend to information that might relate to emissions in some way but which is not concerned directly with what is being emitted; and
 - does not extend to anything that could be said to have been emitted in a wider sense, such as natural emissions.
56. DECC argued that in order for something to constitute information on emissions, it must be about emissions that have actually occurred and which have or are likely to affect the elements of the environment. It

also argued that the information itself must relate to the emission and not be about what caused the emission. It argued that if that was not the case then parts of the definition of environmental information, namely paragraphs (c), (d) and (e) would be irrelevant. These paragraphs would have no purpose if this other information related to emissions already covered by (a) and (b).

57. Finally DECC made reference to the Guide to the Aarhus Convention⁶ in relation to “pollutant emissions”. It used references in the Guide, to support its position that emissions must already have occurred. It stated that the Guide goes on to refer to the relevant provisions of the Aarhus Convention being:

“broadly consistent with the principle that information about emissions would lose its proprietary character once the emissions enter the public domain.”

58. In reaching a decision on this issue, the Commissioner has been mindful of the views expressed by the Tribunal in *Ofcom v Information Commissioner & T-Mobile UK Limited*. In that case, the Information Tribunal considered whether information relating to radio wave energy, transmitted from a mobile phone transmitter, could be considered to be information relating to information on an emission. The Tribunal commented:

“It is conceivable that those drafting the Directive did intend the word “emissions” to have a narrower meaning for the purposes of regulation 12(5)(e) than would normally be applied to it. However, no guidance appears in the Directive to assist us in deciding whether it should be interpreted in that way. The 16th recital suggests that the grounds for refusal to disclose should be interpreted in a restrictive way. It follows that any exception to such a ground should be given a broad interpretation. Against that background we believe that we should only apply the more restrictive meaning if we are given clear guidance to that effect. We do not believe that we are provided with such guidance by the Implementation Guide. The Aarhus Convention itself does not cross refer to the definition in the IPPC directive. Even if it did it need not necessarily follow that the same definition should be adopted (again with any direct cross reference to it) for the purposes of interpretation of either the Directive or the EIR. Although recital 5 of the Directive states that it is intended that it be broadly consistent with the Aarhus Convention, there is no suggestion that the Directive is intended to implement the terms of the Convention in the same way that a national measure, such as the EIR, is intended to implement a Community Directive and thereafter to be interpreted in a

⁶ The source of the Council Directive 2003/4/EC is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, otherwise known as the Aarhus Convention.

manner that complies with it. Nor is there any provision within the Aarhus Convention itself, or among its recitals that indicates what meaning should be applied to the word. For all of these reasons we conclude that “emissions” in both sub paragraph (b) of the definition of environmental information and regulation 12(9) should be given its plain and natural meaning and not the artificially narrow one set out in the IPCC Directive. As we have indicated it is accepted, on that basis, that radio wave radiation emanating from a base station is an emission.”⁷

59. The Commissioner finds the comments of the Tribunal persuasive. In particular, he has noted the Tribunal's statement that the definition of emissions, “should be given its plain and natural meaning ...” In considering the ‘plain and natural’ meaning of the word emission the Commissioner has considered the definitions in the Oxford English Dictionary of the words emission and emit. It defines the word ‘emission’ as ‘something emitted’, and the verb ‘emit’ as (amongst other things): “Give off, send out from oneself or itself, (something imponderable, as light, sound, scent, flames, etc)”.
60. It is also the Commissioner's view that emissions referred to in Regulation 12(9) are not limited to those that have already taken place and could include past, present and future emissions.
61. In taking this view, the Commissioner has considered the wording of the EIR, the Directive and the Aarhus Convention and is satisfied that the wording of these documents does not limit the definition of emissions under 12(9) to those which have already occurred.
62. The Directive provides that:
- “Member States may not provide for a request to be refused where the request relates to information on emissions into the environment.”⁸*
63. The Aarhus Convention states that:
- “The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”⁹*
64. Article 7 of the Aarhus Convention establishes provisions for the public to be provided with the necessary information to allow them to participate in preparation of plans and programmes relevant to the

⁷ EA/2006/0078, para 25.

