

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 30 April 2019

**Public Authority:** Department for Environment, Food & Rural Affairs

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

#### **Decision (including any steps ordered)**

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1. The complainant requested information from the Department for Environment, Food & Rural Affairs (DEFRA) about the Draft UK Air Quality Plan for tackling nitrogen dioxide. DEFRA disclosed some redacted materials during the course of the Commissioner's investigation, but withheld the remainder of the requested information in its entirety.
2. The Commissioner's decision is that DEFRA correctly withheld some information under regulation 12(4)(e) of the EIR – internal communications.
3. However, DEFRA incorrectly redacted some information under regulation 12(5)(b) of the EIR – adversely affect the course of justice. It also failed to carry out an objective reading of the request in accordance with regulation 5(1) of the EIR and consequently incorrectly redacted some information as being out of scope.
4. DEFRA also failed to respond to the request within 20 working days, and failed to carry out a reconsideration when asked (known as an internal review) within 40 working days. It therefore breached regulations 5(2) and 11(2) of the EIR respectively.

5. The Commissioner requires DEFRA to take the following steps to ensure compliance with the legislation.
  - Disclose the portions of document 6, as explained in this notice, which were redacted under regulation 12(5)(b);
  - Consider for disclosure the agenda items from document 9, as explained in this notice, which were redacted as being out of scope, and issue a response to the complainant regarding these items under the provisions of the EIR.
6. DEFRA must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Background to the request**

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7. The requested information relates to the UK Government's Air Quality Plan for tackling the build-up of nitrogen dioxide. The Government was ordered to publish details of the draft plan for consultation by 24 April 2017, but on 21 April 2017, it applied to the High Court for an extension to this date. The Government's view was that pre-election "purdah" prevented it from publishing its plan until after the snap general election which had been called on 8 June 2017.
8. The High Court rejected this application, and on 27 April 2017, it ordered the Government to publish the draft plan by 9 May 2017, with the required deadline for the publication of the plan itself remaining unchanged at 31 July 2017.
9. The draft plan was subsequently published on 5 May 2017, and the plan itself was published in July 2017.

### **Earlier requests**

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10. On 8 June 2017, the complainant, on behalf of the environmental news website [unearthed.greenpeace.org](http://unearthed.greenpeace.org) ("Unearthed"), wrote to DEFRA and requested: *"all correspondence between 20 March and 10 May 2017 about the 2017 air pollution plan between ministers, special advisors and senior civil servants at Defra [and] the following people at the Cabinet Office: ministers, special advisors, senior civil servants, [and] the propriety and ethics team"*.

11. On 9 June 2017, the complainant's colleague, on behalf of Unearthed, requested:

*"copies of any and all written communications between senior DEFRA staff (meaning in this case ministers, special advisors, and/or senior civil servants) and the Prime Minister's Office, 10 Downing Street (in this case meaning the Prime Minister, her advisors, and/or any staff working out of that office) which were sent between 1 January 2017 and 8 May 2017, and which relate to either:*

*a. The timing of the publication of the Draft UK Air Quality Plan for tackling nitrogen dioxide (<https://consult.defra.gov.uk/airquality/air-quality-plan-for-tackling-nitrogen-dioxide/>); or*

*b. The content of that plan.*

*'Written communications' in this context includes, but is not limited to, letters, emails, memos, the DEFRA cover sheets associated with any of those documents, comments written on any drafts of the consultation circulated between DEFRA and No 10, text messages, and messages sent through messaging apps (e.g. WhatsApp)."*

12. On 15 June 2017, the complainant, on behalf of Unearthed, requested:

*"all documents and correspondence (written and electronic and including attachments) detailing legal advice the government received concerning the timing of the release of the 2017 air quality plan".*

13. DEFRA aggregated these requests and informed the complainant on 6 July 2017 that it refused the requests under regulation 12(4)(b) of the EIR – manifestly unreasonable on grounds of cost.

