

Environmental Information Regulations 2004

Decision Notice

Date 5 February 2007

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

Summary

The complainant initially requested all the communications and minutes of meetings between the Defra and DOE NI concerning the implementation of the EC Waste Water Treatment Directive in Northern Ireland. When this was refused, on the basis of the application of a number of exceptions under the EIR, the complainant made a second request for a list of all communications including details of the date, type of communication, the sender and recipient and title. This was refused on the basis that such a list was not held by the public authority and, in any event, the information was exempt from disclosure under the same exceptions as for the first request. The Commissioner concluded that most of the information requested was held by the public authority and therefore regulation 12(4) (a) was incorrectly applied. However he decided that this information was exempt from disclosure under regulation 12(5) (b) as the information was covered by legal professional privilege. In addition, he found that the public authority had failed to comply with regulation 14(2), as it had not issued a refusal notice within 20 working days of receipt of the request.

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.

The Request

2. The Commissioner has received a complaint which states that on 7 January 2005 the complainant made the following initial request for information by email to Department for Environment, Food and Rural Affairs ("Defra") for:

"Please would you provide us with copies of all communications (including letter, memoranda and emails) or minutes of meetings since October 2002 between (a) DEFRA and (b) the Department of Environment (DOE) in Northern Ireland in relation to the issue of the Northern Ireland's Planning Hotspots (sewage) and/or matters relating to the Urban Waste Water Treatment Directive in Northern Ireland."

3. **On 2 February 2005.** Defra provided copies of two emails between Defra and the Department of Environment in Northern Ireland ("DOE NI"). It issued a refusal notice in relation to the remainder of the information. The notice stated that the information withheld was exempt from disclosure as it was covered by exceptions under the EIR, specifically regulation 12(4)(e) (internal communications), 12(5)(a) (adverse affect on international relations), 12(5)(b) (adverse affect on the course of justice) and 12(5)(d) (adverse affect on the confidentiality of proceedings).
4. Defra stated that regulation 12(4)(e) was applicable to some of the information as it consisted of internal communications within Defra. Regulation 12(5)(d) applied as the information related to a matter under investigation by the EC Commission which had progressed to the stage of the Commission issuing a reasoned opinion under Article 226 of the EC Treaty. As there was a prospect from the start of the Commission's investigation, when it issued the letter of formal notice, that it might progress to trial, the requested communications were made for the dominant purpose of seeking or providing information, advice or evidence to be used in connection with prospective litigation. The communications were therefore protected by legal professional privilege.
5. Under Article 226 of the EC Treaty, where the Commission believes that a Member State has not complied with its obligations under the Treaty, it can issue a reasoned opinion after giving the Member State concerned an opportunity to submit its observations on the matter. If the Member State does not comply with the reasoned opinion within a specified time period, the Commission may bring the matter before the European Court of Justice. When it is considering taking action under Article 226, the Commission will normally issue a letter of formal notice drawing the Member State's attention to the alleged breach and asking for its observations, before issuing a reasoned opinion. This action is often described as infraction proceedings.
6. In so far as communications related to the letter of formal notice and the reasoned opinion, it was argued that these communications were protected by confidentiality as a result of EC legislation, specifically Article 4 of Regulation (EC) 1049/2001, and EC case law, such as *Petrie* (Case T-191/99). This information was therefore covered by the exceptions contained within regulations 12(5)(a), 12(5)(b) and 12(5)(d).

7. As the exceptions under the Regulations are subject to a public interest test, Defra considered whether the public interest in maintaining the exception outweighed the public interest in disclosure. It concluded that the release of any of this information would not be in the public interest as it would jeopardise the outcome of the investigation by the Commission and any subsequent proceedings arising from it.
8. **On 2 February 2005.** The complainant made the following second request for information by email to Defra:

“Please would you provide us with a list of all such information and communications, and, in respect of each item, indicate the basis on which you consider that the information may lawfully be withheld. For each item of information or communication please provide as full details as you are able to including at least date, type of information (ie., email, letter, memoranda, legal advice etc), ‘from’ and ‘to’, and title of document if any.”
9. The complainant suggested that it might be useful to present the information in the form of a table, an example of which was provided.
10. **On 22 March 2005.** Defra issued a refusal notice to the second request on the basis that it did not hold a table of the kind requested and did not feel it was reasonably incumbent upon it to create one. More fundamentally, Defra believed the reasons provided for withholding the information in relation to the first request were equally applicable to the information sought under the second request.
11. **On 23 March 2005.** The complainant requested by email an internal review of the decisions to refuse the first and second requests. In relation to the first and second requests, it stated that it believed that the exceptions may have been misapplied. As regards the refusal of the second request, the complainant argued that the table was only a suggested form for presenting information which was held and therefore this was not a valid basis to refuse the request.
12. **On 23 May 2005.** Defra sent the complainant the results of the internal review which upheld the decisions to refuse the first and second requests. Defra identified the information requested in the first and second requests as relating to two sets of infraction proceedings taken by the EC Commission against the UK, the first was case 2003/2008, commenced by a formal notice on 14 July 2003 and the second was case 2004/2036, commenced by a formal notice on 9 July 2004.
13. In relation to the decision to apply exceptions to the information requested in the first request, Defra stated that it believed that the exception regarding international relations was applicable because it covered situations where, according to Defra’s guidance on the EIR, disclosure

“may compromise ...information which has the potential to undermine the relationship between the UK and other countries (or international organisations).”

14. All the information requested related to infraction proceedings by the Commission under Article 226 of the EC Treaty and, therefore, Defra had contacted the Commission to seek its views on disclosure. The Commission had indicated that, if it received a request under the EC's access to information legislation for copies of the formal notices and reasoned opinions, it would refuse to release this information. The reason for this was that the infringement investigation required genuine cooperation and an atmosphere of mutual trust between the Commission and the Member State concerned so that the parties could have open discussions with a view to a rapid resolution of the dispute. This process would be seriously undermined if it were subject to public scrutiny. In Defra's view, as the communications requested discussed the way in which the UK intended to respond to the Commission, the public interest did not favour disclosure.
15. Defra also indicated that it believed that the information requested was covered by legal professional privilege and was therefore subject to the exception contained in regulation 12(5)(d) (confidentiality of proceedings). It felt that the public interest was best served by withholding the information to enable Defra and DOE NI to have free and frank discussions on the strengths and weaknesses of the UK's position. The same public interest argument also meant that the information was exempt from disclosure under regulation 12(4)(e) (internal communications).
16. Defra indicated that it had given careful consideration to the public interest arguments in favour of the disclosure of the information such as the general public interest in open government, public scrutiny in how devolution works, how the UK conducts litigation and whether the EC institutions exercise their powers under the EC Treaty appropriately. However it felt that these arguments were outweighed by the arguments against disclosure.
17. With regard to the second request, Defra stated that the list which was sought did not exist and could only be produced by manipulating existing information. Whilst it was aware that regulation 6(1) of the EIR required a public authority to provide information in a particular format, if this was requested, this requirement only applied if (a) there was a duty to disclose in the first place (i.e. if the general duty was not displaced by an exception) and (b) it was reasonable to provide the information in the format requested. Defra's view was that creating the list requested would involve an unreasonable diversion of its resources given that there were 133 pieces of correspondence falling within the ambit of the request.
18. Defra also reiterated its view that much of the information relevant to the second request would be covered by one or more of the exceptions applicable to the first request because the list would itself contain sensitive information about the infraction proceedings. In addition, it felt that it would need to consider whether it would be appropriate to release personal information, such as the identity of the senders and recipients of communications.

