

## Freedom of Information Act 2000 (Section 50)

### The Environmental Information Regulations 2004

#### Decision Notice

1 December 2008

**Public Authority:** The Department for Business, Enterprise and Regulatory Reform  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

#### Summary

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The complainant wrote to the Department for Trade and Industry (now the Department for Business, Enterprise and Regulatory Reform) to request details of secondees and consultants which the public authority had working on issues related to Iraq, as well as information regarding communications with oil companies on the issue of Iraq. The public authority refused the request under section 12 of the Freedom of Information Act on the grounds that the cost of complying with the request would exceed the appropriate limit. The Commissioner has investigated the complaint and has concluded that the public authority was correct to refuse the request under section 12. However the Commissioner has found that one element of the request should have been dealt with under the Environmental Information Regulations and has decided that this information should be made available to the complainant. The Commissioner has also found that in its handling of the request the public authority breached sections 16(1) and 17(5) of the Freedom of Information Act and regulations 5(1), 5(2) and 14(3) of the Environmental Information Regulations. The Commissioner has also commented on a number of matters of concern that have arisen out of the public authority's handling of this case.

#### The Commissioner's Role

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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 Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## The Request

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3. On 21 May 2005 the complainant wrote to the public authority to make a request for information. The complainant cited both the Freedom of Information Act 2000 ("the Act") and the Environmental Information Regulations 2004 ("EIR"). The request read as follows:

"Please provide me with the following:

- a) A list of all individuals who have been seconded to work on issues related to Iraq, in BERR, in public bodies overseen by BERR, in the (Iraq) Coalition Provisional Authority (April 2003 – June 2004), or in International Organisations of which the UK is a part.

For each individual, please provide their name, the dates of their secondment, their job title and role in the secondment, the name of their regular employer from which they are/were seconded, and their job title in their regular employer

- b) A list of all consultants hired to work on issues related to Iraq, by BERR, by public bodies overseen by BERR, or by International Organisations of which the UK is a part.

For each consultant, please provide their name, organisation, dates of contract, and an outline of the purpose of their contract.

- c) Correspondence and minutes of meetings, with oil companies, their consultants and representatives and oil industry trade associations, on the subject of Iraq.

Please include all correspondence these companies and organisations have had with Government departments, of which BERR has copies, and not only those addressed to or signed by BERR itself; and likewise with meetings.

Please would you supply me with the information you hold that meets the description above, and provide me with the names of all files (and file titles) in which such information is held and the names of the individuals and units dealing with such issues."

4. The public authority did not reply substantively until 7 December 2005 and only after the intervention of the Commissioner. At this point it informed the complainant that it had seconded individuals to work in the power, water and healthcare sectors in Iraq. However, it said that it would not release their identities and cited the exemptions in sections 38 and 40 of the Act as justification, as well as the Data Protection Act 1998. Information relating to its contact with oil companies was also refused under section 38 of the Act.

5. In response to the request for file titles, the public authority said that it had no files possessing titles specifically relating to consultants or secondees to Iraq. It went on to say that it would need to go through many more general files to see if it had information on this topic and therefore it was refusing this element of the request under section 12 of the Act. It explained that under section 12 it is not obliged to comply with a request if the cost of doing so would exceed the appropriate limit of £600 for central government departments.
6. Finally, the public authority said that it had dealt with the request under the Act because it did not consider the requested information to be environmental in nature. However it said that it thought it likely that, under the EIR, regulations 12(5)(a) and 12(5)(f) would have been equally applicable. The complainant was invited, if dissatisfied, to seek an internal review.
7. On 19 January 2006 Friends of the Earth, who had now taken up the matter on behalf of the complainant, wrote to the public authority to ask that it conduct an internal review of its handling of the complainant's request. In asking for the internal review Friends of the Earth said that the public authority had not provided an explanation for the significant delay in dealing with the complainant's request. It also suggested that the public authority had misunderstood the request as it had referred to staff and secondees working in Iraq and the oil industries. It explained that the complainant's request was in fact broader in scope because it had asked for details of staff working on all issues related to Iraq and the oil industries rather than just the details of staff working in Iraq.
8. Friends of the Earth said that it did not accept that the exemption in section 38 of the Act applied and suggested that, even if some information did need to be withheld, other information could have been released. Referring to the public authority's response to the request Friends of the Earth said that the complainant had no interest in the water and healthcare sectors. Finally, Friends of the Earth said it considered the public authority to be in breach of section 17 of the Act as it had failed to take account of the public interest test when applying the section 38 exemption.
9. The public authority failed to provide the internal review until 11 October 2007 and again this was only after the intervention of the Commissioner. At this point the public authority said that its original response to the request was inappropriate and it was no longer seeking to rely on the exemptions in sections 38 and 40 of the Act. It said that the correct approach at the time, and the approach it intended to adopt now, would have been to refuse the request under section 12 of the Act on the grounds that the cost of complying with the request would exceed the appropriate limit of £600.
10. The public authority said that it held over 550 files, a mixture of both electronic and paper records, relating to Iraq. All of these would need searching, at individual document level, in order to establish whether or not any relevant information was held. Even if the request were to be narrowed to exclude the water or healthcare sectors (and it said that it would be willing to consider such a narrowed request), the public authority said that the cost of compliance would still exceed the appropriate limit.