⁸ Directive 2003/4/EC, Article 4.2

⁹ Aarhus Convention, Article 4.4

environment. The Commissioner has considered this and has concluded that the EIR should not be interpreted to only consider information to be environmental at the point at which a plan is likely to go ahead. This would effectively exclude information relevant to participation at the preparation stage of plans relating to the environment. Therefore, when the measure under consideration is something that is proposed for the future the relevant consideration will be whether, if the measure were to go ahead, it would be likely to affect the elements and factors referred to in Regulation (2)(1)(a) and (2)(1)(b). Therefore the definition of environmental information on or related to emissions is not restricted to emissions that have already occurred.

65. The Commissioner also notes that one of the reasons for allowing enhanced access to information on emissions is to ensure public participation in decisions affecting emissions at an early stage. The value of this would be extremely limited if the only material falling within the definition was material on emissions that had already occurred.
66. In the Commissioner's view the inclusion of the phrase 'relates to information' in Regulation 12(9) means that its application is not restricted to cases where information falls within the definition of environmental information only by virtue of Regulation 2(1)(b). He believes that Regulation 12(9) can apply where information is environmental under another part of Regulation 2(1) provided that it links back to 2(1)(a) via 2(1)(b). Further, Regulation 2(1)(b) must be relevant because of emissions. So, in this case because the information is used within the framework of measures likely to affect emissions, which in turn affect the elements of the environment, the Commissioner considers that Regulation 12(9) is applicable. If however the measure was directly linked to 2(1)(a) because it was likely to affect elements such as land and landscape but not via emissions then 12(9) would not be relevant.
67. In view of the above the Commissioner is satisfied that DECC was incorrect to withhold information on the basis of Regulations 12(5)(e), 12(5)(f) and 12(5)(g) because by virtue of Regulation 12(9) these exceptions cannot apply.

Regulation 12(4)(e) – internal communications

68. DECC claimed this exception for the majority of the information that was withheld at the time of the request. The exception was applied to 19 documents, which comprised the 6 independent reports and the 13 documents relating to communications between Ministers and Government officials. As mentioned above, the Commissioner has restricted his analysis of the exceptions to the information he has concluded falls within the scope of the request.
69. Regulation 12(4) of the EIR provides that:

“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.”

What constitutes a ‘communication’?

- 70. Neither the EIR, or the Council Directive 2003/4/EC, provide a definition of what constitutes a communication. The Commissioner has found that where the information recorded has been or is intended to be, communicated to others or to be placed on file where it may be consulted by others, this information will be deemed to be a communication.
- 71. Communications can take any form, and can include memos, notes or meetings or emails. It may also include, for example, correspondence between local authority council members or board members of a government agency, information passed between officials in the course of their duties, internal minutes and briefs and submissions to ministers in government departments.

What constitutes an ‘internal’ communication?

- 72. For ‘Government departments’ within the meaning of the EIR, the scope of the exception expressly extends to communications between one Government department and another by virtue of Regulation 12(8).
- 73. The Commissioner’s interpretation of Regulation 12(4)(e) is that it includes only communications passing between members of staff in a public authority. The Commissioner is of the opinion that communications between a public authority and its external advisers, contractors etc. will not be covered by the exception.
- 74. Some of the withheld information consists of reports commissioned by DECC and completed by external consultants (the independent reports). The Commissioner has considered, at length, the content of the information as well as a number of decisions of the Information Tribunal. The Commissioner notes, in particular, the comments of the Tribunal in the case of *Department for Transport v Information Commissioner* which involved the consideration of Regulation 12(4)(e). The Tribunal stated that whether the exempt information constituted an internal communication was a question of fact and law and moreover it suggested that:

“We do not consider that it is possible, or desirable, to attempt to devise a standard test as to what amounts to internal or external communication, for example by reference to the nature of the

communication or its audience. It will depend on the context and facts in each situation."¹⁰