The Investigation

Scope of the case

19. **On 7 June 2005.** The complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision not to provide the list requested on 2 February 2005 ("the second request"). The complainant stated that it did not wish to make a complaint, at present, in relation to the decision to withhold the information requested on 7 January 2005 ("the first request"). The Commissioner therefore viewed the complaint as solely in connection with the second request made by the complainant to Defra. Consequently, he did not investigate matters relating to the first request except for considering whether the first request was a request for environmental information within the EIR. He did this in order to assist him in determining whether the second request, which was a refined version of the first request, might also constitute environmental information. This issue is discussed in detail at paragraph 56-59.
20. The complainant raised the following points in relation to Defra's refusal to disclose the information requested in the second request:
- the argument that the list does not exist was not relevant as the complainant was seeking information that already existed. Defra did not need to create new information, but merely to extract from its documents information it possessed and provide it in the requested format. The EIR were concerned with providing access to information, not documents, and, therefore, if Defra had the information, in whatever format, it must provide it unless it was exempt from disclosure;
 - it was difficult to see how any of the exceptions would be applicable to the information requested and, even if any were applicable, doubtful that they would be applicable to all the information requested;
 - the creation of a list of 133 pieces of correspondence, which had already been located and identified, could be done in a relatively short period of time and would not involve an unreasonable diversion of Defra's resources. The complainant had obtained similar lists from other public authorities in the past;
 - the information requested, particularly that relating to the names of the senders and recipients of communications, was unlikely to contain personal information which was subject to the exception under regulation 13 of the EIR, as it would not constitute personal data under the Data Protection Act 1998 and, even if it did constitute personal data, its disclosure would not contravene any of the data protection principles;
 - an important point of principle was involved in this case because, where the requestor is not informed what information is being withheld by a public

authority, the requestor is unable to effectively challenge the decision to withhold;

- the information sought might shed light on continuing breaches of a European Directive by the UK. These breaches were causing serious environmental problems in Northern Ireland and so there was a great public interest in disclosure of the information.

Chronology

21. **On 4 November 2005.** The Commissioner identified to Defra the main issues as being whether:

- (i) Defra held the requested information and
- (ii) the exceptions quoted by Defra were applicable to the requested information.

22. With regard to the first issue, the Commissioner expressed the view that it appeared difficult to argue that Defra did not hold at least some of the information requested, particularly the dates of correspondence, names of the senders and recipients and, in relation to at least some documents, the heading or title. However he accepted that the form of a document, whether it was an email, letter or other sort of communication, may not be information which was held. Given that he felt that some of the information requested was held, he went on to query whether it would be unreasonable for Defra to produce it in the format requested. He felt that the production of a list would not be too resource intensive.

23. With regard to the application of the exceptions, Defra was asked to explain how these were engaged, particularly as the request only sought limited information from the relevant documents. The Commissioner also stated that the disclosure of the identity of civil servants who sent or received correspondence in their professional capacity, when the focus of the correspondence was infraction proceedings regarding a European Directive, was unlikely to involve a breach of the data protection principles.

24. **On 4 November 2005.** The complainant contacted the Commissioner to express concern that the Commissioner had taken the view that the form of a document may not in itself be "information" for the purposes of the Freedom of Information Act (the Act") or "environmental information" for the purposes of the EIR. The complainant felt that such information was information in a material and recorded form and therefore came within both the EIR and the Act.

25. **Between the December 2005 and October 2006.** There were detailed discussions, mainly between the Commissioner and Defra, which centred on the issues of the extent to which the information sought by the complainant was held by Defra and whether exceptions under the EIR might be applicable to the requested information. The main aspects of the discussions which took place in respect of these two issues are summarised below.

(i) Whether the requested information was held by Defra

26. After discussions with the Commissioner, Defra accepted that it held information on the dates, the details of senders and recipients and, where correspondence was titled, the title of communications. However, it was unwilling to accept that the form of a document (whether the communication was a letter, email or memorandum) was information which was held. The Commissioner initially considered that the form of a document and the exceptions under which the full documents had been withheld may not be information which was held by Defra.

27. **On 11 February 2006.** The complainant, in an email to the Commissioner, argued that that the Commissioner had taken too narrow an interpretation of what constituted information held by a public authority on the basis that:

- if this interpretation were applied, if a public authority were asked whether it, for example, it held letters on a particular subject, it would be under no obligation to answer the question unless it held an index which recorded that communications were letters;
- the form of a communication is part of the information in the same way as the information contained within it;
- if a person asked to inspect documents (which is an entitlement under regulation 6 of the EIR and section 11 of the Act) they would be able to see the form of the document and, therefore, would be able to obtain some information by inspection that would not be obtained if they did not visit the public authority's premises;
- the form of a document may have an important bearing on the complainant's view about whether a particular document was likely to be subject to an exemption or exception and, therefore, whether to make a complaint if it was withheld.