14. On 24 August 2017, the complainant wrote to DEFRA and referred to the previous requests. She agreed that they could be narrowed in scope as follows:

*"Request sent on 8th June, regarding correspondence between Defra and the Cabinet Office. The requested start date for the time period can be amended from 20 March 2017 to 3 April 2017. The definition of senior civil servant can be amended so that it refers to senior civil servants with responsibility for air pollution. All other persons, job titles and parameters stated should remain the same.*

*Request sent on the 9th June, regarding correspondence between Defra and number 10. The requested start date for the time period can be amended from 1 January 2017 to 1 April 2017. The definition of senior DEFRA staff can also be amended so that senior civil servants refers to senior civil servants with responsibility for air pollution. All*

*other persons, job titles and other parameters should remain the same.*

*Request sent on 15 June, regarding legal advice. We are happy to forgo this request”.*

15. She also provided some arguments regarding the public interest.
16. On 22 September 2017, DEFRA responded. It refused the request of 24 August under 12(4)(b) as before and offered some advice and assistance regarding the narrowing of the request.

## **Request and response**

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17. On 17 November 2017, the complainant wrote to DEFRA to request information of the following description:

*“... we are willing to address your concerns by narrowing down our requests, as follows:*

*In relation to the request sent on 8th June, which requested all correspondence between 20 March and 10 May 2017 about the 2017 air pollution plan. The period should be amended so that it runs from 3 April 2017 to 10 May 2017. The definition of civil servant can be amended so that it applies only to senior civil servants with direct responsibility for the air pollution plan. All other persons, job titles and parameters stated should remain the same.*

*In relation to the request sent on the 9th June, which requested all correspondence regarding the timing and content of the air pollution plan between Defra and number 10 from 1 January 2017 to 8 May. The period should be amended so that it runs from 1 April to 8 May. The definition of senior civil servant can be amended so that it applies only to senior civil servants with direct responsibility for the air pollution plan.*

*We shall not pursue the third request sent for legal advice.*

*We are happy for you to exclude personal information where it relates to junior staff and third parties.*

*Please note in relation to the above that in your letter of 22 September, you seem to have misread the dates requested. The amended dates we have requested amount to two periods, each of around five weeks; neither period covers three months nor two weeks, as suggested in your letter.*

*Your letter also stated that we were requesting correspondence within departments. This is not the case. We requested correspondence between either Defra and Number 10, or Defra and the Cabinet Office. This should be a much smaller amount of correspondence.*

*Please note that correspondence refers to both written and electronic correspondence."*

18. On 1 February 2018, DEFRA responded and confirmed that it held information relevant to the request; however, it refused to provide the information, citing the exceptions provided by the following regulations:
  - 12(4)(d) – information in the course of completion
  - 12(4)(e) – internal communications
  - 12(5)(b) – the course of justice
19. The complainant requested an internal review on 20 March 2018. Following the intervention of the Commissioner, DEFRA sent her the outcome of its internal review on 27 July 2018. It upheld its original position.

### **Scope of the case**

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20. The complainant contacted the Commissioner on 27 June 2018 to complain about the way Uearthed's request for information had been handled. At this stage, no response had been received to the request for an internal review.
21. On 21 August 2018, following the outcome of the internal review, the complainant confirmed that Uearthed was unhappy with DEFRA's response and wished the Commissioner to investigate its compliance with the EIR.
22. The Commissioner notes that the revised request of 17 November 2017, in summary, comprises two parts:
  - correspondence about the 2017 air pollution plan dating from 3 April 2017 to 10 May 2017 between individuals in the specified posts at DEFRA and individuals in the specified posts at the Cabinet Office; and
  - correspondence about the timing and content of the plan dating from 1 April 2017 to 8 May 2017 between individuals in the specified posts at DEFRA and individuals in the specified posts at the Prime Minister's Office at No. 10 Downing Street.