## The Investigation

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### Scope of the case

11. Given the significant delay in completing the internal review, Friends of the Earth contacted the Commissioner to ask that he consider the complaint even though it had not exhausted the public authority's internal complaints procedure. Friends of the Earth asked the Commissioner to review the public authority's response to the request and its application of sections 12, 38 and 40 of the Act. The Commissioner agreed to exercise his discretion to consider the complaint but before he could commence his investigation the public authority completed its internal review of its handling of the request.
12. After receiving a copy of the internal review Friends of the Earth contacted the Commissioner again on 23 November 2007 to clarify its grounds for complaint. At this point it specifically asked the Commissioner to consider the public authority's decision to refuse the request on the grounds that it had estimated that the cost of complying with the request would exceed the appropriate limit of £600. Friends of the Earth also asked the Commissioner to consider, what it saw as, the public authority's failure to provide advice and assistance in accordance with section 16 of the Act.

### Chronology

13. The Commissioner wrote to the public authority on 12 November 2007 to ask for further information regarding its application of section 12 of the Act. As a result of that request a member of the Commissioner's staff attended a meeting at which the public authority's information manager was present, as well as representatives of its Iraq and FOI teams. This meeting took place on 29 November 2007. At that meeting the operation of the public authority's electronic records system (known as Matrix) was explained to the Commissioner and the public authority confirmed its view that it would have been impossible to deal with the very broad nature of the original request without exceeding the appropriate limit. It also said that a more narrowly based request could have been met without exceeding the appropriate limit although, even had such a request been made, it might have proved necessary to cite other exemptions depending on the nature of the information concerned. The Commissioner was provided with a printed sample of file titles which could contain information relevant to the subject-matter of the request.
14. At the meeting of 29 November 2007 the Commissioner invited the public authority to provide an estimate of the costs it would expect to incur in dealing with the complainant's request.
15. Despite a number of reminders from the Commissioner, the public authority did not respond to the Commissioner until 17 March 2008 at which point it said that it did not believe that it was obliged to produce an estimate of this kind. It said that in its view the only way an estimate could be arrived at would be by effectively

- meeting the request. The public authority maintained that the cost of complying with the request would exceed the appropriate limit.
16. On 3 April 2008 BERR provided the Commissioner with further representations in support of its position that it had applied section 12 correctly.
  17. The Commissioner was dissatisfied with the public authority's response to his enquiries and so on 18 August 2008, in accordance with his powers under section 51 of the Act, he served the public authority with an Information Notice. The Commissioner asked the public authority to provide him with the following information, quoted here in full:
    - i) A sample of information falling within the scope of part c) of the complainant's request. The Commissioner expects to be provided with information on each element of this part of the request, both copies of correspondence and minutes of meetings, where this information is held.
    - ii) BERR's comments on why it is not possible to search for the information requested by focusing on a smaller number of business areas and/or specific areas of BERR's records management systems. In addition the Commissioner requires BERR's comments on the possibility that the information requested in parts a) and b) may be more easily retrieved by consulting its Human Resources or Finance departments to understand where the information is likely to be held, rather than a general search of the "Matrix" electronic records management system.
    - iii) A full estimate and breakdown of the costs that BERR would expect to incur in dealing with the complainant's request in full.
  18. The public authority responded to the Information Notice on 19 September 2008.
  19. In response to part i) of the Information Notice the public authority provided a sample of information as requested by the Commissioner.
  20. In response to part ii) of the Information Notice the public authority explained why it was unable to carry out a more focussed search for the information requested by the complainant. It said that there was not one single department that dealt with all issues related to Iraq. It said that the only unit specifically handling issues related to Iraq was the Iraq 'country desk' which it explained was part of UK Trade and Investment, a body promoting investment in the UK and UK based businesses operating abroad, for which the public authority and the Foreign and Commonwealth Office are the parent departments. The public authority went on to say that because it had restructured itself several times over the years which had involved changes of names to individual directorates and their functions, it made tracking down information, through what it described as taking a 'vertical slice' of the public authority, a more difficult task than it may appear.
  21. The public authority said that it did not think that it was the correct approach, when managing a request which would, in its totality, exceed the appropriate limit, to second guess what the applicant might want and administer the request in