75. When considering whether or not Regulation 12(4)(e) is engaged in respect of the independent reports, the Commissioner has noted the Tribunal's findings in relation to third party relationships. This case involved a request for a copy of a draft report prepared for the Department for Transport (the DfT) and HM Treasury by Sir Rod Eddington, the former Chief Executive of British Airways, on the future of the UK's transport policy.
76. In this case, the Tribunal concluded that Regulation 12(4)(e) was engaged on the basis that:
- In preparing the report in question, Sir Rod was firmly 'embedded' into the civil service – he had his office at the DfT and used business cards showing the logos of both the DfT and HM Treasury;
 - Sir Rod had access to the confidential thoughts of the Ministers who commissioned the report and thus invited into the 'safe space' of policy development within the DfT and HM Treasury;
 - Although Sir Rod provided the overall direction of the report and was ultimately responsible for its conclusions, the study was managed and run by senior civil servants;
 - The drafts of the report had limited circulation.¹¹
77. The Commissioner has also considered the findings of a more recent Tribunal decision, *South Gloucestershire Council v Information Commissioner*. In this case, the requestor sought copies of independent appraisals carried out for the Council by external consultants. In this case, the Tribunal concluded that the appraisals did not fall within the scope of the Regulation 12(4)(e) on the basis that:
- The consultants in question were not integrated into the Council; they were not seconded to the Council nor otherwise embedded nor did they take decisions or otherwise act on behalf of the Council;
 - Paying attention to both form and to substance and to the particular circumstances of and nature of the communication, the consultants' reports could not be properly characterised as internal communications of the Council¹².
78. Whilst the Commissioner has not used the findings of the Tribunal in these cases as a direct model to follow in considering DECC's application of Regulation 12(4)(e), he has found that the Tribunal's

¹⁰ EA/2008/0052 para 96

¹¹ See paragraphs 95 to 98 of EA/2008/0052

¹² EA/2009/0032, paras 23(h) and 33

conclusions have provided a useful 'real-life' example against which this present case can be analysed.

79. In the Commissioner's opinion, the relationship that DECC had with the two external third parties in this case lacked the proximity that Sir Rod Eddington had with the DfT, i.e. they were not embedded into DECC in the way that he was within the DfT. Furthermore, DECC acknowledged that the authors of these reports were 'external consultants' and not individuals who were closely linked or associated with DECC in the manner that Sir Rod was with DfT.
80. On this basis the Commissioner is satisfied that the 6 independent reports withheld under Regulation 12(4)(e) do not fall within the definition of internal communications and therefore DECC was incorrect to withhold them under this exception.
81. However the Commissioner is satisfied that the remaining information within the scope of the request that was withheld under Regulation 12(4)(e), constitutes communications between civil servants and Ministers. Accordingly, he accepts that these do fall within the definition of internal communications. The Commissioner is satisfied that this information constitutes discussions and internal communications between civil servants that clearly purport to the issues specified in the request.
82. As the exception at Regulation 12(4)(e) is subject to the public interest test as set out in Regulation 12(1), the Commissioner must decide if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. In doing so, the Commissioner must bear in mind the presumption in favour of disclosure at Regulation 12(2).

Public interest arguments in favour of disclosing the requested information

83. DECC acknowledged that there was a strong public interest in people being informed about the Government's energy policy. It recognised that there is significant public interest in releasing information about energy issues especially when taking into account its role in tackling global climate change. Obviously with government making more and more effort to reach its targets in respect of climate change, there is a keen interest by the public to see how these targets will be met.
84. DECC also recognised that there is also a public interest in enabling people to assess the quality of advice being provided to, and considered by, public authorities so that they can be confident that decisions are taken on the basis of the best available information. DECC also acknowledged that greater transparency makes Government more accountable to the electorate and increases trust between Government and the public.

85. DECC advised that the information covers material which relates to Government policy that is still under development. It acknowledged that by releasing the information at this stage, it would give the public an insight into the options that are being actively considered by Government. This in turn would afford the public with an opportunity to contribute towards policy making and to challenge government at the earliest opportunity and from a more informed position when decisions taken are not seen to be in the public interest.
86. The Commissioner notes the importance of the withheld information in relation to the UK policy of reducing CO₂ emissions. The EIR places a high level of importance on disclosure of information relating to emissions as Regulation 12(9) prevents the reliance on certain exemptions when the information is of that nature. In the Commissioner's view there is clearly a strong public interest in disclosure of information relating to measures or activities that will have an effect on emissions.
87. The Commissioner agrees with DECC's assertions that there is a public interest in allowing people to have access to information that is used to inform its energy policy decisions, which in this case is the nuclear elements of such policy and particularly associated costs. He also agrees that there is a public interest in releasing information that would inform the public debate surrounding the nuclear elements of energy policy and which would enable the public to challenge the government's decisions from a more informed position. In his view greater transparency would also lead to better quality advice being provided and ultimately to improved decision-making.

