

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

Decision Notice

Date: 23 February 2011

Public Authority: Office of Communications
Address: Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Summary

The complainant requested copies of the findings of any independent tests commissioned by the public authority to establish if any home networking PLT devices complied with the essential requirements of the Electromagnetic Compatibility Directive (Directive). The public authority confirmed it held a report of an investigation it had conducted under the Directive in relation to Ethernet Power Line Adaptors supplied by a company known as Comtrend.

The public authority dealt with the request under the Freedom of Information Act 2000 relying on exemptions at sections 30, 36, and 42 of the Act. During the course of his investigation, the Commissioner found that the Environmental Information Regulations 2004 (EIR) should have been the correct access regime. He therefore invited the public authority to either disclose the report or rely on an appropriate exception(s) under the EIR. The public authority consequently decided to withhold the report on the basis of the exception at regulation 12(5)(b) (course of justice, the ability to receive a fair trial, and the ability of a public authority to conduct a criminal investigation).

The Commissioner found that the exception was correctly engaged but ordered the disclosure of the report because in all the circumstances of the case the public interest in maintaining the exception did not outweigh the public interest in disclosure. He therefore requires the withheld information to be disclosed.

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

Background

3. Power Line Telecommunication (PLT) technology is used to carry data on a domestic mains wiring system using a radio frequency signal. It is generally used to interconnect computers and other IT apparatus around the home. PLT devices use relatively high power levels in order to send signals down electricity wires. It is the degree of power used by PLT devices which allegedly causes harmful interference affecting radio reception within a particular radio spectrum.

The Request

4. On 30 October 2009 the complainant requested information relating to home PLT networking devices. The request was phrased as follows:

Have OFCOM carried out any tests, or commissioned any independent tests, or other tests, to establish if any Home PLT networking devices conform with the essential requirements of the EU EMC Directive, or any other applicable regulations or agreements particularly in respect of emissions in the radio spectrum?

If so where can these findings be accessed?

5. The public authority properly treated the request as a request for the outcome of the tests. On 27 November 2009 the public authority responded. It withheld the information within the scope of the request (disputed information) under 'section 30 of the Act'.

6. On 05 December 2009 the complainant requested a review of the decision to withhold the disputed information.
7. On 22 February 2010 the public authority wrote back with details of the outcome of the internal review. It upheld the application of section 30, and additionally relied on 'section 36' as well as the exemption at section 42(1) to parts of the disputed information.

The Investigation

Scope of the case

8. On 14 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to review the public authority's refusal to disclose the information held within the scope of his request.

Chronology

9. On 08 April 2010 the Commissioner wrote to the public authority and requested copies of the disputed information.
10. On 24 May 2010 the public authority responded. It provided the Commissioner with copies of the disputed information.
11. On 16 August 2010 the Commissioner wrote to the complainant. He outlined the scope of the investigation and invited the complainant to comment if necessary.
12. In the meantime on 16 August 2010 the Commissioner also wrote to the public authority. He advised the public authority that, in his view, the request should have been addressed under the Environmental Information Regulations 2004 (EIR). The Commissioner therefore invited the public authority to either disclose the disputed information or rely on a relevant exception(s) under the EIR instead to withhold the disputed information.
13. On 13 September 2010 the public authority responded. It made detailed representations as to why it considered that the Act rather than the EIR was the correct access regime. It however added that even if the Commissioner subsequently ruled definitively that the EIR was the correct access regime, the disputed information was in any event exempt from disclosure on the basis of the exception at regulation 12(5)(b).

14. On 21 October 2010 the Commissioner informed the public authority that he remained of the view that the EIR was the applicable access regime and also requested clarification in relation to a number of points made by the public authority regarding the application of regulation 12(5)(b).
15. On 10 November 2010 the public authority responded.

