

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

Decision Notice

Date: 17 June 2010

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AX

Summary

The complainant submitted a request in two parts to the Cabinet Office (CO) focussing on the involvement of Gordon Brown in the sale and development of land in the immediate vicinity of the British Library. The CO replied stating that to comply would exceed the cost limit at section 12(1) of the Act. The Commissioner is satisfied that the CO has provided a reasonable estimate which demonstrates that the cost of complying with the request would exceed £600 and thus the CO is entitled to refuse to fulfil the request. The Commissioner asked the CO to consider the possibility that the information was environmental in nature and that therefore the request should be examined with reference to the Environmental Information Regulations 2004 (EIR). The CO did not engage with this reasoning. However, the Commissioner considers that the information can still be considered as exempt under regulation 12(4)(b) of the EIR. The Commissioner finds that the CO provided sufficient advice and assistance to fulfil its obligation under section 16 of the Act and regulation 9(1) of the EIR.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

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

Background

3. The request is focussed on the sale and development of land in the immediate vicinity of the British Library.
4. The complainant has made a number of requests to several public bodies about the sale and development of the land.
5. Following the refusal of this request the complainant sent a second request to the Cabinet Office (CO) which is being dealt with separately.
6. The land in question was owned and controlled by the Department for Culture, Media and Sport and has been sold to a consortium headed by the Medical Research Council in conjunction with Cancer Research UK, the Wellcome Trust and University College London.

The Request

7. The complainant submitted the following request to the CO on 18 February 2008:

"I request all information held by the Cabinet Office relating to
 1. Gordon Brown and the sale of the land to the north of the British Library.
 2. Gordon Brown and the proposed building of a medical research centre on the site"
8. A response was issued from 10 Downing Street on 14 March 2008 stating that it would not be able to provide the information within the appropriate cost limit of £600 and that therefore under section 12 of the Act it did not intend to fulfil the request. The CO also suggested that to bring the request within the cost limit it should be restricted to a specific period of time and a specific aspect of the issue that the complainant was interested in.

9. The complainant wrote to the CO on 25 March 2008 reiterating his original request but also requesting details of Gordon Brown's involvement from January 2007 to the date of the letter, this second request was dealt with as a separate FOI request.
10. The CO wrote to the complainant on 18 April 2008 again stating that the original request was too broad in nature and could not be fulfilled within the £600 limit. The CO explained that this limit equates to one person spending 3½ working days; i.e. 24 hours of work; in determining whether the department holds information relevant to the request and if so, locating, retrieving and extracting the information. This information could be either manual or electronic and could be held by any number of people or departments across the CO. The CO went on to explain that the original phrasing could extend to information being held in 'media coverage, parliamentary reports and debates etc'.
11. The complainant responded on 21 April 2008 'appealing' against the CO's stance and stating that as a retired civil servant he could not accept that to fulfil the request would take more than the stated 24 working hours.
12. The complainant sent a second letter, also dated 21 April 2008, to the CO reiterating that he could not accept that the request could not be fulfilled within the time stated. This letter also contained a revised request, asking for information contained within the Prime Minister's Office.
13. On 24 April 2008 the CO acknowledged one of the letters from the complainant dated 21 April 2008 as a request for an internal review.
14. The complainant wrote to the CO on 26 May 2008 to request a substantive reply to his request for an internal review.
15. The CO responded on 3 June 2008 regarding the revised request but made no comment regarding the internal review of the original request.
16. The CO wrote to the complainant on 16 July 2008 in response to his request for an internal review. This review simply reiterated that there was not a specific file that contained all the information falling within the scope of the request and that relevant information could be in various areas of the department. A search to determine this would exceed the cost limit laid down in regulations.

The Investigation

Scope of the case

17. On 23 June 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the fact that the CO had claimed it would take more than 24 working hours to fulfil the request and the fact that the CO had not appropriately responded to his appeal dated 21 April 2008.
18. Following the CO's letter to him of 16 July 2008, the complainant wrote to the Commissioner on 27 July 2008 again asking him to investigate the handling of his request by the CO and in particular its claim that to comply with his request would cost more than the cost limit of £600.

Chronology

19. The Commissioner wrote to the CO on 10 February 2009 asking it to explain why complying with the request would exceed the limit provided of £600.
20. The Commissioner wrote to the CO on 7 May 2009 to chase up a response and also to advise the CO that he felt the request should be considered under the Environmental Information Regulations 2004 (EIR).
21. The CO replied on 27 May 2009 stating that although that was its original position things may have been 'overtaken by events'.
22. The CO explained that it felt that all the information relevant to the request was held by the Prime Minister's Office. The complainant had made a refined request for information held by the Prime Minister's Office and most of this had already been released to the complainant on 14 July 2008.
23. The Commissioner wrote to the Cabinet Office on 3 June 2009 advising that the complainant had issued a revised and narrower request that had resulted in some information being disclosed by the Prime Minister's Office. However, the complainant had still not received satisfaction with regards to his original request to the CO.
24. The CO responded on 24 August 2009 stating that it still felt that dealing with the original request would exceed the £600 cost limit.