Public interest arguments in favour of maintaining the exception

88. DECC argued that the withheld information relates to policy that was under development at the time of the request. At this time, there had been a Ministerial announcement to Parliament that a forthcoming consultation would begin to assist the Government in making decisions about its policy in relation to nuclear power. DECC stated that to release information on policies that are still under development may prejudice or jeopardise possible future work as it could cause confusion and mislead the public as to the Government's intentions. It also argued that the Government needed a safe space in which to weigh up the advice it had obtained and the different options available without the threat of premature disclosure and the consequent distortion that it could cause to the final outcome.
89. DECC also argued that disclosure of the requested information would have revealed partially formulated policy positions and that this in turn could impact on markets because of speculation about government intervention, or harm to public confidence in the government or private sector. It asserted that this could have a potentially destabilising effect

on wider industry. Though he accepts the safe space argument is relevant, the Commissioner does not accept that avoiding any impact on markets or destabilising wider industry is a factor inherent in Regulation 12(4)(e). In other words the exception is not designed to protect against the adverse effect described and therefore the Commissioner does not consider this argument to be relevant in this case.

90. DECC asserted that the private sector played a very important role in assisting it in formulating future energy policies. It argued that the input from private sector companies would be weakened if those companies did not feel able to be as open and frank with DECC, for fear of commercially sensitive information about their business operations being disclosed. To release such information would inhibit the future provision of important, sensitive material from stakeholders, which, according to DECC, is essential to the development of government policy. This argument is essentially that disclosure would have a chilling effect on external contributions from industry that feed into policy making. The Commissioner does not consider this to be a relevant factor when considering Regulation 12(4)(e) because any chilling effect on external contributions is not inherent in this particular exception which is designed to protect internal communications.
91. DECC's submissions also suggest that disclosure of the withheld information would have a chilling effect on the free and frank exchange of views and candour of communications amongst those formulating the Government's energy policy. The Commissioner accepts that this is a relevant factor in this instance.

Balance of the public interest arguments

92. The Commissioner has taken into account the arguments in favour of disclosure and all of the relevant factors for maintaining the exception set out in the previous sections and has concluded that when balanced against each other, in all the circumstances of this case, the public interest arguments in favour of maintaining the exception are not sufficient to outweigh those in favour of disclosure. In doing so he has noted the presumption in favour of disclosure in Regulation 12(2).
93. As explained above, the arguments in favour of maintaining the exception in this case are to preserve a safe space in which government can develop its energy and nuclear policies and to avoid a chilling effect on the candour and frankness of internal communications regarding that policy development. The Commissioner has considered each in turn.
94. The Commissioner notes that a considerable amount of the withheld information, though not all of it, was created to inform the Energy Review which was complete and the final report published prior to the

date of the request. Therefore no safe space was required in relation to this policy development. However, he accepts that the same material was actively being used by the public authority to inform ongoing energy policy and decisions regarding nuclear power. This is evidenced by the subsequent publication of the Energy White Paper and the consultation on nuclear power. He accepts that disclosure of the withheld information may have prematurely revealed policy options or a partially formed positions and consequently resulted in distraction from the policy making process due to external interference which would not be in the public interest. The Commissioner has attributed significant weight to the safe space argument particularly given the importance and wide ranging impact of the policies in question.

95. In reaching this view the Commissioner has been influenced by the comments of the Information Tribunal in the case of *DBERR v Information Commissioner and Friends of the Earth*. In that case the Tribunal held that:

“This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made”¹³.

96. Having reviewed the disputed information the Commissioner is also satisfied that the chilling effect argument has significant weight in this case. He has reached this conclusion as the content of the communications are free and frank and given that the issues discussed in the communications were still under active consideration at the time of the request. In his view this increases the likelihood of individuals feeling unable to be as candid in their future comments or input.
97. The Commissioner recognises that if civil servants are less likely to be open in their views, the quality of the input and recommendations will suffer as a result. This will in turn lead to lower quality advice being given to government, which will in turn lead to a weakened decision-making process, which would clearly not be in the public interest. The Commissioner has considered the High Court decision in *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*¹⁴ when reaching this view.
98. Whilst the Commissioner has attributed substantial weight to both factors in favour of maintaining the exception he considers that the arguments in favour of disclosure are even more significant in this case.
99. The requested information concerns costs and fiscal incentives associated with proposed nuclear plant construction, waste

¹³ EA/2007/0072

¹⁴ 2008 [EWHC 638]

management, decommissioning and security thereby dealing with the potential long-term impact of nuclear waste. The amount of people who could potentially be affected by nuclear waste and nuclear plant construction, the significance and longevity of any impact and the substantial costs involved all add weight to the transparency and accountability arguments in this case.