Analysis

Substantive Procedural Matters

16. A full text of the statutory provisions referred to below can be found in the legal annex.

Disputed Information

17. The public authority confirmed that the disputed information consists of;
18. A report by [named company] dated 'September 2008' and entitled; 'EMC Evaluation of Comtrend Ethernet Powerline Adaptors'. It includes an appendix entitled; 'Test Report from [named company] dated 17 September 2008'.
19. The Commissioner understands that the report was commissioned by the public authority pursuant to its enforcement functions under the Electromagnetic Compatibility Regulations 2005 (the 'EMC Regulations').
20. The public authority explained that the disputed information comprises details of the tests undertaken on specific home PLT networking devices to determine whether they cause electromagnetic disturbance. It includes the specific parameters and the results from the tests of conducted.

Applicable access Regime

21. 'Environmental Information' is defined at regulation 2(1) of the EIR as 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);
22. In the Commissioner's view, 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 enact. The Commissioner considers 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.
23. The Commissioner understands that the "EU EMC Directive" referred to by the complainant is the electromagnetic Directive 2004/108/EC. The Commissioner understands that the primary effect of the Directive has been to introduce identical requirements for the electromagnetic performance of electrical apparatus in every country within the European Economic Area (EEA).¹
24. In respect of the appropriate access regime the Commissioner considered that the primary issue for him to decide was whether

¹ Directive 2004/108/EC is implemented in the UK via the Electromagnetic Compatibility Regulations 2005

information relating to electromagnetic emissions from home PLT networking devices could be described as 'environmental information' within the meaning of regulation 2(1) of the EIR.

25. By virtue of regulation 2(1)(b), information on emissions affecting or likely to affect the elements falls within the definition of environmental information. Not only does 'information on' emissions fall within the definition of environmental information, by virtue of regulation 12(9), it includes information which 'relates to information on emissions....' in so far as a public authority intends to rely on the exceptions at regulations 12(5) (d) – (g).
26. The public authority however argued that the level of emissions from home PLT networking devices is on such a low scale that it does not affect or is not likely to affect any of the elements listed in regulation 2(1). According to the public authority, this 'de minimis' principle was recognised by the Information Tribunal in the Office of Communications v Information Commissioner (EA/2006/0078) (OFCOM case) at paragraph 28 of their decision where the Tribunal stated;

'Low level emissions from small scale domestic equipment will not affect any of the elements of the environment and will therefore fall out of the definition by virtue of subparagraph (a)'
27. The public authority explained that the type of low level electromagnetic disturbance generated by home PLT networking devices is an unintentional by-product caused by the operation of some electrical apparatus which may interfere with other electrical or radio equipment.
28. In the Commissioner's view, if a particular type of emission (in this case electromagnetic emissions) is likely to affect the elements, all information on that type of emission will fall within the definition of environmental information irrespective of the quantity of emissions. The Commissioner disagrees that a 'de – minimis' test should be applied and making a finding on the actual level of emissions in a particular case is neither necessary nor desirable. In many cases, (including the present one regarding the level of electromagnetic emissions generated by home PLT networking devices), there may be genuine ongoing scientific uncertainty about the precise level or effect of emissions from a particular source and it would be unrealistic to expect the Commissioner to resolve such scientific issues.²

² The public authority's website states that as at September 2009, it had received 143 complaints regarding PLT interference with the airwaves. Also, in its submissions to the