23. During the course of the investigation, DEFRA explained to the Commissioner that it held 10 discrete documents falling within the scope of the request. It numbered these documents 1 – 10.
24. It agreed to disclose five out of the 10 discrete pieces of correspondence which had previously been withheld: documents 5, 6, 7, 9 and 10.
25. From these, DEFRA redacted some third party personal data. The complainant has not challenged these redactions and these redactions are not covered in the following analysis.
26. DEFRA also redacted two items from a listed agenda in document 9 as being out of scope of the request.
27. DEFRA also redacted some information from document 6 under the exemption at regulation 12(5)(b) of the EIR – adversely affect the course of justice.
28. DEFRA continued to withhold the remaining five documents in their entirety, numbered 1, 2, 3, 4 and 8 respectively. It applied regulation 12(4)(e) – internal communications – to all five of the documents, and also stated that it considered that regulation 12(4)(d) – material still in the course of completion – and regulation 12(5)(b) – adversely affect the course of justice – applied to some of the documents.
29. The following analysis covers whether DEFRA was correct to respond to the requests under the EIR. It covers the application of the exception at regulation 12(4)(e) to the five documents withheld in their entirety. It covers the redactions made to document 6 under regulation 12(5)(b) of the EIR, and to document 9 as being “out of scope” of the request.
30. It also covers whether DEFRA has complied with the time for compliance in responding to the request and in carrying out its internal review.

## **Reasons for decision**

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### **Regulation 2: environmental information**

31. Regulation 2(1) of the EIR provides the following definition of environmental information:

*“...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)."*

32. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
33. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance<sup>1</sup> to assist public authorities and applicants. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose

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<sup>1</sup> 1

[https://ico.org.uk/media/fororganisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf)

expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.

34. In this case, DEFRA's view is that all of the requests were for information which is environmental in nature. The information relates to the government's plans to tackle the build-up of nitrogen dioxide near roads, with a view complying with statutory requirements regarding air quality.
35. In line with her guidance, the Commissioner is satisfied that, the Draft UK Air Quality Plan for tackling nitrogen dioxide is clearly a "measure" affecting the elements and factors of the environment and that it is also relevant to human health.
36. The Commissioner is also satisfied that the requested information in this case, which comprises correspondence, is information "on" this measure, and is therefore environmental information within the definition at regulation 2(1). She is satisfied that DEFRA has considered the requests under the correct access regime.

**Regulation 12(4)(e) – internal communications (documents 1, 2, 3, 4 and 8)**

37. DEFRA applied regulation 12(4)(e) to five of the documents which it withheld in their entirety, and the Commissioner has therefore considered this exception first.
38. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The exception is subject to the public interest test.
39. As the Commissioner notes in her guidance on the application of regulation 12(4)(e)<sup>2</sup>, the term "*internal communications*" is not defined in the EIR and is normally interpreted in a broad sense. She has considered the meaning of "*internal*" and "*communications*" separately.
40. Considering the meaning of "*communications*" first, the guidance notes that "*the concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file... It will therefore include not only letters, memos, and emails,*

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)



*but also notes of meetings or any other documents if these are circulated or filed so that they are available to others”.*

41. In this case, all of the withheld information comprises email correspondence. The Commissioner is satisfied that it clearly comprises “communications”.
42. With regard to the term “internal”, the Commissioner notes in her guidance that “an ‘internal’ communication is a communication within one public authority”.
43. As set out in the guidance, regulation 12(8) of the EIR states that, for the purposes of this exception, “internal communications” includes communications between government departments. That is, departments of central government are deemed to be one public authority for the purposes of regulation 12(4)(e).
44. In this case, the withheld communications were made between the Cabinet Office, DEFRA and HM Treasury. DEFRA has confirmed that none of the withheld information has been disclosed outside central government.
45. The Commissioner is satisfied that the communications are, therefore, “internal” for the purposes of regulation 12(4)(e).
46. The Commissioner is satisfied in this case that the withheld information falls within the definition of “internal communications” and that the exception is engaged. She has therefore gone on to consider the balance of the public interest in the disclosure of the information.

### **The public interest test**

47. As regulation 12(1) of the EIR states, the exceptions at the sub-sections of regulation 12(4) are subject to the public interest test. That is, a public authority may only refuse to disclose information under a 12(4) exception if “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”.
48. Therefore, as the Commissioner notes in her guidance, although the term “internal communications” is normally interpreted in a broad sense, in practice, the application of the exception may be limited by the public interest test.