28. **On 13 September 2006.** The Commissioner, following discussions within his office, wrote to Defra indicating that his view of this issue had changed and that he now believed that Defra should identify which pieces of correspondence were emails. His reasoning was that an email will contain addresses within it which is itself information held by the public authority. A simple request for all information contained in emails, and then a separate request for all information contained in letters, would have resulted in the identification of the different types of correspondence. Therefore by rephrasing the request the complainant could have obtained the information it wanted on the form of the correspondence.

29. **On 6 October 2006.** Defra indicated that it had earlier stated a willingness to provide the complainant with details of the types of documents it held, without identifying what form specific documents took. It believed to do the latter would be time consuming and of little value, particularly given that so much modern communication takes place electronically and to identify whether a communication took the form of, for example a letter or submission, would serve no useful purpose.

(ii) Whether exceptions under the EIR are applicable to the requested information

30. **On 5 December 2005.** Defra explained to the Commissioner that the list of documents requested by the complainant was subject to exceptions under the EIRs as such a list would disclose a significant amount of information about the conduct of the infraction proceedings, including who was involved in the case, when advice was sought and the patterns of activity in the case at certain times.
31. **On 2 February 2006.** Defra confirmed its view that each of the exceptions which had been quoted to refuse the first and second requests were applicable to all the requested correspondence, including the details requested in the second request. It believed that the exception in 12(4)(d) (internal communications) was applicable as all the communications were between two government departments. Regulation 12(5)(a) (international relations) was engaged because the communications related to ongoing infraction proceedings. Finally, regulation 12(5)(d) (confidentiality of proceedings) applied to all the information as it was created in relation to litigation and was therefore subject to litigation privilege as part of legal professional privilege.
32. With regard to litigation privilege, Defra believed that it applied to documents created in contemplation of litigation and that it applied to the whole of a document rather than just some of the information contained within that document. As the information requested concerned documents written on the subject of the infraction proceedings, litigation privilege attached to the whole of every document, including the subject, dates and details of the sender and the recipient.
33. Defra argued that the public interest strongly favoured maintaining litigation privilege as it was important that Defra could act in proceedings on the same terms as other parties. If the information requested was disclosed, it would reveal the pattern and frequency of correspondence, the identity of legal advisers consulted and the headings of issues under discussion. This would give an insight into Defra's conduct of the litigation.
34. **On 23 February 2006.** The Commissioner wrote to Defra seeking clarification as to why it believed that the details sought in the second request would reveal information which the EC Commission regarded as sensitive or would affect the UK Government's willingness to adopt a constructive approach to the infringement investigation and would, therefore, adversely affect international relations.
35. He also queried, in relation to the public interest arguments, whether there would be less prejudice to the UK's ability to present its case in infraction proceedings by the disclosure of the limited information sought under the second request compared with the disclosure of all of the details of the correspondence. He emphasised that there would seem to a very strong public interest in the public obtaining information about the UK Government's compliance with a European Directive.