29. In addition, if there is a link between the disputed information and an emission affecting or likely to affect the environment, it would seem that the underlying principle of the EIR should be brought into play – i.e. disclosure would further public understanding of the extent of such emissions and allow public participation in any debate or decision-making about such emissions. It would frustrate this purpose to introduce a quantitative threshold on the level of emissions.
30. Furthermore, in the Commissioner's view, information explicitly confirming an absence or low level of emissions would still seem to be information about emissions. In line with the broad interpretation of 'any information on', the fact that home PLT networking devices produce a certain level of electromagnetic emissions does not have to record or reflect a direct effect on the elements of the environment. What is relevant is that the information is **on** a factor (i.e. electromagnetic emission) which does.
31. In the Commissioner's view, the main thrust of the Tribunal's decision in the OFCOM case was the definition of environmental information which "is not intended to set out a scientific test and its words should be given their plain and natural meaning....."(Paragraph 27). The Tribunal further commented that;
- "A broad definition of environmental information for these purposes may result in very low level emission sources also being included (such as the baby alarm referred to earlier or some remote control devices). However, there are several other elements of the definition which could cover both substantial and insubstantial factors. For example, 'land' in sub paragraph (a) may be capable of including a small garden and 'waste' in subparagraph (b) could include elements of domestic drainage." (Paragraph 28).
32. Therefore, in the context of the other comments made by the Tribunal in the same case, the Commissioner does not consider the comment above that low level emissions from small scale domestic equipment would not affect the elements should be taken as a definitive or fully reasoned ruling on the issue.
33. The Commissioner draws additional support for his position from the implementation guide³ on the Aarhus Convention⁴ on which the

Commissioner, the public authority acknowledges that the issue still generates considerable debate and is more than likely to generate further investigations in the future.

³ <http://www.unece.org/env/pp/acig.pdf>

⁴ UN Convention on Access to Information, Public Participation in Decision – Making and Access to Justice in Environmental Matters – 25 June 1998

definition of environmental information and principles of the Directive/EIR is based. The guidance suggests that it is not reasonable to impose a threshold based on the significance or level of the potential effects on the environment. "... (W)here information is concerned, efficiency is not served by imposing a threshold but by including everything that is relevant. (Page 27).

34. The Commissioner would also comment that in view of the fact that electromagnetic emissions are capable of affecting the environment, the EMC Directive (or any other applicable regulations on electromagnetic emissions) is clearly a measure that affects or is likely to affect the elements. Therefore, irrespective of whether home PLT networking devices themselves are likely to affect the environment, information about compliance with the requirements of the Directive should be covered by virtue of the provision in regulation 2(1)(c) to the extent the disputed information is on a measure likely to affect emissions and the elements.
35. In view of the above, the Commissioner finds that the request should have been addressed under the provisions of the Environmental Information Regulations 2004 and not the Freedom of Information Act 2000.

Exception

36. In view of his finding above, the Commissioner next considered whether the disputed information should have been withheld under the EIR. As noted above, the public authority also considered that the disputed information would in any event be exempt from disclosure by virtue of the exception at regulation 12(5)(b).
37. Regulation 12(1) provides that a public authority may refuse to disclose environmental information if an exception to disclosure under paragraphs 4 and 5 (of regulation 12) applies and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
38. The Commissioner therefore first considered whether the disputed information was exempt from disclosure on the basis of regulation 12(5)(b).

Regulation 12(5)(b)

39. Information is exempt on the basis of regulation 12(5)(b) if its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

40. The public authority explained that the report consists of evidence it obtained as part of a criminal investigation into allegations that a criminal offence had been committed under the EMC Regulations.⁵ The EMC Regulations provide a set of rules to ensure the levels of electromagnetic disturbance are regulated without stipulating particular limits.⁶ According to the public authority, there is no suitable harmonised standard for PLT equipment. In other words, there is no single harmonised standard in the EEA against which to test PLT devices for electromagnetic emissions.
41. The person who places the product on the market (i.e. the manufacturer or the importer) is responsible for compliance and must ensure that equipment meets the essential requirements. Evaluation of electromagnetic disturbance is carried out by conducting engineering tests and compliance can be demonstrated through self assessment or by involving an accredited organisation known as a “notified body”. A notified body is a body designated by the Secretary of State in accordance with his powers under regulations 1(2) of the EMC Regulations to carry out the functions described in Part IV of the EMC Regulations. These functions include assessing on behalf of a manufacturer whether equipment complies with the essential requirements.
42. According to the public authority, Comtrend obtained the opinion of a notified body (described at paragraph 41 above) as evidence that their product (i.e. Powerline Ethernet Adaptors) meets the essential requirements of the EMC Regulations.
43. The public authority additionally pointed out that, as an alternative to assessing whether equipment meets the essential requirements through the use of a notified body, compliance with the EMC Regulations can be demonstrated through self assessment. Self assessment, as suggested, requires manufactures to immediately test their equipment against harmonised standards across the EEA immediately after production. If this is done, there is a legal presumption that the essential requirements are met.