100. The Commissioner considers that the arguments about disclosure informing the public debate regarding energy and nuclear policy has weight given their importance and long term impact on the population of the UK as a whole and beyond. He also considers that timing of the request increases the weight of this factor because a consultation process was due to begin and therefore the information would have enabled the public to contribute from a more informed position. This is particularly so given that the Commissioner is of the opinion that the content of the disputed information, which is always a central consideration, would genuinely have added considerably to the public's knowledge on the subject matter.
101. The Commissioner also considers that the circumstances surrounding the case, namely the recent judgment of Mr Justice Sullivan in the case of *R (on the application of Greenpeace Limited) v Secretary of State for Trade and Industry*¹⁵ (which was handed down just prior to the request) lends weight to the arguments for disclosure. This judgment provided the outcome of a Judicial Review taken by Greenpeace against the Government. Greenpeace sought a quashing order in respect of the Government's decision, announced in the Energy Review report, to support nuclear new build as part of the UK's future electricity generating mix on the basis that the consultation was procedurally flawed and that therefore the decision was unlawful.
102. Mr Justice Sullivan commented that:

116. *".....the consultation exercise was very seriously flawed. Adopting the test put forward by Mr Drabble, "something has gone clearly and radically wrong." The purpose of the 2006 Consultation Document as part of the process of "the fullest public consultation" was unclear. It gave every appearance of being an issues paper, which was to be followed by a consultation paper containing proposals on which the public would be able to make informed comment. As an issues paper it was perfectly adequate. As the consultation paper on an issue of such importance and complexity it was manifestly inadequate. It contained no proposals as such, and even if it had, the information given to consultees was wholly insufficient to enable them to make "an intelligent response". The 2006 Consultation Document contained no information of any substance on the two issues which had been identified in the 2003 White Paper as being of critical importance: the economics of new*

¹⁵ <http://www.bailli.org/ew/cases/EWHC/Admin/2007/311.htm>

nuclear build and the disposal of nuclear waste. When dealing with the issue of waste, the information given in the 2006 Consultation Document was not merely wholly inadequate, it was also seriously misleading as to CoRWM's position on new nuclear waste.

117. On both the economics and the waste issues all, or virtually all, the information of any substance (the cost-benefit analysis and supporting reports, and CoRWM's draft and then final recommendations) emerged only after the consultation period had concluded. Elementary fairness required that consultees, who had been given so little information hitherto, should be given a proper opportunity to respond to the substantial amount of new material before any "in principle" decision as to the role of new nuclear build was taken. There could be no proper consultation, let alone "the fullest public consultation" as promised in the 2003 White Paper, if the substance of these two issues was not consulted upon before a decision was made. There was therefore procedural unfairness, and a breach of the claimant's legitimate expectation that there would be "the fullest public consultation" before a decision was taken to support new nuclear build."¹⁶

103. DECC argued that the fact that relevant information is already in the public domain reduces the significant weight of the arguments in favour of releasing the requested material. The Commissioner does not consider that in this case this reduces the weight of the arguments for disclosure. This is the case, bearing in mind the context set out in the preceding paragraphs and the fact that in the Commissioner's view the disclosure would add to and enhance understanding of the issues at stake. There is also a considerable public interest in having all the information available so as to remove any suspicion of misleading information or "spin".
104. The Commissioner has concluded that although the chilling effect and safe space arguments are relevant and attach considerable weight, they are not sufficient to outweigh the factors in favour of releasing the disputed material which, for the reasons given above, are of very significant weight in this particular case. Therefore he has concluded that the public interest favoured the disclosure of the withheld information.

Regulation 12(4)(d) – material still in the course of completion

105. In November 2009, DECC indicated to the Commissioner that it also sought to rely on regulation 12(4)(d) in respect of one particular document, entitled "Energy Review – New Nuclear Build Memorandum by the Minister for Energy". This was some 6 months after the Commissioner began his investigation and a considerable time after the public authority issued the refusal notice to the complainant.