25. The Commissioner wrote to the CO on 9 September 2009 asking for a more detailed breakdown detailing why it felt the cost of complying with the request would exceed the £600 limit. The Commissioner again asked the CO to consider whether the request should be regarded as a request for environmental information.
26. The CO replied on 20 October 2009 giving some details of why it felt the cost of complying would exceed £600. The CO also stated that it felt the request had been correctly handled under the Act rather than under the EIR.
27. The Commissioner wrote to the CO again on 29 March 2010 and stated that the breakdown provided was insufficient and that more details were required.
28. The CO replied on 14 April 2010 giving a more detailed breakdown of potential costs that would be incurred.

Findings of Fact

29. For the purposes of the Act the CO is the public authority. The Prime Minister's Office is an office within the CO. The Prime Ministers Office is not a public authority in itself and therefore all requests under the Act to the Prime Minister's Office are dealt with by the CO.

Analysis

Substantive Procedural Matters

Is any of the requested information environmental information?

30. Regulation 2(1) of the EIR defines 'environmental information' as any information in any 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)'

31. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enacts. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc 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.
32. The Commissioner also finds support for this approach in two decisions issued by the Information Tribunal. The first being *The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072). In this case the Tribunal found:

'that the Decision Notice [in which the Commissioner has concluded that none of the requested information was environmental information] fails to recognise that information on 'energy policy' in respect of 'supply, demand and pricing' will often fall within the definition of 'environmental information' under Regulation 2(1) EIR. In relation to the Disputed Information we find that where there is information relating to energy policy then that information is covered by the definition of environmental information under EIR. Also we find that meetings

held to consider 'climate change' are also covered by the definition.' (Tribunal at paragraph 27).

33. In reaching this conclusion the Tribunal placed weight on two arguments advanced by Friends of the Earth (FoE), the first being that information on energy policy, including the supply, demand and pricing issues, will often affect or be likely to affect the environment and the second that the term 'environmental information' should be interpreted broadly:

'23. Mr Michaels on behalf of FOE contends that 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 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.

25. Mr Michaels further argues that the term 'environmental information' is required to be construed 'very broadly' so as to give effect to the purpose of the Directive. Recognition of the breadth of meaning to be applied has been recognised by the European Court of Justice, by the High Court and by this Tribunal in *Kirkaldie v Information Commissioner & Thanet District Council* EA/2006/001. The breadth is also recognised in the DEFRA guidance 'What is covered by the regulations'. It does not appear, Mr Michaels argues, that the Commissioner has adopted such an approach.'

34. Moreover in reaching this conclusion the Tribunal appeared to reject BERR's arguments that there must be a sufficiently close connection between the information and a probable impact on the environment before it can be said that the information is 'environmental information'.
35. The second Tribunal decision is *Ofcom v Information Commissioner and T-Mobile* (EA/2006/0078) which involved a request for the location, ownership and technical attributes of mobile phone cellular base

stations. Ofcom had argued that the names of Mobile Network Operators were not environmental information as they did not constitute information 'about either the state of the elements of the environment....or the factors.....that may affect those elements.'

36. The Tribunal disagreed, stating at paragraph 31 that:

'The name of a person or organisation responsible for an installation that emits electromagnetic waves falls comfortably within the meaning of the words "any information... on... radiation". In our view it would create unacceptable artificiality to interpret those words as referring to the nature and affect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in the first recital, to achieve "... a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making...". It is difficult to see how, in particular, the public might participate if information on those creating emissions does not fall within the environmental information regime.'

37. The Commissioner believes that wherever possible the decision as to whether requested information is environmental information should be made on a review of the actual information that has been identified as held by the public authority as falling within the scope of the request, rather than on the wording of the request itself. However, in some cases it is not always possible to review a copy of the requested information. Such a scenario can include where the requested information is not in fact held (but if it would be held could be environmental information) and scenarios such as this case where the CO cannot in fact provide the requested information because, in its opinion, to do so would exceed the fees limit at section 12 of the Act.