36. **On 16 March 2006.** Defra stated that it felt that disclosure would jeopardise opportunities to settle the issues raised in the present case and future ones, as well as damage the integrity of the litigation. It felt that the public interest in people being provided with information about the cases had been adequately served by a detailed press release concerning the infraction proceedings that was issued by the EC in July 2005. Members of the public who had concerns about the implementation of a EC Directive could make a complaint to the Commission. In addition, further details of the cases would be made public once the proceedings had been concluded. Defra believed that these arrangements met the public interest in ensuring proper implementation of the Directive.
37. Defra accepted that releasing the limited information requested might cause less prejudice than releasing the full correspondence but argued that this did not mean that the prejudice caused would be inconsequential or that the public interest was best served by releasing the information. Also, the infraction process was in place to resolve arguments in a litigation setting which is inherently adversarial in nature and, consequently, there was a need for confidentiality.
38. In relation to legal professional privilege, Defra believed that releasing the information would enable interested parties to the infraction proceedings to draw conclusions about the issues raised in the proceedings, such as which officials, lawyers and departments had been consulted, who in the departments took an interest in the case, when discussions had been at the most intense and what subjects the Government had focused on.
39. Defra argued that litigation privilege existed to ensure court proceedings could operate fairly by ensuring confidentiality applied to both sides. It was important to maintain a level playing field in cases where important UK national interests were at stake. Releasing the information would harm these important principles.
40. **On 3 July 2006.** Defra made further representations to the Commissioner with regard to the issue of legal professional privilege. It believed that under legal professional privilege communications to and from legal advisers for the purpose of obtaining legal advice and assistance were protected from disclosure in the preliminary and later stages of legal proceedings. Privilege would also include documents drawn up by non lawyers for onward transmission to lawyers for the purpose of preparing responses to the infraction proceedings.
41. **On 13 September 2006.** The Commissioner indicated to Defra that he accepted the argument that, if legal professional privilege was applicable to a document, it would apply to everything contained within the document. Therefore if legal professional privilege applied to any of the documents which were the subject of the request it would apply to all the details, such as the date and names of the senders and recipients, contained within those documents.
42. Following the decision of the Information Tribunal in *Kirkaldie v The Information Commissioner (EA/2006/001)*, the Commissioner indicated that he believed that the exception which was most appropriate to use in relation to legal professional privilege was regulation 12(5)(b) (adverse affect on the course of justice), rather than 12(5)(d) (confidentiality of proceedings). The rationale for this view is

explained at paragraphs 69-70. He suggested that the sensitivity of the information requested may decline over time depending on the stage the infraction proceedings had reached.

43. The Commissioner also sought a more detailed explanation of why Defra believed that releasing the information would adversely affect international relations under regulation 12(5)(a).
44. In addition, the Commissioner commented on Defra's view that to extract the information requested from the documents in which it was contained might be so time consuming as to engage the exception, contained in regulation 12(4)(b), that the request for the information was manifestly unreasonable. Both Defra and the Commissioner carried out exercises, with samples of the information, to estimate the likely time that would be taken in complying with the request.
45. As a result of the exercise he had carried out, the Commissioner estimated that it would take approximately ten hours to produce the list requested. Whilst he agreed that the time involved in complying with the request was not negligible, he did not believe that the request could be regarded as manifestly unreasonable on the basis of the time required to comply with it. Whilst the request was one under the EIR, a comparison could be drawn with the time a public authority is required to spend complying with a request under the Freedom of Information Act before it exceeds the cost limit. For a government department this is twenty four hours. The period the Commissioner estimated for complying with the request was well within this period and therefore he did not believe it could be regarded as manifestly unreasonable.
46. **On 6 October 2006.** Defra confirmed to the Commissioner that both sets of infraction proceedings were still in progress. It agreed that regulation 12(5)(b) was applicable to legal professional privilege in this case, although it still felt that it was arguable that regulation 12(5)(d) was equally applicable. It emphasised that it believed that legal professional privilege applied to all the documents as none of the document would have come into existence if proceedings had not been instigated by the EC Commission and that they were created solely for the purpose of dealing with those proceedings.
47. With regard to the application of the exception related to the adverse affect on international relations, Defra confirmed that, in response to an enquiry from DOE NI, the Commission, on 28 January 2005, had indicated that documents related to these infraction cases should not be released to third parties. There was no reason to believe that this view would have changed in the intervening period.
48. This view was reinforced by a letter dated 28 June 2006 in relation to other infraction proceedings, a copy of which was provided to the Commissioner, in which the Commission stated that a request to the UK for the release of its response to a reasoned opinion should be refused.
49. Defra also pointed to a decision of the Information Commissioner of 18 September 2006(FS500110720) in which the Commissioner had ruled, on a similar request under the Act, that the exemption relating to international relations

under section 27 was engaged and that there was a strong public interest in maintaining the exemption.

50. **On 22 November 2006.** The Commissioner wrote to Defra indicating that, in order to determine whether legal professional privilege was applicable to the requested information, he was seeking confirmation that certain people involved in communications on behalf of Defra were qualified solicitors or barristers. In addition, he sought confirmation that none of the information requested had been shared with third parties so as to lead to arguments that legal professional privilege had been waived.