respect of a 'vertical slice' of the public authority. The public authority noted that in its internal review it had offered to administer a further request from the complainant if the subject matter and/or the timeframe of the request could be more narrowly defined. It said that it had no record of a receiving a response to this offer.

22. In response to the Commissioner's question as to whether information on secondees and consultants could have been found by approaching its human resources or finance departments, the public authority acknowledged that its Human resources department may have been able to provide some of the information in parts a) and b) of the complainant's request. However it said that for one relevant section of the public authority secondments would have been handled through the Foreign and Commonwealth office and therefore the records regarding these staff would not be held centrally. Furthermore, it added that its payroll system does not hold details of what each secondee is working on.
23. As regards consultants working on issues related to Iraq, the public authority said that its Human Resources department did not hold information on where consultants were working. It added that its finance system does hold details of payments made under contracts but it does not hold details of what work individuals are assigned to. It said that such information is not held centrally and was not held centrally when the complainant made his request. It explained that to find this information would involve a search of the finance system to identify potentially relevant contracts, followed up with an approach to the relevant directorate to establish whether the contract was relevant, and if so whether they held any relevant information.
24. The public authority provided the Commissioner with an estimate of the costs it would expect to incur in dealing with the request as a whole and the costs it would expect to incur in dealing with the part c) of the request on its own. Notwithstanding this, the public authority said that it considered that the requirement of section 12(1) of the Act is to have estimated that to administer the request would exceed the appropriate limit and that it did not believe that it was required to calculate what the full cost of complying with the request would be. Similarly, it said that it did not believe that it needed to estimate the full cost of complying in order to rely on regulation 12(4)(b) of the EIR.

## Analysis

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25. A full text of the relevant statutes referred to in this section is contained within the legal annex.
26. When the complainant submitted his request to the public authority on 21 May 2005, he explained that it was made pursuant to both the Act and the EIR. The Commissioner has first considered the public authority's response to the request under the Act.

## Freedom of Information Act 2000

### Procedural Matters

#### Section 17 – Refusal of request

27. The public authority initially refused the request by relying on the exemptions in section 38 (health and safety) and section 40 (personal information) of the Act. However, the public authority subsequently chose not to rely on these exemptions and acknowledged that the correct approach would have been for it to have refused the request under section 12 of the Act. The public authority only cited section 12 in its much delayed internal review. By failing to inform the complainant, within 20 working days, that it was relying on section 12, the public authority breached section 17(5) of the Act.

#### Section 16 – Advice and assistance

28. Friends of the earth has argued that if the public authority has sought to rely on a claim that the cost of complying with a request would exceed the appropriate limit then it should provide the complainant with advice and assistance to allow him to narrow his request. Friends of the Earth has argued that the public authority failed to offer such advice and assistance. A public authority which conforms to the Code of Practice issued under section 45 of the Act will be taken to have complied with the duty to provide advice and assistance under section 16(1) of the Act.
29. Paragraph 14 of *The Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000* (“the Code of Practice”) describes what advice and assistance may be offered to an applicant whose request is refused under section 12 of the Act on the grounds that the cost of complying would exceed the appropriate limit. In particular the Code of Practice suggests that a public authority should consider providing an applicant with an indication of what information could be provided within the cost limit.
30. The Code of Practice states that a public authority should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant. Given the fact that the public authority took a considerably long time to carry out the internal review the Commissioner is of the view that it would not be unreasonable for the public authority to have indicated to the complainant what information could be provided within the appropriate limit. Furthermore, the Commissioner thinks that it would not be unreasonable for the public authority to have suggested to the complainant how he could have refined his request, for instance by focusing his request on a particular department or secretariat of the public authority. The public authority invited the complainant to refine the request and suggested he narrow the timeframe or subject matter of the request so as to bring it under the appropriate limit. However, without any further advice and assistance from the public authority it is difficult to see how the complainant could have achieved this, bearing in mind the public authority’s estimate of the cost of complying with the request.