⁵ Section 46 of the EMC Regulations makes it an offence to place on the market or put into service, an equipment which contravenes electromagnetic compatibility provisions. Section 37 imposes a duty on OFCOM to enforce the EMC Regulations in so far as action taken to enforce relates to the protection and management of the radio spectrum.

⁶ These rules are described in regulations 4 and 5 of the EMC Regulations and are referred to as the ‘essential requirements’. There are however reference standards (also known as harmonised standards because they are harmonised across the EEA), against which equipment can be manufactured and tested.

44. The public authority explained that it did not find a breach following its investigation into complaints that the Powerline Ethernet Adaptors manufactured by Comtrend did not meet the requirements of the EMC Regulations and it therefore decided not to prosecute. The Commissioner has commented on this point in the confidential annex to this notice.
45. According to the public authority, there is however a possibility that the investigation could be reopened if new evidence was to emerge in the future. In the public authority's view, given that mass consumer use of home PLT network devices is a relatively recent development, it is likely that new evidence could emerge in the not too distant future. The public authority was also keen to stress that the compatibility of PLT equipment with the EMC Regulations is a hotly debated issue within the community of amateur radio users. The disputed information is therefore not historical and disclosure could be prejudicial to the conduct of future investigations into similar allegations.
46. The public authority further argued that the information in the report would be likely to inform suppliers of PLT devices of the approach and general consideration/strategies it undertakes when investigating possible breaches of the EMC Regulations.
47. Specifically, disclosure would allow PLT suppliers to identify the harmonised standard against which it tests PLT devices in the absence of a harmonised standard directly applicable to PLT devices (page 7 of the report) and the margin by which the public authority deems it acceptable to exceed that harmonised standard (section 4 of, and the appendix to, the report) without taking enforcement action.
48. The public authority drew support for its position from the Commissioner's decision in case FS50225815 in which the Commissioner accepted that the disclosure of certain data as to the number of motorists travelling at 70-75 mph on the M6 motorway prosecuted by Cumbria Constabulary would be likely to prejudice the prevention and detection of crime.
49. Disclosure would also give suppliers of PLT devices a detailed understanding of the types of tests and the technical parameters used when testing these devices (section 3 of the report).
50. It would further reveal the identity of the companies it uses to carry out testing on its behalf, leading to a risk that an entity being investigated might seek to instruct such a company in order to conflict it from assisting the public authority.
51. The public authority further argued that it had to be mindful of the potentially severe commercial and reputational damage that PLT

manufacturers and suppliers may incur in circumstances where their customers become aware that they are under investigation. It asserted that is therefore vital for the integrity of its investigations that it does not expose the process to the undue interference or speculation of third parties.

52. The Commissioner considers that, in the circumstances, the applicable part of the exception is in respect of the possible adverse effect on the ability of the public authority to conduct an inquiry of a criminal or disciplinary nature.
53. The adverse effect anticipated in this case is on the ability of the public authority to conduct future investigations regarding complaints about the interference of home PLT networking devices with radio airwaves by virtue of the disclosure of information relating to a completed investigation. The investigation must however be one of a criminal or disciplinary nature. The Commissioner has already noted above that section 46 of the EMC Regulations makes it an offence to contravene electromagnetic compatibility provisions and the powers granted under section 37 of the same regulations enable the public authority to conduct investigations to determine whether an offence has been committed under the regulations.
54. On the basis of his review of the withheld information and the public authority's representation the Commissioner is therefore satisfied that the protection sought by the public authority is inherent in the exception at regulation 12(5)(b).

Would the disclosure of the disputed information adversely affect the ability of the public authority to conduct a criminal inquiry under the EMC Regulations?