51. **On 7 December 2006.** Defra confirmed that the people about whom the Commissioner had enquired were qualified solicitors or barristers and that, to the best of its knowledge, information contained within the communications which were the subject matter of the request had not been shared with third parties so as to waive legal professional privilege.

Findings of fact

52. The request for information was made on 2 February 2005. The public authority issued a refusal notice on 22 March 2005.

53. A request for an internal review was made on 23 March 2005. The public authority responded to the internal review request on 23 May 2005.

Analysis

The full text of the relevant regulations can be found in the legal annex. However, the salient points are summarised below. The procedural matters are considered initially and then the matters relating to the application of the exceptions.

Procedural matters

(i) Compliance with the time limit for responding to a request

54. The request was received by Defra on 2 February 2005 and it issued a refusal notice on 22 March 2005. 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 receipt of the request.”

Defra breached regulation 14(2) in that it failed to issue a refusal notice within 20 working days of receipt of the request.

55. A request for an internal review was made on 23 March 2005. Defra provided a response to this request on 23 May 2005. Regulation 11(4) states in relation to internal reviews that :

“A public authority shall notify the applicant of its decision ...as soon as possible and no later than 40 working days after the date of receipt of the representations.”

Defra complied with regulation 11(4) as it notified the complainant of the result of the internal review within 40 working days of the receipt of representations from the complainant.

(ii) Is the information which is the subject of the first request environmental information?

56. As the second request was closely linked to the first request, the Commissioner initially considered whether the first request was for environmental information as defined by regulation 2(1) of the EIR.

57. What constitutes “environmental information” is defined by regulation 2(1) which states that:

“...”environmental information” has the same meaning as Article 2(1) of the Directive, namely any information in written, visual, aural electric 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;”

58. The first request related to communications regarding the implementation of an EC Directive on urban waste water treatment. It therefore falls within regulation 2(1)(c) as it is a request for information on the implementation of measures and activities affecting, or likely to affect, the elements referred to in (a) and (b), as well as measures or activities designed to protect those elements. These measures and activities, in this case the treatment of urban waste water, are likely to affect factors such as waste and other releases into the environment referred to in regulation 2(1)(b), which in turn are likely to affect the state of the elements of the environment, such as water, soil and land referred to in regulation 2(1)(a). The Commissioner has therefore concluded that the first request was for environmental information.

(iii) Is the information which is the subject of the second request environmental information?

59. The second request was for some of the information which was sought by the first request. If the information which was the subject of the first request was environmental information, then logically a request for part of that information, from the same documents, would also be a request for environmental information. In this case, whilst the information requested is more limited than in the first request, it still relates to discussions on the implementation of an EC Directive and therefore would still come within the definition of environmental information in regulation 2(1)(c). The Commissioner's view on what information was held by Defra is explained at paragraphs 60-67.

(iv) What information was held by Defra?

60. "Environmental information" is defined by regulation 2(1) as having

"...the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form..."

61. In its refusal notice, Defra argued that it did not hold the information requested by the complainant. The Commissioner's view, with which Defra subsequently concurred, is that the information requested in relation to the date of a document, the name of the document, if it had one, and the names of the sender and recipient was information which was held by Defra at the time the request was made. This is because the information requested was actually contained in documents which were in Defra's possession. Even though the request was only for a relatively small amount of information from each document it was still information which was held by Defra. In order to comply with this part of the request Defra would simply had to have extracted the relevant information from the documents which were the subject of the first request.

62. By arguing that it did not hold this information, Defra incorrectly applied the exception contained in regulation 12(4)(a) which allows a public authority to

"...refuse to disclose information to the extent that-

(a) it does not hold that information when an applicant's request is refused"

63. With regard to the details of the exceptions applicable to each document, which was part of the complainant's second request, it appears from the refusal notice to the first request that Defra had formed the view that the exception contained in regulation 12(5)(d) was applicable to all the documents. Therefore at the time of the second request, the information about the applicability of this exception to the first request was held by Defra. However, whilst Defra indicated, in its refusal notice to the first request, that the exceptions in 12(4)(e), (5)(a) and (b) were applicable to some of the documents, it held no record of how these exceptions applied to each individual document at the time of the second request and therefore this information was not held at that time. Defra's view at the internal review stage, which was then disclosed to the complainant, was that the

exceptions contained in regulation 12(4)(e),(5)(a) and (d) were applicable to all of the documents.