31. Consequently, the Commissioner has found that the public authority breached section 16 of the Act through its handling of the complainant's request.

### **Section 12 – Exemption where cost of compliance exceeds appropriate limit**

32. Section 12 provides that a public authority is not obliged to respond to a request if it estimates that the cost of complying with the request would exceed the appropriate limit.
33. The appropriate limit is set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the fees regulations"). Under regulation 3 the appropriate limit for a central government department is £600.
34. In accordance with regulation 4, a public authority may, for the purpose of its estimate, take account only of the costs it would reasonably expect to incur in relation to the following activities:
- (a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information, and
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
35. The fees regulations provide that any costs which the public authority would expect to incur in relation to the above activities should be calculated at a rate of £25 per person per hour.
36. The public authority has claimed that the time taken to comply with the whole request would exceed 100 hours and therefore £2500. The public authority based its estimate on the time taken to comply with just part c) of the request. It estimated that the time taken to comply with part c) on its own would exceed 100 hours and did not make an estimate of the time taken to comply with parts a) and b) of the request. However, it noted that were the time taken to comply with parts a) and b) combined with the time it estimated it would take to comply with part c), the time taken to comply with the request as a whole would be considerably more.
37. In reaching its estimate the public authority provided the Commissioner with a detailed explanation of its 'Matrix' electronic records management system. In doing this the public authority explained how folders (i.e. files) and documents can be searched for using various categories so as to narrow the search. It added that the search categories can be used in various combinations in order to refine a search.



38. The public authority went on to say that a search on the Matrix system can be further refined by restricting the search to a type of document or file record, or several types of document or file in combination.
39. The public authority explained that whilst obtaining a sample of the information falling within part c) of the request, so as to comply with part i) of the Information Notice, it had carried out a number of searches of the Matrix system so as to demonstrate the significant number of records it held which could be of relevance to part c) of the request. The results of these searches are included as an annex to this decision notice.
40. Under the fees regulations the appropriate limit of £600 would be exceeded if complying with the request would require the public authority to spend more than 24 hours, calculated at £25 per person per hour, dealing with the request. The Commissioner accepts that a potentially significant amount of information would need to be searched in order to produce the information within part c) of the request and having considered the example searches put forward by the public authority he accepts that it is likely that complying with this part of the request would take around 24 hours or more. The public authority has suggested that it would take 100+ hours to deal with part c) of the request, however, the Commissioner does not necessarily agree with this estimate and will explain his reasoning for this when he revisits the public authority's cost estimate when addressing the request under the EIR.
41. As regards part a) and b) of the complainant's request, the public authority has said, as detailed in paragraphs 23 and 24, above, that information regarding secondees and consultants is not held centrally. The public authority has not produced an estimate of the costs it would expect to incur in dealing specifically with parts a) and b) of the request. However, whilst the Commissioner does not think that the cost of complying with parts a) and b) of the request would be particularly onerous on the public authority, he does accept that a search for this information would need to be more developed than it may otherwise appear and would in all probability involve a search of information held in more than one department of the public authority. In light of this he accepts that the costs involved, when combined with the cost of complying with part c) of the request, would have the effect of pushing the request above the appropriate limit.

## **Environmental Information Regulations 2004**

### **Regulation 2(1) – Defining Environmental Information**

42. When the complainant submitted his request to the public authority on 21 May 2005 he explained that it was made pursuant to both the Act and the EIR. The public authority dealt with the request under the Act and said that it did not consider the request to be for environmental information as defined in the Regulations. The Commissioner will now need to consider whether any of the requested information constitutes environmental information as defined in regulation 2(1) of the EIR.

43. Regulation 2(1)(c) provides that:

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

(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.”

44. The factors referred to in (a) include:

“(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.”