38. In such scenarios where the public authority has not been able to extract and provide the Commissioner with all of the requested information, he considers the following points in order to assess what access regime(s) the requested information falls under:

- Whether a sample of the information could be provided.
- Does the wording of the request suggest that the EIR would apply (e.g. a request for information about waste disposal)?
- Does the context of the request suggest EIR would apply? (e.g. if the complainant has been corresponding with a public authority about a proposed building development and then asks for all copies of correspondence between the public authority and the building contractor)?

- How does the public authority hold the information and for what purpose is it held (e.g. information is held by the planning department in a planning file)?
39. The Commissioner accepts that from an objective viewpoint the information which falls within the scope of the request would be environmental information by virtue of regulation 2(1)(c). For information to be environmental information via regulation 2(1)(c) the Commissioner considers that:
- The information itself must be **on** a measure or activity; and
 - The measure or activity (not the information itself) must affect or be likely to affect the elements and factors in 2(1)(a) or (b).
40. The threshold of 'likely to affect' is one where the likelihood need not be more likely than not, but it must be substantially more than remote.
41. In the Commissioner's opinion, this request is asking for information on a measure – the sale of land and the development of land. This is because the sale of a piece of land is likely to result in changes to the use of the land, particularly in this case: the building of medical research facility whereby the construction of such a building following the sale would affect the land on the site.
42. However, in the circumstances of this particular case the Commissioner has in effect been provided with a sample of similar information concerning the sale and development of this land in his investigation of the complainant's other requests on this matter to the CO and also the DCMS. In analysing this information the Commissioner has concluded that a small portion of this information cannot be sufficiently linked back by regulation 2(1) so that it can be said to be environmental information. The Commissioner is therefore aware that the request covers a mixture of environmental and non-environmental information; the Commissioner's approach in such cases is to allow the costs of dealing with the requests under section 12 of the Act.
43. Any request meeting the requirement of section 8 of the Act is a valid Freedom of Information request, including where the request may include environmental information, to which the exemption at section 39 would apply. Therefore in the context of this case the complainant's right of access to all of the information falling within the scope of his requests is technically provided for by the Act.
44. The Commissioner, therefore, has initially considered whether to determine if it holds, locate, retrieve and extract all potentially

disclosable information would exceed the appropriate cost limit and therefore whether the CO can rely on section 12(1) of the Act.

Exemptions

Section 12 – cost of compliance exceeds appropriate cost limit

45. Section 12(1) of the Act provides that public authorities do not have to comply with a request where the estimated costs of responding to that request exceeds the appropriate limit as specified by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations').
46. Section 4(3) of the Regulations sets out the basis upon which an estimate can be made:

“(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only the costs it reasonably expects to incur in relation to the request in –

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per hour.”

The Cabinet Office's position

47. In correspondence with both the complainant and the Commissioner the CO referred to the 'broad and general nature' of the request. It also stated that the information could potentially be held both electronically and manually and by a large number of people and teams across the CO.
48. In response to the Commissioner's enquiries the CO provided the following information and points in order to clarify and further support

its position that section 12 provided a basis upon which to refuse to fulfil the request.

49. The CO does not hold a registered file for the "British Library" nor does it have a specific file for all correspondence concerning the involvement of Gordon Brown. To search for the information the CO would have to undertake a very general search covering "health, planning, research, science, culture etc".
50. To illustrate the time required to undertake such a search the CO provided the following example:
 - a. The Knowledge and Information Management Unit in the Cabinet Office holds 11 files on health related issues, 2 files on planning issues and, while it does not have files on research or libraries/museums, it would also have to look for relevant information in education (4 files), science (2 files) and culture (3 files). This gives a total of 22 file parts. These are all paper files and the time taken to search each would vary but the Knowledge and Information Management Unit usually allow one hour per file part which would give a total of 22 hours to search for any relevant information.
 - b. The Prime Minister's Office holds 4 files on libraries/museums, 35 on health related issues, 6 on research and 8 on planning. This adds another 53 files which would have to be searched.
 - c. The Prime Minister's Office records any correspondence it receives by subject rather than by view expressed. In 2008 the correspondence unit in the Prime Minister's Office received some 6400 records on health, 20 on research and over 1500 on planning. Details of each are held electronically. Even allowing for 1 minute per search this would mean some 7920 minutes – or 132 hours – to search for any relevant information.
51. In summary, the CO estimates that to undertake the search stated above would take somewhere in the region of 207 hours; at a cost of £25 per hour this would equate to £5,175. This is very obviously "well in excess of one person spending 3 ½ working days in determining whether the department holds the information, and locating, retrieving and extracting the information".