¹⁶ <http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.htm>

106. Where a public authority has not referred to a particular exemption or exception when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption or exception into account if it is raised in the course of his investigation. This issue was considered by the Information Tribunal in the case of *Department of Business and Regulatory Reform v Information Commissioner and Friends of the Earth*. The Tribunal held that:

“The question for the Tribunal is whether a new exemption can be claimed for the first time before the Commissioner. This is an issue which has been considered by this Tribunal in a number of other previous cases¹⁷ and there is now considerable jurisprudence on the matter. In summary the Tribunal has decided that despite ss.10 and 17 FOIA providing time limits and a process for dealing with requests, these provisions do not prohibit exemptions being claimed later. The Tribunal may decide on a case by case basis whether an exemption can be claimed outside the time limits set by ss.10 and 17 depending on the circumstances of the particular case. Moreover the Tribunal considers that it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude to their obligations under ss.10 and 17. This is a public policy issue which goes to the underlying purpose of FOIA.”¹⁸

107. The Commissioner has taken into account the findings of previous Tribunals in respect of the late application of exceptions to withholding information. He has decided not to allow the late claim of Regulation 12(4)(d) in this case. In reaching this decision he notes that DECC did not provide any explanation as to why it had not previously cited the exception, nor did it seek to justify why it would be appropriate for the Commissioner to consider it at a late stage.

Regulation 13(1) – personal information

108. In November 2009, DECC also indicated to the Commissioner that it now also sought to rely on Regulation 13(1). Again this was some 6 months after the Commissioner began his investigation and a

¹⁷ *Bowbrick v Information Commissioner & Nottingham City Council* [EA/2005/006]; *England & London Borough of Bexley v Information Commissioner* [EA/2006/0060&66]; *Benford v Information Commissioner* [EA/2007/0009]; *Archer v Information Commissioner & Salisbury County Council* [EA/2006/0037] and *Oftcom v Information Commissioner & T-Mobile* [EA/2006/0078].

¹⁸ [EA/2007/0072] para 42.

considerable time after the public authority issued the refusal notice to the complainant.

109. The Commissioner has considered the late claim of Regulation 13(1) which relates to personal data. He has concluded that bearing in mind his role as the data protection regulator and the fact that third parties' rights are at stake, it is appropriate to allow the late citation of the exception. Therefore, he has considered whether or not disclosing the elements of the withheld information covered by this exception would breach the data protection principles.

110. The relevant sections of Regulation 13 state that personal data cannot be disclosed if the following condition is met:

“13(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

13(2) The first condition is –

(a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –

(i) any of the data protection principles”.

111. DECC informed the Commissioner that the information withheld under this exception comprised of names of civil servants and their telephone and fax numbers. The Commissioner also notes that the names of a number of individuals who are not civil servants are contained within one of the independent reports.

112. DECC informed the Commissioner that the names redacted were all individuals below Senior Civil Service level who had an interest in the policy, either as an adviser, lawyer or in the communication/media aspects. In respect of the individuals named within the independent reports, all the individuals were of a senior rank in their organisations to include Directors, Chief Executives and Managing Partners.

113. In this case that Commissioner has concluded that disclosing the withheld personal data would not breach the data protection principles. The first data protection principle is the relevant one in this case. It states that personal data must be processed fairly and lawfully and must not be processed unless at least one of the conditions in Schedule 2 of the Data Protection Act 1998 (the DPA) is met.

114. When reaching a decision on this matter, the Commissioner has also taken into account his own Awareness Guide on section 40 of the Act¹⁹ which is the exemption that deals with personal data. This makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) as opposed to their public life (i.e. their work as a public official or employee) it will deserve more protection than information about them acting in an official or work capacity.
115. Within the Awareness Guide, there are also guidelines concerning the roles of employees within public authorities. It states that public authorities should take into account the seniority of employees when personal information about their staff is requested under the Act. The more senior a person is, the less likely it is that disclosing the information about their public duties will be unwarranted or unfair. In this case, the Commissioner has taken into account the fact that the positions and roles of those whose names and contact details have been redacted are all individuals who had an input into and a responsible role in the policy-making process. These are not individuals who are at a junior level. In the Commissioner's view such individuals should have a reasonable expectation that their names may be released when a request for information is received.
116. The Commissioner also notes that where the names of civil servants have been withheld in the majority of cases all that the information records is that they have been copied into a communication. Therefore if there were any prejudice to their rights and freedoms this would be extremely limited. However there are some instances in which the names are attributed to the content of the information. Whilst this would arguably reveal more information about those individuals, the Commissioner does not consider that this would amount to unwarranted prejudice to their rights, freedoms or legitimate interests. This is particularly the case given that the comments are made by these individuals contained in the withheld information were all made in their professional capacity. Therefore the contributions do not relate to their private life and thus any harm to their privacy would be minimal.
117. The Commissioner considers that there is a legitimate public interest in having the details of these names and contact details disclosed so as to ensure transparency and accountability in the policy-making process and that therefore disclosing the information is necessary in this instance. This is particularly the case in light of the comments made by Mr Justice Sullivan in his High Court judgment, as referred to earlier. Therefore condition 6 in Schedule 2 of the DPA is met.
118. In respect of the individuals named within the independent reports, the Commissioner is satisfied that these individuals hold a position of