45. The Commissioner, having reviewed the information submitted by the public authority as part of the sampling exercise, has reached the view that the information in part c) of the request falls within the definition of environmental information in the Regulations. The public authority does not agree that the sample information is environmental information although the Commissioner notes that the public authority has itself conceded that it is likely that some of the information falling within the scope of part c) of the request will be environmental information. For the avoidance of any doubt, the Commissioner does not believe that the information requested in part a) and b) of the request falls within the definition of environmental information. This is because the focus of this part of the request is the employees of the public authority. Unlike part c) of the request, it does not specify any factor of the environment or any measure likely to affect any element of the environment such as the reconstruction of the Iraqi oil industry. “Issues related to Iraq” is so broad a term that it would be likely to include, given the recent history of Iraq, many issues that in no way could be considered environmental.

46. In making his decision, the Commissioner finds himself in a difficult position as he is in effect forced to make a decision on whether the information in part c) is environmental based on the wording of the request and the small sample of documents provided by the public authority. Obviously the Commissioner has been unable to review all the information which may fall within the scope of this part of the request because the public authority has maintained that the cost of complying with the request would exceed the appropriate limit.

47. Having reviewed the sample information, and having given consideration to the wider context of the involvement of oil companies in Iraq, the Commissioner finds that it is likely that a significant amount of the information relates to plans (both of the oil companies and the British government) for the reconstruction of the oil industry in post invasion Iraq. The Commissioner is of the view that this meets the definition of environmental information in regulation 2(1)(c) of the EIR because in

the main the information focuses on plans for certain oil firms involvement in the reconstruction of the Iraqi oil industry which are likely to affect the state of one or more of the elements of the environment as described in regulation 2(1)(a), particularly the land and landscape.

48. In reaching this view, the Commissioner has interpreted the meaning of “any information...on” in regulation 2(1) fairly widely. The Commissioner considers this to be in line with the purpose of the first recital of Council Directive 2003/4/EC from which the EIR are derived. The Commissioner’s general approach is that “any information...on” will usually include information concerning, about or relating to the measure in question. In other words, the Commissioner considers that information that would inform the public about the matter under consideration, (in this case the plans for the Iraqi oil industry) and would therefore facilitate effective participation by the public in environmental decision making, is likely to be environmental information.
49. The Commissioner has concluded, on the balance of probabilities, that the information in part c) of the request constitutes environmental information as defined in regulation 2(1)(c) of the EIR. Consequently the Commissioner finds that the public authority should have dealt with this element of the request under the EIR. The Commissioner is concerned that by failing to consider the request under the EIR the public authority ignored the complainant’s rights under this legislation. Given that the public authority was unwilling to undertake the tests necessary to establish if the information was environmental, it was reasonable in this case for the Commissioner to take the approach he has done by analysing the request and the sample of information to allow him to reach a decision.

#### **Regulation 12(4)(b) – Request is manifestly unreasonable**

50. The public authority has suggested that were the Commissioner to decide that the information in part c) of the request covers environmental information the request should still be refused under regulation 12(4)(b) of the EIR. Regulation 12(4)(b) provides that a request can be refused if it is manifestly unreasonable.
51. In making its submissions to the Commissioner the public authority has in effect suggested that regulation 12(4)(b) runs parallel to the exemption in section 12 of the Act in that if a request would exceed the appropriate limit, but the information is found to be environmental information, it may still be refused under regulation 12(4)(b). However there is no appropriate limit under the EIR and the fact that a request would exceed the appropriate limit if it were dealt with under the Act is not in itself grounds for classing a request as manifestly unreasonable.
52. The public authority has estimated that the time needed to comply with just part c) of the request would be in excess of 100 hours. The Commissioner has reviewed the examples of searches listed in annex A and recognises that the public authority holds a significant amount of information regarding oil companies and Iraq. However the Commissioner is not convinced that the public authority has identified the best way of searching the Matrix system so as to reduce the amount of time it would take to comply with part c) of the request. Indeed, it occurs to the Commissioner that the point of having an electronic records management system,

with a sophisticated search function, such as 'Matrix', would be to carry out searches of the kind necessary to comply with the complainant's request.