64. With regard to the form of documents that were the subject of the request, the Commissioner has taken the view that the form that a communication takes is not recorded information in itself as it is simply a description of a communication which is not necessarily recorded anywhere. If the form of a communication is not recorded information, it is not information which is held by a public authority, unless the form of the communication is recorded separately somewhere by the public authority, for example in a list of letters or emails.
65. The fact that the form of written communications was not itself information held by Defra did not mean that it did not hold some of the information requested. With regard to communications by email, these were contained at the time of the request in an index of emails in the form of staff inboxes. As a record existed, in the form of a separate index of emails, Defra therefore held information concerning which communications were emails and was therefore obliged to consider disclosing this.
66. In relation to other forms of communication, such as letters and memos, details of these were not held in the form of an index and therefore information about the form of these communication was not be held by Defra. However, even though an index was not held, if the fact that a communication was an email had to be considered for disclosure, the fact that a communication is a letter should also be considered for disclosure under the public authority's duty to provide advice and assistance under regulation 9.
67. Even if Defra had not held information as outlined above, by slightly rewording its request, for example by asking for details of all the communications which were emails and making a separate request for those which were letters, the complainant could have ascertained the information requested in relation to the form of the communications. In such circumstances, it might be considered reasonable for a public authority provide this information as part of its duty to provide advice and assistance.

Exceptions

68. In considering the arguments in favour of disclosure of the information requested and the maintenance of the exceptions, the Commissioner has taken into account evidence gathered from the complainant and Defra, as well as advice provided during internal discussions and legal advice.

Regulation 12(5)(b) – Legal professional privilege

69. When considering whether information is exempt from disclosure under the EIR, the Commissioner believes that the appropriate exception to apply is that contained in regulation 12(5)(b) which provides that the disclosure of information can be refused if it 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 nature.”

70. In *Kirkaldie v The Information Commissioner (EA/2006/001)*, the Information Tribunal stated that the exception “...covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.”(para 21). It is noted that whilst Defra initially applied the exception in regulation 12(5)(d) in respect of legal professional privilege, it subsequently agreed that regulation 12(5)(b) would be applicable to this case.
71. The Commissioner has seen the documents which are the subject of the request and is satisfied that, with exception of a very small number, they are all subject to legal professional privilege. The Commissioner has taken the view that, as the documents not subject to legal professional privilege are communications between the UK and the EC Commission, they are outside the scope of the complainant's request and therefore do not need to be considered in relation to this decision.
72. The exception in regulation 12(5)(b) is applicable to information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. The principle of legal professional privilege can be described as a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers. It also covers exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and third parties, if such communications or exchanges come into being for the purposes of preparing for litigation.
73. There are two separate categories within this privilege those being legal advice privilege, which applies where no litigation is contemplated or pending and litigation privilege, which applies where litigation is contemplated or pending. The Commissioner is satisfied that the documents in question came into existence following the issuing by the EC Commission of a formal notices under Article 226 of the EC Treaty drawing the UK's attention to an alleged failure to comply with a European Directive. At this point litigation could be said to be contemplated as there was a reasonable prospect of litigation and therefore litigation privilege applied to these documents.
74. For litigation privilege to apply, the documents must also have come into existence for the sole or dominant purpose of either giving or getting legal advice from a professional legal adviser with regard to the litigation or for the sole or dominant purpose of collecting evidence for use in the conduct of the litigation. Having inspected the documents in question the Commissioner is satisfied that they come within these criteria and that they therefore attract litigation privilege. He is also satisfied that, where legal advice was sought or given, it involved a professional legal adviser.
75. Whilst the second request was only for a limited amount of information contained within these documents, the Commissioner's view is that if legal professional privilege applies to a particular document it applies to all the information

contained within that document and therefore, despite the limited nature of the information requested, this will be covered by legal professional privilege.

