

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

Decision Notice

Date: 23 December 2009

Public Authority: Department of Energy and Climate Control
Address: 2 Whitehall Place
London
SW1A 2HH

Summary

The complainant requested information relating to a meeting which discussed high amplitude modulation of wind turbine noise. The public authority claimed that the information was exempt under section 36(2)(b) and section 36(2)(c) of the Act. In the event that the information fell within the Environmental Information Regulations (EIR), the public authority advised that regulation 12(4)(e) (internal communications) applied. The Commissioner is satisfied that the information requested is environmental information and should be considered under the EIR. However, the Commissioner finds that the information does not fall within the scope of regulation 12(4)(e) and therefore the exception is not engaged in relation to this information. DECC is required to disclose to the complainant the information withheld within 35 days from the date of this Notice.

The Commissioner's Role

1. The Environmental Information Regulations (the EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the Commissioner). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the Act) are imported into the EIR.

Background

2. The complainant lodged his information request to the Department of Trade and Industry (DTI). This organisation was subsequently incorporated within the Department of Business and Regulatory Reform (BERR) in June 2007. In October 2008 responsibility for energy and climate change policy was passed to the newly created Department of Energy and Climate Change (DECC).

Responsibility for two Departmental Strategic Objectives, relating to energy security and supply, and managing energy liabilities, were also passed to DECC.

3. In light of the above, the public authority in this case is actually DECC. For consistency and ease of reference, the Commissioner has referred to the DTI in relation to the initial handling of the request. However the subsequent complaint to the Commissioner was handled by DECC, and this Notice is served on DECC.
4. In 2004, the then DTI commissioned Hayes McKenzie to report on claims that infrasound or low frequency sound by wind turbine generators were causing health problems. Hayes McKenzie reported back to DTI in May 2006.
5. The Hayes McKenzie report noted that a phenomenon known as Aerodynamic Modulation (AM) was in some isolated circumstances occurring which was not anticipated by ETSU-R-97, which is the method of assessing the impact of the rating of noise from wind farms.¹
6. In order to determine whether or not AM was an issue, the Government brought together an advisory group, namely the Noise Working Group (NWG). The NWG was seen as an advisory group to provide technical advice and guidance on the issue of Aerodynamic Modulation (AM)².
7. However, following the publication of the Salford University report and a further DTI statement in August 2007³, the Department for Business, Enterprise & Regulatory Reform wrote to members of the NWG and advised them that no further meetings would be held unless new evidence came to light of the issue. The purpose of the Salford Report, which was published in July 2007, was to ascertain the prevalence of AM from UK wind farm sites, to try and gain a better understanding of the likely causes and to establish whether further research into AM was required.
8. The Commissioner notes that both parties have considered the request relates to two sets of draft minutes and a number of emails between various individuals discussing the content of the draft minutes prior to same being approved and published.

The Request

9. The complainant submitted the following request to DTI on 3 August 2006:

"I understand a meeting was held at the DTI yesterday (2 August 2006) to discuss the report written by the Hayes McKenzie Partnership concerning,

¹<http://webarchive.nationalarchives.gov.uk/http://www.berr.gov.uk/energy/sources/renewables/explain/wind/onshore-offshore/page21743.html>

²www.berr.gov.uk/files/file35592.pdf;
www.ref.org.uk/Files/berr.response.to.ref.claim.pdf

³www.semantise.com/~lewiswindfarms/Download%20Store/Noise%20Downloads/2007:08:01BERRNoisePR.pdf

in part, the unexpectedly high amplitude modulation of wind turbine noise which is not accounted for in ETSU-R-97. I further understand that a review or revision of ETSU-R-97 was discussed and further work is planned to quantify the extent of this problem.

I believe that I am entitled under the Freedom of Information Act to see the minutes of this meeting and also to have sent to me copies of the future discussions between the parties involved in this review/revision as well as any related information arising from the proposed surveys of noise complaints.”