¹⁹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

seniority within their organisations and are well-known as experts in their areas of specialism. They belong to various organisations that have been known to contribute towards and be involved in the wider policy making process. In view of this the Commissioner considers that they would have a reasonable expectation that their names would be disclosed.

119. As with the civil servants, many of the individuals in this category are simply named in the withheld information and no comments are attributed to them. However there are some instances where comments are attributed. Again any contributions made are in a professional capacity and do not include information about the individuals' private lives. In this case the Commissioner has concluded that disclosing the information would be fair and would satisfy condition 6 in Schedule 2 of the DPA for the same reasons he has given in respect of civil servants in the paragraphs above.
120. The Commissioner notes that DECC provided the complainant with the contact numbers of the individuals within the information released to the complainant during the course of the Commissioner's investigation. The Commissioner finds that the personal data was incorrectly withheld at the time of the request and that it should have all been disclosed to the complainant.

Procedural Requirements

Regulation 5: duty to make information available on request

121. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.
122. As indicated above, the Commissioner finds that DECC incorrectly withheld information that should have been disclosed to the complainant at the time it was requested. Accordingly, the Commissioner finds that DECC breached regulation 5(1) of the EIR. As the information was not provided within 20 working days, the Commissioner also finds that DECC breached regulation 5(2).

Regulation 14: refusal to disclose information

123. Regulation 14(1) states:

“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) states that:

“The refusal shall be made as soon as possible and no later than 20 working days after the date of the receipt of the request.

Regulation 14(3) states that:

“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 the 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).

124. The refusal notice in this case was issued on 25 April 2007. The Commissioner notes that DECC sought to rely on a number of exceptions to withhold the information. However, towards the end of the Commissioner’s investigation, DECC also indicated that it wished to rely on Regulation 13 to withhold some information which fell within the scope of the complainant’s request. The Commissioner finds that the failure to cite Regulation 13 in the refusal notice constitutes a breach of regulation 14(3).

The Decision

125. The Commissioner’s decision is that DECC did not deal with the request for information in accordance with the Regulations. In failing to disclose the requested information DECC breached regulation 5(1) and also the time limit stipulated under regulation 5(2). The Commissioner also finds that DECC breached regulation 14(3) by failing to cite Regulation 13 in its refusal notice.

Steps required

126. The Commissioner requires DECC to take the following steps to ensure compliance with the EIR:
- Disclose to the complainant all of the information that the Commissioner has found not to be excepted which fell within the scope of the request but has not yet been released to the complainant. The Commissioner has indicated which information should be released in the confidential annex to this notice.

127. DECC must take the steps required by this notice within 35 calendar days of the date of this Notice.

Failure to comply

128. 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) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

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

First-tier Tribunal (Information Rights)
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk
Website: 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 this 25th day of January 2010

Signed

**Jo Pedder
Senior Policy Manager**

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

Legal Annex

Exceptions under the EIR

Regulation 2

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;
- (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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

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.

Regulation 12

- 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 the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (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.
- (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 the public authority has complied with regulation 9;
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves the disclosure of internal communications.
- (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 these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

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

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 13 – Personal data

13(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is -

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene -

- (i) any of the data protection principles; or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relate to manual data held by public authorities) were disregarded.

Regulation 14 – refusal to disclose information

- 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.
- (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.
- (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 the 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).
- (4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the 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.
- (5) The refusal shall inform the applicant -
- (a) that he may make representations to the public authority under regulation 11; and
 - (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

Data Protection Act 1998

Part 1

1) In this Act, unless the context otherwise requires -

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Schedule 1

The first principle states that:

Personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data.

1. The data subject has given his consent to the processing.
2. The processing is necessary -
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary -
 - (a) for the administration of justice
 - (b) for the exercise of any functions conferred on any person by or under any enactment
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6.
 - (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
 - (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.