55. The Commissioner would like to point out from the outset that in his view, the threshold to justify non-disclosure because of adverse effect under regulation 12(5) of the EIR is a high one compared to the threshold to engage a prejudice based exemption under the Act. It is not enough that disclosure will have an effect, that effect must be 'adverse'. Also, it is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. In the Commissioner's opinion, the term 'would' does not require a public authority to prove that the adverse effect would occur beyond any doubt whatsoever. However, the likelihood of it occurring must be at least more probable than not..
56. As noted above, in the circumstances of this case, the Commissioner has to decide whether the disclosure of the disputed information would have an adverse effect on the ability of the public authority to

investigate future complaints relating to alleged interference by PLT devices with radio airwaves.

57. The Commissioner agrees with the public authority that in the circumstances, it is highly likely that it could receive similar complaints about PLT devices in the future. As already noted, whether or not the operation of PLT devices interferes with radio airwaves remains debatable and has generated a considerable number of complaints to the public authority. It would seem reasonable therefore to assume that the issue is still 'live' and in the circumstances, due weight must be attached to arguments that disclosure would adversely affect future investigations
58. However, as always, the starting point has to be with the disputed information. Therefore, notwithstanding the fact that the issue was 'live' at the time of the request, the Commissioner must also consider whether making the disputed information publicly available would adversely affect the public authority's ability to investigate future complaints relating to PLT devices.
59. The Commissioner has carefully examined the disputed information and he agrees with the public authority that on the whole, it reveals the information relating to the approach and strategies (including details of technical parameters) the public authority undertakes when investigating possible breaches of the EMC regulations. He accepts that knowledge of the public authority's investigation strategies could assist persons who want to circumvent the EMC regulations.
60. In terms of revealing the identity of the company(ies) or independent experts the public authority uses to conduct the testing of PLT devices for electromagnetic emissions, the Commissioner has not found any evidence to contradict the public authority's assertion that the names of the relevant company(ies) were not publicly available at the time of the request. He therefore accepts that revealing this information could potentially put those companies in a conflict of interest with the public authority thereby adversely affecting its ability to conduct investigations into possible breaches of the EMC regulations.
61. However, the Commissioner cannot see how revealing the specific limits/standard against which the public authority tests PLT devices would adversely affect the ability of the public authority to conduct a criminal inquiry. The public authority has revealed that there is no single harmonised standard across the EEA to test PLT devices. As the Commissioner understands it, the intended aim of the EMC Directive is to ensure EEA-wide compatibility to ensure free movement of goods. Therefore, it would seem counter-productive in his view to suggest that manufacturers and suppliers of PLT devices should not be aware of the

specific standard against which the public authority would test their products if it were to investigate a complaint in relation to those products. Clearly the aim of the legislation is to secure compliance with the standard.

62. The Commissioner however accepts that disclosing the disputed information would reveal the margins by which the public authority might be prepared to allow electromagnetic emissions from PLT devices exceed its adopted standard. He is persuaded that this information could encourage manufacturers and suppliers to comply only at a very minimal level with restrictions imposed on the level of electromagnetic emissions from PLT devices. It is conceivable that compliance at the most minimal of levels might not be adequate to stop interference with the airwaves in some cases. The knowledge that the public authority could allow, or has allowed such levels of emissions in the past from PLT devices might in some circumstances adversely affect its ability to conduct an investigation, but only to a very limited degree.
63. However, in the circumstances of this case, the Commissioner is not persuaded that the risk of damage to the commercial reputation of manufacturers and suppliers under investigation is a relevant factor. At the time of the request, it was public knowledge that the PLT devices manufactured by Comtrend were those being investigated.⁷
64. Nevertheless, for the reasons above especially in relation to the 'live' nature of the subject matter and the risk of revealing information relating to its investigation strategy, the Commissioner finds that disclosing the disputed information would adversely affect the ability of the public authority to conduct investigations pursuant to the EMC regulations.