10. DTI acknowledged the request on 4 August 2006, and advised that the minutes of the meeting would be placed on DTI's website. However DTI explained that it needed to circulate the draft minutes to those who contributed to the process to ensure that the contents were accurate.
11. In the absence of any further response, the complainant contacted DTI on 29 and 30 August 2006. DTI advised the complainant on 4 September 2006 that the minutes would be provided to him as a matter of urgency.
12. The complainant contacted the public authority on 22 September 2006. The complainant indicated to DTI that he was of the understanding that the minutes that were circulated shortly after the initial meeting had been substantially rewritten. The complainant noted that these minutes had now been rewritten and he asked for both the original circulated version and the current version of the minutes.
13. On 29 September 2006 the complainant wrote to DTI and outlined in detail exactly what information he requested, which mirrored the request that he submitted on 3 August 2006.
14. Following a number of holding letters, DTI wrote to the complainant on 19 October 2006. DTI wished to extend the time period for replying to the information request, which was, according to their records, received on 21 September 2006. A refusal notice was also forwarded to the complainant on this date which stated that the information requested was exempt on the basis of section 36(2)(b) and section 36(2)(c) of the Act.
15. The complainant asked DTI on 22 October 2006 for an internal review of its decision to withhold the information. On 1 November 2006 DTI indicated that it aimed to have the review completed by 17 November 2006.
16. DTI contacted the complainant on 16 November 2006 and advised him that due to changes at Ministerial level, the internal review was not yet completed and an outcome would not be expected until 7 December 2006.
17. On 20 November 2006 DTI advised the complainant that the Minister had now completed the internal review. The outcome of the review was to uphold the decision to refuse the request. DTI cited sections 36(2)(b) and 36(2)(c) as the reasons for withholding the information. Additionally, DTI argued that if the draft minutes or the discussions surrounding the revised minutes constituted

environmental information, then they would fall within regulation 12(4)(e) of the EIR.

The Investigation

Scope of the case

18. On 20 April 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In previous correspondence to the public authority, the complainant raised concerns as to the time taken in dealing with his request as well as the decision to withhold the information.
19. As outlined in detail below, the Commissioner has taken into consideration the entire context of the case and in particular the contents of the refusal notice issued to the complainant. The Commissioner is therefore of the view that the request lodged by the complainant on 22 September 2006 is the request which shall form the purposes of this Decision Notice.
20. The Commissioner is satisfied that the request of 22 September 2006 consists of both the draft minutes and the email correspondences. As the final, approved minutes of the meeting were already published prior to the complaint being submitted to the Commissioner, the Commissioner is not taking the final minutes into consideration in respect of this Decision Notice.
21. The role of the Commissioner was not however, to investigate how the Noise Working Group (NWG) reviewed ETSU-R-97, which is a document entitled "The Assessment and Rating of Noise from Wind Farms". The Commissioner did not make any investigation as to how the NWG was formed or who was able to join the group. This was a matter of discussion between the complainant and the public authority and the Commissioner therefore is not addressing these issues within this Notice.

Chronology

22. Regrettably there was a delay before the Commissioner's investigation began. The Commissioner wrote to DECC on 25 February 2009 and requested sight of the withheld information. The Commissioner also asked DECC to provide any further arguments that it wished to make in relation why the information should be withheld.
23. Following a number of reminders, DECC responded to the Commissioner on 1 June 2009 and 24 June 2009. DECC confirmed that the initial request lodged by the complainant on 3 August 2006 was not interpreted as an information request lodged under the Act. DECC held that the 'formal request' lodged by the complainant was received on 22 September 2006. The Commissioner, having considered the arguments presented by DECC in respect of this issue, is satisfied that the complainant's request of 3 August 2006 was acknowledged by the public

authority even though it was not correctly identified as an information request. As per paragraph 19 above, the Commissioner is of the view that the request lodged by the complainant on 22 September 2006 is the request which shall form the purposes of this Decision Notice.

24. DECC advised the Commissioner that even with the passage of time, it remained of the view that the arguments made to withhold the information were still relevant. DECC argued that it was important that minutes of meetings that are published are correct and accurate, to avoid misunderstandings, errors, and points missed or views misrepresented. This is particularly important for those who contributed to the minutes, who expect their views to be accurately represented. DECC advised that the report, namely the Hayes McKenzie report which was the subject of these minutes, was published in 2006⁴. However, the issues within the report still remained topical and any draft minutes or incorrect text could be misused if placed into the public domain, which would undermine the public interest.
25. The Commissioner wrote to DECC on 19 August 2009, asking it to provide detailed arguments as to why it felt that the EIR did not apply to the entirety of the information request. The Commissioner also asked DECC for further details regarding the nature of its relationship with the NWG and in particular the nature of the internal communications that constituted part of the request.
26. DECC responded to the Commissioner on 9 October 2009. In respect of the Commissioner's view that the information request should be dealt with under the EIR, DECC advised the Commissioner that as the complainant had originally submitted his information request under the Act, the request was dealt with in accordance with that legislation. DECC confirmed that at the internal review stage, it was felt that the request could potentially fall under the EIR as well as, or instead of, the Act. The response to the internal review request was therefore considered in light of both regimes.
27. DECC provided the Commissioner with additional arguments as to why the information would be considered as 'internal communications'. DECC reiterated the fact that the final minutes were published as had been indicated to the complainant from the outset. DECC also provided the Commissioner with further representations regarding the public interest test.