The Commissioner's position

52. In considering estimates relied upon by public authorities in relation to section 12, the Commissioner has followed the approach of the

Tribunal in *Alasdair Roberts v Information Commissioner* (EA/2008/0050) at paragraphs 9 to 13 in which the Tribunal confirmed that the approach of deciding whether an estimate was reasonable involved consideration of a number of issues, including:

- i. A public authority has only to provide an estimate rather than a precise calculation;
 - ii. The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
 - iii. Time spent considering exemptions or redactions cannot be taken into account;
 - iv. Estimates cannot take into account the costs relating to data validation or communication;
 - v. The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - vi. Any estimate should be 'sensible, realistic and supported by cogent evidence'.
53. Given the breadth of the request and the fact that relevant information could be in numerous locations the Commissioner accepts that to find all the required information the CO would have to undertake a search of all the manual files and all of the electronic information held in those locations. The CO has provided a logical explanation of how this search would be undertaken and the Commissioner is persuaded that the sheer volume of information would necessitate a search taking far in excess of the 24 hours limit.
54. On the basis of the above, the Commissioner accepts that the CO has provided estimates that are sensible, realistic and supported by cogent evidence and moreover support the conclusion that the cost of fulfilling the requests would significantly exceed the £600 limit.
55. The complainant states that he has, in the past, worked in the civil service and believes that the information would be more readily identifiable and retrievable. The complainant has suggested that the possible involvement of Gordon Brown would necessitate the communication being concentrated, perhaps within one central file. The Commissioner notes this argument but is also mindful that the CO, which includes the Prime Minister's Office, will have a great deal of communication with direct reference to Gordon Brown and it would therefore not be practical for all correspondence of this kind to be kept separate. Therefore, in the absence of any proof otherwise he accepts the argument presented by the CO that the information is not easily retrievable.

56. Whilst the costs of identifying, locating, retrieving and extracting the information to meet the request in full can be taken into account under section 12, any costs related to identifying and redacting environmental information under section 39 is not permissible.
57. However, in the circumstances of this case it is clear that in order to determine which access regime a piece of information falls under, the CO must be in a position to actually examine that information. Therefore before it can make a determination as to how much of the information is non-environmental information it must have first located, retrieved and extracted all of the requested information. Therefore the Commissioner is satisfied that the CO can include in the estimate needed to support the application of section 12(1) the time it would take to carry out the activities listed in the Regulations in order to locate and retrieve all potentially disclosable information.

Regulation 12 of EIR

58. Although the cost of dealing with the whole request is found to exceed the appropriate limit under section 12 of the Act, as the Commissioner believes that much of the information relevant to the request is environmental in nature the applicant still has the right for his request to be administered under the EIR. Therefore, the Commissioner will consider the public authority's separate obligations under the EIR notwithstanding the fact that the CO does not consider that the information held is environmental in nature. Nevertheless, such information can be exempt from disclosure on the basis of the exceptions contained at 12(4)(b) and 12(4)(c) of the EIR.

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.

The Commissioner has initially considered regulation 12(4)(b).

59. As noted above, the Commissioner accepts in this case that before the CO is in a position to provide the environmental information falling

within the scope of the request, it must first determine what environmental information it holds and before it does that it must locate **all** of the information falling within the scope of the request. Therefore in relation to whether the CO can rely on regulation 12(4)(b) the decision the Commissioner effectively has to reach is whether fulfilling the request in its entirety would place a burden on the CO that is manifestly unreasonable.

60. In determining the threshold needed to engage this exception the Commissioner has taken into account the comments of the Information Tribunal in *DBERR v The Information Commissioner and Platform* (EA/2008/0096) which stated that:

‘It is clear to us that the expression [manifestly unreasonable] means something more than just “unreasonable” The word “manifestly” imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. (paragraph 31)

61. In determining whether the cost of complying with a request would be manifestly unreasonable the Commissioner will use the Act as a starting point to ascertain what costs or diversion of resources would be involved in answering a request. This does not mean however that a request exceeding the appropriate limit will necessarily be manifestly unreasonable under regulation 12(4)(b). Again the Commissioner notes the comments of the Tribunal in *Platform*:

‘Regulation 12(4)(b) is quite different. There is no “appropriate limit” to act as a cut off point. It is the request that must be “manifestly unreasonable”, not just the time required to comply with it, nor indeed any single aspect of it. In our view, this means that Regulation 12(4)(b) requires the public authority to consider the request more broadly. This does not mean that the time required to comply with a request is irrelevant. Rather, it is one factor to be considered along with others when assessing whether a request is “manifestly unreasonable”.’ (paragraph 36)

And:

‘We note that recital 9 of the Directive calls for disclosure of environmental information to be “to the widest extent possible”. Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information.’ (paragraph 39)