### *Arguments in favour of disclosing the information*

49. The complainant has argued that there is public interest in disclosure of the withheld correspondence, which dates from the period of legal

wrangling over the timing of the publication of the draft plan. As previously explained, the government applied for an extension, citing pre-election purdah as a reason why the consultation period should not begin until after 8 June 2017. However, the court rejected this application.

50. Some media coverage at the time suggested that the government may have been seeking to delay publication until after the election because elements of the plan may have been unpopular with the voting public; for example, proposals to charge some vehicles in clean air zones. The complainant therefore considers that correspondence around the timing of publication, and the content of the plan, should be subject to public scrutiny.
51. DEFRA itself has explained that it considered the public interest in disclosure of information on grounds of accountability and transparency. It is aware that the public has "*a right of access to information on the government's position with respect to environmental policies*". However in its view, the balance of the public interest lay in the exception being maintained.

*Arguments in favour of maintaining the exception*

52. DEFRA considers that there is a strong public interest in withholding information which has been created as part of the process of formulating and developing policy.
53. It explains that policy responsibilities are split between a number of government departments, which, in this case, were acting collectively to formulate the Air Quality Plan, and explains that effective collaboration between government departments is "*essential*".
54. DEFRA has argued that, with regard to the relevant issues in this case, that there was a need for a "safe space" to debate the issues, and reach decisions away from external interference and distraction.
55. Although the plan has been published, DEFRA has explained that: "*ongoing work on mitigation and the government's air quality work means that these areas are still dynamic policy areas which require this safe space for discussion in order not to prejudice the ongoing process of implementing the plan*".
56. DEFRA's position, therefore, is that the withheld documents cover decisions on continuing live policy issues. By way of example, it states that this includes "vehicle scrappage" which is still an ongoing debate generating frequent interaction from major stakeholders. It argues that there is still a need for DEFRA and other government officials to discuss these issues.

*The balance of the public interest*

57. The Commissioner has considered the balance of the public interest in the context of the five withheld documents.
58. She is satisfied that the contents of the information relate to the Air Quality Plan. The matters under consideration are detailed and specific in nature.
59. The plan has been published; however, DEFRA has explained that work is still ongoing with regard to its implementation.
60. The Commissioner notes that, where withheld information relates to a live issue, this adds considerable weight in favour of maintaining an exception which has been found to be engaged. In this case, she is aware that the plan is still being implemented, and that considerations such as charging zones and scrappage remain contentious.
61. Although the EIR provide a means for the public to access environmental information and are designed to improve the transparency of public authorities, the Commissioner is satisfied that the information in this case relates to a live issue.
62. The Commissioner's decision is that the balance of the public interest favours the exception being maintained, and that DEFRA has correctly withheld the information in this case. She has therefore not considered any other exceptions which DEFRA considered would apply to these documents.

**Document 6 - Regulation 12(5)(b) – adversely affect the course of justice**

63. DEFRA disclosed document 6 to the complainant during the course of the Commissioner's investigation. However, as well as redacting some third party personal data – which the complainant did not challenge – it also made three redactions, explaining to the complainant that it comprised "legal advice". Following questions from the Commissioner, DEFRA confirmed that it had redacted the information under regulation 12(5)(b) of the EIR.
64. Under regulation 12(5)(b) of the EIR, a public authority can refuse to disclose information to the extent that disclosure would adversely affect 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.

65. The Commissioner's guidance<sup>3</sup> notes that this exception is broad in nature, explaining that it can, potentially, be widely applied to information held in relation to the administration of the course of justice. This may include legally privileged information; information gathered in relation to law enforcement, investigations and proceedings; and, as stated in the wording of the exception, information whose disclosure would adversely affect the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
66. In addition, the requirement necessary for the exception to be engaged was addressed in the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037), when the Information Tribunal highlighted that there must be an "adverse" effect resulting from disclosure of the information, as indicated by the wording of the exception.
67. The Commissioner's guidance also notes that, in accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" (in "would adversely affect") is "more probable than not".