⁴ <http://www.berr.gov.uk/files/file31270.pdf>

Analysis

Is the information environmental?

28. The definition of “environmental information” is set out in regulation 2(1) of the EIR. This states that:

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

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and build 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)”

29. The Commissioner considers that the phrase “any information ... on” should be interpreted widely and that this is in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact⁵. Therefore ‘any information on’ will usually include information concerning, about or relating to a

⁵ Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

particular measure, activity, or factor in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

30. DTI had originally processed the request for information under the Act. However, to the extent that any of the information contained within the reports or advice requested was environmental, DTI also considered the EIR. The information requested in this case centred on the discussions and debate regarding Aerodynamic Modulation (AM). However during the course of the investigation, the Commissioner indicated to DECC that he in fact considered that the information constituted environmental information and therefore it should have been dealt with under the EIR. It is accepted by all parties in this case (including the Commissioner) that this information falls within the definition of environmental information set out in (c) above, as it is information on factors affecting or likely to affect the elements of the environment referred to in (a) and (c) above.
31. In order to define information as environmental under 2(1)(c), the measure or activity (not the information in question) must affect or be likely to affect the elements and factors in 2(1)(a) and (b), or be designed to protect the elements in (a).
32. The Commissioner has assessed the withheld information using the test described above and has concluded that it constitutes environmental information by virtue of regulation 2(1)(c). He has set out the reasoning for his conclusions below.
33. The withheld information relates to a meeting which took place on 2 August 2006 which discussed the issues of wind turbine installations and low frequency noise. The discussions which took place regarding the minutes concerned any errors or inaccuracies which may have been contained in the initial minutes.
34. The meeting related to low frequency noise from wind turbines, which the Commissioner considers falls within the definition outlined at regulation 2(1)(b). This is because noise is a factor which may affect the elements of the environment. The published minutes outline issues concerning low frequency noise and highlight the fact that a greater understanding of the effects and causes of AM was required to manage these issues. This may or may not require steps or measures to be taken to address these issues. The Commissioner is therefore satisfied that the information requested is environmental information and falls within the definition of regulation 2(1)(c).
35. Whilst DTI initially applied section 36(2)(b) and (c) to the requested information, at internal review it was considered that the information also fell under the exception at regulation 12(4)(e) of the EIR. The Commissioner has already found that as the requested information is environmental, exemptions under the Act no longer apply.

Exceptions

Regulation 12(4)(e): internal communications

36. The Commissioner notes that the complainant requested any draft minutes of the meeting, email correspondences which discussed the contents of the drafts and the final version of the minutes of the meeting. The Commissioner is aware that the final minutes have already been published and therefore these do not form part of this Decision Notice.
37. In respect of the remaining information, the Commissioner wishes to consider whether the draft minutes and the email discussions were correctly withheld or whether they should have been disclosed to the complainant upon receipt of his request of 22 September 2006.
38. Regulation 12(4) of the EIR provides that:
- “For the purposes of paragraph 1(a), a public authority, may refuse to disclose information to the extent that –
- (e) the request involves the disclosure of internal communications.”
39. DECC considered that if any of the information requested by the complainant fell within the definition of environmental information, it would be seen as ‘internal communications’, and should therefore be withheld under regulation 12(4)(e) of the EIR.

What constitutes a ‘communication’?

40. Neither the EIR, nor the Council Directive 2003/4/EC, provide a definition of what constitutes a communication. The Commissioner has found that where the information recorded is intended to be communicated to others or to be placed on file where it may be consulted by others, this information will be deemed to be a communication.
41. Information can take any form, and can include memos, notes of meetings or emails. It may also include, for example, correspondence between local authority council members or board members of a government agency, information passed between officials in the course of their duties, internal minutes and briefs and submissions to ministers in government departments.

What constitutes an ‘internal’ communication?

42. For ‘government departments’ within the meaning of the EIR, the scope of the exception expressly extends to communications between one government department and another by virtue of regulation 12(8). Regulation 12(8) expressly recognises the importance of the convention of collective responsibility which requires that ministers be able to argue freely in private in the expectation that when decisions have been reached, they will present a united front.