62. For the reasons set out above the Commissioner accepts that fulfilling the request would involve considerable expense and significantly exceed the fees limit in the Act. Furthermore, the Commissioner accepts that searching for this information will involve disruption across many areas of the CO as many business areas will need to be searched in order to ensure that all relevant information is located. Although the Commissioner notes that the CO is a large central government public authority and therefore considers it unlikely that fulfilling the request would actually prevent the CO from carrying out its core functions, he believes that fulfilling this request would result in an unreasonable diversion of the CO's resources away from its core functions. Allied with the broad nature of the request and the high cost in fulfilling it this means that the request can correctly be classed as manifestly unreasonable and thus the CO can rely on regulation 12(4)(b) to refuse to answer it.

Public interest test

63. However, regulation 12(4)(b) is a qualified exception and therefore subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

64. The Commissioner has considered the following public interest arguments in favour of disclosure:
- The general interest in openness and greater confidence in government and the process of government which comes from releasing information.
 - The level of influence exerted on the decision making process by the Prime Minister.
 - The project concerned is a large building project that some, such as the complainant, consider to be controversial in nature. If the decision making process were more open then protestors could be more focussed and informed.
65. There is an inherent public interest in disclosure of information to ensure that the government is accountable for, and transparent about, its decision making processes. This transparency could in turn lead to government departments being more aware that their decisions and processes could be open to public scrutiny. In order to facilitate such scrutiny this could in turn lead to more detailed records management in the relevant public authority.

Public interest arguments in favour of maintaining the exemption

66. There is a public interest in the public authority being able to carry out its core functions without the distraction of having to comply with requests that would impose a significant burden in both time and resources. The Commissioner is mindful of the fact that the CO's ability to comply with other more focused requests for information would be undermined if it had to routinely deal with wide ranging requests for large amounts of information covering an unlimited timeframe.

Balance of public interest arguments

67. The Commissioner has weighed the arguments of open government and greater transparency together with greater access to environmental information against the arguments of the request being a disproportionate burden on the public authority's resources. On balance, the Commissioner believes the cost of complying with the request will be very high. He therefore feels that this will place a significant burden on the public authority to the extent that this would outweigh the benefits to the public interest identified which would be served through complying with the request. Therefore the Commissioner accepts the arguments presented by the CO to support its use of section 12 of the Act and regulation 12(4)(b) of the EIR.
68. The Commissioner has not gone on to address the use of regulation 12(4)(c) in the light of the fact that he has accepted the argument in relation to regulation 12(4)(b).

Procedural Requirements

Section 16 – duty to provide advice and assistance

69. Section 16(1) of the Act requires a public authority to provide advice and assistance so far as it is reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information.
70. The section 45 Code of Practice provides guidance to public authorities in carrying out their duties in relation to the Act and includes suggestions in relation to the nature of the advice and assistance that public authorities should provide in relation to section 16 of the Act. In relation to cases where the public authority has refused a request on the basis of section 12, the guidance suggests that:

'...the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The

authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee¹ (Para 14)'.

71. The Commissioner is satisfied that in the circumstances of this case, the CO provided the complainant with a reasonable level of advice and assistance in order to allow the request to be refined. The Commissioner has reached this conclusion by considering the actions of the CO when it suggested the request could be refined and narrower in its scope. It suggested that a request specifying a narrower period of time and specific aspect of the issue concerned may be a more manageable request.

Regulation 9 – advice and assistance

72. Regulation 9(1) places the same requirements on a public authority as section 16(1) of the Act when the information being requested consists of environmental information. For the reasons set out above the Commissioner believes that the CO fulfilled its obligations under regulation 9(1).

The Decision

73. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The CO was entitled to refuse the request on the basis of section 12(1) of the Act.
 - To the extent that the requested information falls within the scope of the EIR, the CO was entitled to refuse to provide the information on the basis of regulation 12(4)(b) of the EIR.
 - The CO provided sufficient advice and assistance to fulfil its obligation under section 16(1) of the Act and regulation 9(1) of the EIR.

Steps Required

74. The Commissioner requires no steps to be taken.
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¹ Freedom of Information Act, Section 45 Code of Practice:

Other matters

75. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
76. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 50 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

77. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 17th day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

**Information Commissioner's Office
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Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled -

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that -

"Where a public authority -

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that -

"The information -

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Duty to provide Advice and Assistance

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Environmental Information Regulations

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

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

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

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

“the Commissioner” means the Information Commissioner;

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

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

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

referred to in (a) and (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

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

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

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

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

“Scottish public authority” means –

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

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

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 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 –

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

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

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

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

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

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

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

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

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