53. The public authority has also claimed that the information in part c) could potentially be held in more than one secretariat or section of the public authority and therefore it would be necessary to carry out a search of information held by virtually all areas of the public authority. The Commissioner does not accept this argument and sees no reason why the public authority would not be able to carry out a more targeted search by focusing on a smaller number of secretariats that are most likely to hold the information.
54. Under the fees regulations the public authority must only take into account the costs it would reasonably expect to incur in dealing with the request and the Commissioner would expect the public authority to carry out a reasonable search for the requested information. The Commissioner would not expect the public authority to search every single department for every single file it holds in relation to Iraq so as to establish completely beyond doubt that they have found all of the information related to the request, however tenuously. The public authority appears to have based its estimate on the costs it would expect to incur in conducting a search of this kind.
55. The Commissioner is entitled to investigate the manner in which the public authority has arrived at its estimate and can challenge assumptions it has made about where information may be held. The Commissioner notes the following comments of the Information Tribunal in *Urmenyi V The Information Commissioner [EA/2006/0093]* in this regard.

“...the Commission[er] and the Tribunal can enquire into whether the facts or assumptions underlying this estimation exist and have been taken into account by the public authority. The Commission[er] and the Tribunal can also enquire about whether the estimation has been made upon other facts or assumptions which ought not to have been taken into account. Furthermore the public authority's expectation of the time it would take to carry out the activities set out in regulation 4(3) a-d must be reasonable”.
56. For the exception in regulation 12(4)(b) to apply the request must be manifestly unreasonable. The word “manifestly” implies that a request must be very obviously unreasonable. In other words, there should not be good grounds to doubt that the complaint is unreasonable. In this case the Commissioner finds that there are grounds to doubt that the request is unreasonable.
57. The Commissioner wishes to make clear that in addressing this exception he has not taken into account the elements of the complainant's request that do not fall within the definition of environmental information. Parts a) and b) of the request cannot be “carried over” into the Commissioner's considerations of this exception because the Council Directive requires that the exceptions under the EIR must be read restrictively. Article 4 of the Directive states that:

“The grounds for refusal mentioned in paragraph 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure.”

58. In reaching this view the Commissioner has also considered what burden the request would impose on the public authority and whether complying with the request would involve an unreasonable diversion of resources from the provision of public services. The Commissioner notes that the public authority is a large central government department and whilst he recognises that the amount of information involved is not insignificant he does not believe that complying with the request would in any significant way interrupt or undermine its normal activities and responsibilities.
59. The Commissioner feels that this is a border line case and is prepared to accept that the cost of dealing with part c) of the request on its own would exceed the appropriate limit under the Act. However the Commissioner does not accept the figure of 100+ hours put forward by the public authority and feels compelled, not least because of the reluctance of the public authority to properly engage with the Commissioner when asked to estimate the cost of complying with the request, to conclude that the request is not manifestly unreasonable.

### **Procedural matters**

60. The Commissioner has decided that the information in part c) constitutes environmental information and as a result he must record the following procedural breaches of the EIR.
61. Because the public authority dealt with part c) of the request under the Act rather than the EIR it breached regulation 14(3) which provides that a public authority shall specify the reasons not to disclose the requested information.
62. By failing to make available the information in part c) of the request the public authority breached regulation 5(1). By failing to make that information available to the complainant within 20 working days the public authority breached regulation 5(2).

### **The Decision**

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63. 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 public authority dealt with the request in accordance with the Act to the extent that it correctly refused the request under section 12 of the Act.
64. The Commissioner has decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached section 16(1) of the Act by failing to provide the complainant with advice and assistance.
  - The public authority breached section 17(5) of the Act by failing to inform the complainant within 20 working days that it was refusing the request under section 12 of the Act.
65. The Commissioner has decided that the following elements of the request were not dealt with in accordance with the EIR:
- The public authority breached regulation 5(1) of the EIR by failing to make available the information in part c) of the request.
  - The public authority breached regulation 5(2) of the EIR by failing to make available the information in part c) of the request within 20 working days.
  - The public authority breached regulation 14(3) of the EIR by failing to specify the reasons for refusing to disclose the requested information.