76. The Commissioner has considered whether legal professional privilege might have been waived by Defra by publicly disclosing any of the documents. There is no evidence to suggest that this has occurred.

Public Interest Test

77. Under regulation 12(1)(b) all the exceptions provided by the EIR are subject to a public interest test. It is therefore necessary to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest – in favour of disclosure

78. The Commissioner acknowledges the strong public interest inherent in releasing environmental information. The release of this type of information is important to enable the public to participate in environmental decision-making and have access to justice. The EC Directive (2003/4/EC) , which the EIR implement, states that

“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.”

79. The Commissioner also recognises that there is an inherent public interest in government being transparent and accountable in relation to the advice it has received regarding compliance with EC legislation. This is particularly the case where the EC Commission has commenced formal proceedings against the UK for possible contravention of an EC Directive. If this information were made public, there is a strong argument that this would help to ensure greater compliance with EC legislation in future. In addition greater public scrutiny would help to ensure the accountability of government for any breach of EC legislation.
80. There is, in addition, a public interest in individuals having access to information that helps them understand and participate in the debate on environmental issues. In this case, access to legal advice would provide the public with an opportunity to understand and engage in the debate over possible breaches of EC legislation and the steps that could be taken to remedy this. It would also help them to understand how the UK and the EC conduct infraction proceedings.
81. The Commissioner has also taken account of the importance of the public interest in bringing to light information which affects public health and safety, as in this case, where the issues concern the implementation of provisions related to the disposal of urban waste water.

82. There is a clear importance in the public, where they have made a request for information which has been refused, having access to sufficient details of the information to allow them to form a judgement as to whether they believe the decision is a correct one and therefore being able to make an informed decision as to whether to seek an internal review or to appeal to the Commissioner.

Public interest – in favour of maintaining the exception

83. The Commissioner acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view supported by the Information Tribunal. In *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*, the Tribunal stated that

“there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest” (para 35).

84. There is a need for reasonable certainty relating to confidentiality and the disclosure of legal advice. Without this, the principle of confidentiality would be undermined and the quality of legal advice may not be as full and frank as it ought to be, if there were a risk that it would be disclosed in the future. In *Bellamy* the Tribunal observed

“it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...”(para 35).

85. It is vital that public authorities are able to obtain full and frank legal advice in confidence. Legal advice necessarily highlights both the strengths and weaknesses of a particular position and so if legal advice obtained were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR. The Information Tribunal has stated that “under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned” (*Bellamy*, para. 8). Therefore, there must be a strong public interest in ensuring that legal professional privilege applies equally to all parties, so that they are on a level footing.

86. The Commissioner acknowledges that, in view of the limited amount of information requested, the strength of the public interest arguments in favour of maintaining the exception may be lessened to some degree, as compared with a request for all the information contained within the documents which were the subject of the request. However, he still believes that there is a significant public interest in maintaining the principle of confidentiality between lawyers and their clients in respect of this limited information.

87. The Commissioner is therefore satisfied that there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of legal

professional privilege is not countered by at least equally strong arguments in favour of disclosure.

Other exceptions

88. Having determined that the information requested by the complainant is exempt from disclosure by the exception in regulation 12(5)(b), the Commissioner did not feel it necessary to make a determination as to the applicability of the other exceptions claimed by the public authority.

The Decision

89. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- regulation 11(4) as it notified the complainant of the result of the internal review within 40 working days of the receipt of representations from the complainant;
- regulation 12(5)(b) (the course of justice) as the exception was correctly applied.

90. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- regulation 12(4)(a) (public authority does not hold the information requested) was incorrectly applied as it held most of the information requested;
- regulation 14(2) as it failed to issue a refusal notice within 20 working days of receipt of the request.

Steps Required

91. The Commissioner requires no steps to be taken in relation to the breach of regulation 14(2) as the refusal notice was provided by the public authority, albeit outside the required time period.

Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 5th day of February 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

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

–

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

Regulation 9 - Advice and assistance

Regulation 9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Regulation 11 - Representation and reconsideration

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

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

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

Regulation 12 - Exceptions to the duty to disclose environmental information

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

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

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

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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

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

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

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

Regulation 14 - Refusal to disclose information

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

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