43. The Commissioner's interpretation of regulation 12(4)(e) is quite restrictive in that it includes only communications passing between members of staff in a public authority. Communications between a public authority and its external advisors, contractors etc. will not be covered by the exception.
44. DECC has repeatedly stated that the NWG was an advisory group to the Government. It was established by the then DTI following its decision to carry out a peer view of the Hayes McKenzie report. Indeed within its published minutes following the meeting of 2 August 2006, DTI went to some length to explain the role and purpose of the NWG. Its functions were to:
- consider and agree, if thought appropriate, the main conclusions of the report;
 - consider the report's findings relating to AM;
 - if appropriate, provide a means to assess and apply a correction where AM is predicted to be a clearly audible feature;
 - make clear recommendations to advise Government.⁶
45. The complainant, in his correspondence to the public authority, voiced his concerns regarding the composition of members of the NWG as he felt that they were favourable towards the interests of the wind industry.
46. DTI advised the complainant in correspondence to the complainant of 20 November 2006 that:
- “the current Noise Working Group represents a number of different interests including wind developer companies (2), local authorities (4), Lawyers (1) and Acoustic experts/consultants (6). DEFRA and DTI are also represented with DTI as Chair and the secretariat for the group is performed by Future Energy Solutions.*
- Of the 6 acoustic and consultancy companies represented two usually work with local authorities representing wind farm developers; two usually represent wind farm objectors; two have no direct involvement with the wind industry, one is a general noise expert and one was brought in for his experience on noise related British Standards Therefore it is not correct to suggest that the group is biased towards the wind industry.”*
47. When the Commissioner raised the issue with DECC as to what relationship the NWG had with DECC, it was suggested to the Commissioner that internal communications should include correspondences even if they are sent externally to members of the NWG who are outside of DECC. This, according to DECC, is because the NWG is in effect an extension of DECC for these purposes.
48. The Commissioner, however, does not agree with the stance taken by DECC. The role of the NWG has been clearly stated on a number of occasions, namely to provide advice and input towards the government's policy regarding the issues

⁶ <http://www.berr.gov.uk/files/file35043.pdf>

of AM. It is representative of a wide range of stakeholders with varying interests and backgrounds. Therefore from its clearly defined role as an advisory group, the NWG cannot be seen in itself as part of the government, or an executive agency or a public authority. DECC has advised the Commissioner that the members of the NWG who participated in this process provided their advice on a voluntary basis and without any remuneration or similar contractual obligation towards DECC or DTI.

49. Therefore the Commissioner finds that the public authority has incorrectly applied regulation 12(4)(e) to the email correspondences, circulated amongst the representatives of the NWG, which should have been provided to the complainant upon receipt of his request. As the exception is not engaged in relation to this part of the request, the Commissioner does not need to consider the public interest arguments in respect of this part of the information request.
50. Similarly, the Commissioner is also satisfied that the draft minutes of the meeting of 2 August 2006 do not fall within the definition of regulation 12(4)(e). These were clearly discussions involving an advisory body which is not part of the government. Therefore the Commissioner does not find it necessary to consider whether or not the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(3) – personal data

51. Regulation 12(3) states that:

“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.”

52. The relevant sections of regulation 13 to this request are as follows:

“13(2) The first condition is –

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

53. DECC did not raise the possibility either to the Commissioner or to the complainant that any of the withheld information could be exempt under regulation 12(3). In the absence of this exemption being cited or indeed any details as to which of the data protection principles⁷ could be breached by disclosure of the personal data, the Commissioner would normally find that the exception would not be engaged. However, the Commissioner is mindful of his

⁷As set out at Schedule 1 to the Data Protection Act 1998 (the DPA)

regulatory role in relation to personal information. He has therefore considered whether disclosure of the information would breach the first data protection principle, which states that:

1. Personal data must be processed fairly and lawfully; and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

54. The Commissioner's guidance on section 40 of the Act (which is the equivalent section to regulation 12(3) of the EIR) suggests that a number of factors should be considered when assessing whether disclosure of information would be fair. These include what expectations the third parties may have about what would happen to their personal data.
55. With regard to the names of the individuals that appeared in the withheld information, the Commissioner considers that there should be a reasonable expectation that their names, in the capacity of their employment in government departments or within their role in the NWG, would be released in relation to any information request. The Commissioner notes that the majority of these names are already contained within the final version of the draft minutes which has already been released to the complainant. Therefore these individuals should have had a reasonable expectation that their names would be disclosed in response to a request under the EIR or the Act. The Commissioner is of the view that, had any of the individuals been of a more junior level, he would have been more likely to accept that they would have had a realistic expectation that their names and their contributions would not be disclosed. In such a scenario disclosure of these names would be likely to be unfair and may breach the first data protection principle.
56. In relation as to whether disclosure of the names as they appear in the withheld information in this case meets one of the conditions in Schedule 2 to the DPA, the Commissioner considers the most appropriate condition to be the sixth which reads:
- “The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”
57. The Commissioner has followed the approach taken by the Information Tribunal in the case of *House of Commons v ICO & Leapman, Brooke, Thomas* in which the Tribunal interpreted the sixth condition as setting out a three part test, which must be satisfied, namely:
- there must be legitimate interests in disclosing the information,
 - the disclosure must be necessary for a legitimate interest of the public, and

- even where the disclosure is necessary, it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms & legitimate interests of the data subject⁸.
58. The Commissioner has also taken into account his own Awareness Guide on section 40 of the Act⁹. This makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) as opposed to their public life (i.e. their work as a public official or employee) it will deserve more protection than information about them acting in an official or work capacity.
59. Within the Awareness Guide, there are also guidelines concerning the roles of employees within public authorities. It states that public authorities should take into account the seniority of employees when personal information about their staff is requested under the Act. The more senior a person is, the less likely it is that disclosing the information about their public duties will be unwarranted or unfair. In this case, the Commissioner has taken into account the fact that the representatives on the NWG held positions and roles to provide technical advice and guidance on the issue of AM, an issue of considerable public debate.
60. With regard to any prejudice against the individuals rights, freedoms and legitimate interests, the Commissioner notes that the comments made by these individuals contained in the withheld information were all made in their professional capacity either as civil servants or within their role in the NWG. Therefore the contributions do not relate to their private life and thus any harm to their privacy which the DPA is ultimately designed to protect will be minimal.
61. On this basis, the Commissioner believes that the disclosure of the names of the individuals contained in the withheld documentation is fair, lawful and meets the 6th condition. Regulation 12(3) does not therefore provide a basis upon which to withhold the names, comments or the contact details of these individuals and therefore any documents containing this information should be disclosed.

Procedural Requirements

Regulation 5: duty to make information available on request

62. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.
63. The complainant submitted his information request on 3 August 2006. According to DECC, this correspondence was not interpreted as being a formal request made under the Act or the EIR. DECC was of the view that the complainant's further correspondence of 22 September 2006 is the date upon which a formal request was submitted. The Commissioner, as per paragraph 20 above,

⁸ EA/2007/0060

⁹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

considers that the date from which the complainant's request should be treated is 22 September 2006.

64. As indicated above, the Commissioner finds that all of the information requested by the complainant ought to have been disclosed to him. Therefore the Commissioner finds that DECC breached regulation 5(1) of the EIR. As the information was not provided within 20 working days, the Commissioner also finds that DECC breached regulation 5(2).

The Decision

65. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR in the following respects:
- Regulation 5(1), in that it failed to make information available on request
 - Regulation 5(2) in that it failed to provide information within the specified time.
 - Regulation 12(4)(e) in that it wrongly withheld the draft minutes of the meeting of 2 August 2006 and the discussions surrounding the revised editions of the minutes.

Steps Required

66. The Commissioner requires the public authority, within 35 calendar days of the date of this notice, to disclose to the complainant all the draft minutes of the meeting of 2 August 2006 together with copies of the discussions between the parties involved in the review or revisions of the draft minutes.

Failure to comply

67. 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

68. 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.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 23rd day of December 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Regulation 2

(1) In these Regulations -

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

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among those elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures, such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Regulation 5

- (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.
- (2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

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 the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -
 - (a) it does not hold that information when an applicant's request is received;
 - (b) the request for information is manifestly unreasonable;
 - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; of
 - (e) the request involves the disclosure of internal communications.
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -
 - (a) international relations, defence, national security or public safety;
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature,
 - (c) intellectual property rights;
 - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
 - (f) the interests of the person who provided the information where that person –

- (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.
- (6) For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor 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).
- (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.
- (8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.
- (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).
- (10) For the purposes of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.
- (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.

Regulation 14

- (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.
- (2) The refusals shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
- (3) The refusal shall specify the reasons not to disclose the information requested, including -
- (a) any exception relied on under regulations 12(4), 12(5) or 13; and

- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).