### **Is the exception engaged?**

68. DEFRA has provided some outline arguments in this case. It has argued that the redacted phrases refer to DEFRA's "*litigation strategy*".
69. Its view is that disclosure of the information would cause an adverse effect on the course of justice because it would undermine "*the principles of legal professional privilege and of the administration of justice*".
70. The Commissioner has considered the withheld information in this case.
71. She is satisfied that it relates to the timing of publication of the draft plan. Specifically, it relates to DEFRA's strategy regarding its approach to the courts for an extension, as referred to in the Background to the Request section of this notice.

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

72. The Commissioner is therefore satisfied that the information relates to the course of justice, and specifically to DEFRA's intended approach to legal proceedings which were, at the time of the correspondence, imminent.
73. The Commissioner has considered whether there would be an adverse effect on the course of justice, if the information had been disclosed at the date of the request.
74. The relevant month of the request is November 2017, which was some months after DEFRA's application to court for an extension in publishing the draft Air Quality Plan. As explained in the Background to the Request section of this notice, the government's request for an extension was refused by the High Court on 27 April 2017 and the draft plan was published on 5 May 2017, with the plan itself being published in July 2017.
75. The matter of the government applying to court for an extension has been on public record since late April 2017. In view of the timing of the request, therefore, the Commissioner does not consider that the correspondence deals with an issue which was, at that date, "live", which may potentially have caused an adverse effect.
76. In addition, having considered the nature of the redacted information, the Commissioner considers that it is of a general, discursive nature regarding the government's approach to applying for the extension. Its contents are neither as detailed nor as specific as the correspondence which was withheld in its entirety.
77. The Commissioner notes that the redacted information does not, as such, comprise "advice" and therefore cannot be said to be confidential legal advice supplied by a legal adviser to a client. Therefore she has not had to consider any wider adverse effect on the course of justice which may be caused by the overturning of legal professional privilege.
78. In view of the contents of the redacted information, and the timing of the request, the Commissioner is not satisfied that the disclosure of the information would have an adverse effect on the course of justice. She has therefore determined that the exception at regulation 12(5)(b) of the EIR is not engaged. It has therefore been unnecessary to consider the public interest test.
79. The Commissioner orders DEFRA to disclose those parts of document 6 which it redacted using the wording "legal advice".

### **Regulation 5(1) – duty to make environmental information available on request (document 9)**

80. Regulation 5(1) of the EIR states that, subject to the relevant provisions, a public authority that holds environmental information shall make it available on request.
81. In order to consider a request for environmental information, a public authority is required to carry out an objective reading of the request.
82. In this case, DEFRA has withheld two agenda items from document 9, arguing that they are outside the scope of the request. It has argued: *"we considered that these were out of the scope of the part of the request for correspondence on the 'timing' and 'content' of the plan"*.
83. However the Commissioner notes that, while part of the request was for correspondence about the timing and content of the plan, the other part of the request, as refined on 17 November 2017, was for *"all correspondence about the air pollution plan"* between senior civil servants at DEFRA and the Cabinet Office, from 3 April 2017 to 10 May 2017.
84. Having reviewed the redacted agenda items, she considers that they fall within the scope of this part of the request.
85. She therefore requires DEFRA to consider the items for disclosure and provide a response to the complainant, covering the two items, in accordance with regulation 5(1) of the EIR.

### **Time for compliance**

86. Regulation 5(2) of the EIR states that, following a request for information, such information shall be made available by the public authority *"as soon as possible and no later than 20 working days after the date of receipt of the request"*.
87. In addition, Regulation 11(4) of the EIR sets out that, where a requester has made written representations to a public authority within 40 working days of the date on which he or she believed that the authority has failed to comply with a requirement of the EIR (that is, normally, the date of receipt of the public authority's response), the public authority should reconsider its response and provide its decision *"as soon as possible and no later than 40 working days after the date of receipt of the representations"*. This reconsideration is normally referred to as an internal review.

88. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request of 17 November 2017 within 20 working days, DEFRA breached Regulation 5(2) of the EIR.
89. Also, in failing to provide the outcome of its internal review, which was requested on 20 March 2018, until 27 July 2018, DEFRA also breached regulation 11(4).
90. No remedial steps are required in respect of the time for compliance, but DEFRA should ensure that it meets the requirement to issue responses in a timely manner going forward.

## Right of appeal

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91. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

92. 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.
93. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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