### Steps Required

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66. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- In line with its duty under section 16 of the Act, the public authority should contact the complainant to inform him of the types, form and extent of the information it holds relevant to his request. The public authority should also advise the complainant what information could be disclosed within the appropriate limit.
67. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
- Disclose to the complainant the information it holds falling within part c) of the request.
68. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### Other matters

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69. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

#### Engagement with ICO

(i) During the course of his investigation, the Commissioner has encountered considerable delay on account of the public authority's reluctance to meet the timescales for response set out in his letters. Furthermore, the Commissioner has been met with resistance in his attempts to understand the public authority's reasons for handling the request as it did. The delays were such that the Commissioner was forced to issue an Information Notice in order to obtain details relevant to his investigation.

(ii) Accordingly the Commissioner does not consider the public authority's approach to this case to be particularly co-operative, or within the spirit of the Act. As such he will be monitoring the public authority's future engagement with the ICO and would expect to see improvements in this regard.

### **General good practice (in relation to s12)**

(iii) The Commissioner notes that there is no statutory requirement for a public authority to provide a breakdown as to how they have reached their estimate in relation to the cost of compliance. However the Commissioner considers that as a matter of good practice public authorities should produce a breakdown of this kind, if only to try to avoid cases being passed to the Commissioner and thereafter to avoid decision or enforcement notices or practice recommendations being issued. The Tribunal offered support for this approach in the case of *Gowers V The Information Commissioner [EA/2007/00114]* in which it was said that a public authority should demonstrate how their estimate has been calculated:

"...a public authority seeking to rely on section 12 should include in its refusal notice, its estimate of the cost of compliance and how that figure has been arrived at, so that at the very least, the applicant can consider how he might be able to refine or limit his request so as to come within the costs limit..." (para 68).

(iv) In its response to the complainant the public authority did not provide an explanation of the breakdown of costs in relation to the application of section 12. The Commissioner invites the public authority in future cases to provide such a breakdown.

### **Section 16 / section 45 Code of Practice**

(v) Part II of the Code of Practice recommends that, where a public authority estimates the cost of compliance would exceed the appropriate limit, they should consider providing an indication of what, if any, information could be provided within the cost ceiling. Paragraph 14 of the Code of Practice states that, in such instances, public authorities should

"...consider advising the applicant that by reforming or re-focusing their request, information may be able to be supplied for a lower, or no, fee."

(vi) In this case the public authority's initial response to the request neither provided an indication of what information could be provided within the appropriate limit nor advised the applicant that they might reform or re-focus their request. In failing to conform to the recommendations of the Code of Practice the public authority failed to comply with its duty under section 16(1) of the Act. The Commissioner would expect that, in future, the public authority's responses to requests will conform to the codes of practice and follow the recommendations set within his own guidance.

### **Code of Practice (timescale for internal review)**

(vii) Part VI of the 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. 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. Whilst he recognises that in this case, the delay initially occurred before the publication of his guidance on the matter, the Commissioner is disappointed that it took 431 working days for the internal review to be completed. The Commissioner is monitoring the timeliness of the public authority's internal review responses and expects that in future, these will be provided in the timescales set within his guidance.

### **Failure to comply**

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



## Right of Appeal

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71. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.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 1st day of December 2008**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## **Annex A – Legal Annex**

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### **Freedom of Information Act 2000**

**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 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”.

**Section 17(5)** provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

### **Environmental Information Regulations 2004**

**Regulation 5(1)** provides that –

“Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.”

**Regulation 5(2)** provides that –

“Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”

**Regulation 14(3)** provides that –

“The refusal shall specify the reasons not to disclose the information requested, including –

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

## Annex B – Matrix search results

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*The following is quoted in its entirety from the public authority's response to the Commissioner's Information notice:*

**1. Folders with 'Iraq' in the title registered prior to 21/5/2005**

Folders found = 2612

Average of 5 minutes to examine the contents of each folder = 217.7 hours

**2. Documents with 'Iraq' in the title registered prior to 21/5/2005**

Records found = 6797

Average of 1 minute to examine each document – 113.3 hours

**3. Documents with 'BP' in the title registered prior to 21/5/2005**

Records found = 3001

Average of 1 minute to examine each document = 50.0 hours

[The last search by oil company name would need to be repeated for each oil company]

Sample searches on Document Content produced the following results:

**4. Documents containing the words 'BP' AND 'Iraq':**

Records found = 2650

Average of 1 minute to examine each document = 44.2 hours

**5. Documents containing the words 'shell' AND 'Iraq'**

Records found = 1791

Average of 1 minute to examine each document = 43.7 hours