Public Interest

65. The Commissioner next considered whether in all the circumstances of the case, public interest in maintaining the exception outweighed the public interest in disclosure.

⁷ <http://stakeholders.ofcom.org.uk/enforcement/spectrum-enforcement/plt/>

Public interest arguments in favour of disclosing the requested information

66. The public authority acknowledged that the disclosure of information on the investigations it conducts would enhance public confidence in its regulatory activities.
67. The Commissioner specifically notes that disclosing the disputed information would be in the public interest for the following reasons:
 - There is a public interest in disclosing information about new ways of bringing technology into the home
 - New technology supports the economy, education and society generally
 - The information is held for purposes of public protection
 - The information concerns important information for the public as consumers; it can help to inform consumer choices
 - The information is environmental and consumers are increasingly conscious of and taking into account environmental considerations when making choices as consumers.

Public interest arguments in favour of maintaining the exception.

68. The public authority argued that disclosure would be likely to deter people providing information relevant to an investigation in the future and therefore not in the public interest.
69. The Commissioner considers that the arguments above in relation to the adverse effects of disclosure equally apply as public interest arguments in favour of maintaining the exception.

Balance of the public interest arguments

70. For the same reasons the Commissioner found that the disputed information engaged the exception at regulation 12(5)(b), he also finds that there is a significant public interest in maintaining the application of the exception by not disclosing the disputed information.
71. Nevertheless, the Commissioner considers that there is also a significant public interest in disclosing the disputed information. In *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC* (EA/2006/0011 and EA/2006/0013), the Information Tribunal commented as follows on the general public interest in openness:

'While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.'
(Paragraph 87).

72. In addition to the specific public interest in the disclosure of the disputed information which the Commissioner has outlined above he considers that in view of the findings of both the independent experts and the public authority, there was a strong public interest in the disclosure of the disputed information. In the Commissioner's opinion, disclosure would have shed light on the rationale for the public authority's decision that PLT devices are compatible with the EMC Regulations. In addition, the disputed information is, in the Commissioner's view, a vital element by which the public would have been able to hold the public authority to account for its decision. The Commissioner therefore finds that in all the circumstances of the case, the public interest in disclosure outweighs the public interest in maintaining the exception.
73. Further details of the rationale for the Commissioner's decision can be found in the confidential annex which he is issuing to the public authority at this stage only due to its specific references to the content of the withheld information.

Procedural Requirements

74. Regulations 5(1) and 5(2) combine to impose on a public authority the duty to disclose information to an applicant within 20 working days.
75. The Commissioner therefore finds the public authority in breach of regulations 5(1) and 5(2) for failing to disclose the disputed information to the complainant within 20 working days of the request of 30 October 2009.
76. Regulations 14(2) and 14(3) combine to impose on a public authority the duty to issue a refusal notice within 20 working days specifying the exceptions relied upon and the matters it considered in reaching its decision with respect to the public interest.
77. The Commissioner therefore finds the public authority in breach of regulations 14(2) and 14(3) for relying on the exception at section 12(5)(b) during the course of the investigation and not within 20 working days of the request as stipulated.

The Decision

78. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Regulations.
79. The public authority breached regulations 5(1) and 5(2) for failing to make the disputed information available to the complainant at the time of his request because in all the circumstances of the case, the public interest in disclosure outweighed the public interest in maintaining the exception at section 12(5)(b).
80. The public authority breached sections 14(2) and 14(3).

Steps Required

81. The Commissioner requires the public authority to take the following steps to ensure compliance with the Regulation:
 - Disclose the disputed information (i.e. the report entitled; 'EMC Evaluation of Comtrend Ethernet Powerline Adaptors').
82. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

83. 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

84. 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

85. 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.
86. 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 23rd day of February 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
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Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 5 - Duty to make available environmental information on request

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.

Regulation 5(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 5(3)

To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4)

For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5)

Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6)

Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

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 the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2)

A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3)

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

Regulation 12(4)

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

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

Regulation 12(5)

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

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - 3. 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.