

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

Decision Notice

Date: 21 October 2010

Public Authority: The Governing Body of the University of Reading

Address: Whiteknights
PO Box 217
Reading
RG6 6AH

Summary

The complainant made a number of requests for information related to the involvement of one of the public authority's staff in the Intergovernmental Panel on Climate Change. The public authority initially failed to identify a significant amount of information falling within the scope of the requests. It subsequently disclosed this information to the complainant during the course of the Commissioner's investigation. The Commissioner has found that the public authority breached regulation 5(2) of the EIR by failing to make available requested information within 20 working days of the requests. It also breached regulation 11(4) by not communicating the outcomes of internal reviews within 40 working days of receiving representations from the complainant and regulation 14(2) by not providing a refusal notice within 20 working days of the receipt of requests.

The Commissioner's Role

1. 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

2. The complainant made requests for information held by the public authority related to the involvement of a member of its staff in the Intergovernmental Panel on Climate Change ("IPCC"). The IPCC was established in 1988 by two United Nations Organisations, the World Meteorological Organisation and the United Nations Environment Programme to assess the scientific, technical and socioeconomic information relevant for the understanding of the risk of human-induced climate change.
3. The IPCC does not carry out new research but seeks to summarise the state of scientific understanding with respect to global climate change. It has published four assessment reports. The first was published in 1990, the second in 1995, the third in 2001 and the fourth in 2007. The IPCC bases its assessments mainly on published scientific literature.
4. The IPCC divides its work for the assessment reports between three separate working groups covering different aspects of climate change. Authors, contributors, reviewers and other experts who participate in the preparation of the reports are selected from a list of nominations received from governments and participating organisations and those identified by the IPCC as having special expertise. None of them are paid by the IPCC.
5. IPCC assessment reports have been very influential in the development of national and international policies on climate change and are widely cited in debates on the subject.

The Request

6. The complainant made a number of requests for information to the public authority between March and July 2008 related to the work of a member of its staff for the IPCC. These requests were contained in four separate documents which are detailed below.

Email 1 – 8 March 2008

7. The complainant emailed a member of staff at the public authority on 8 March 2008 and made a number of requests for information related to his role as a Review Editor for the IPCC's Fourth Assessment Report.

The email included a request for "...working papers, emails, etc that might shed further light on the assessment of Chapter 3".

8. On 5 May 2008 the complainant emailed the public authority to point out that he had not received a response to his email. The public authority provided a response to some of the requests on 2 June 2008.

Email 2 – 5 May 2008

9. On 5 May 2008, in addition to pointing out that he had not received a response to his email of 8 March 2008, the complainant requested

"All letters, facsimile and email correspondence to or from [the named member of staff] in connection with their work as IPCC Review Editor..."

10. His email went on to specify that this included correspondence with certain named individuals and institutions.
11. On 2 June 2008 the public authority provided some information to the complainant and withheld other information under sections 40(1) and 41 of the Act.
12. On 10 June 2008 the complainant wrote to the public authority contesting its decision to withhold information. He also made further requests for information, these are detailed in the section headed "Email 3" below.
13. On 11 July 2008 the complainant again expressed his dissatisfaction with the response to his requests.
14. On 10 December 2008 the complainant asked the public authority to carry out an internal review as he was not satisfied with the disclosures that had been made or that that the public authority's Information Management & Policy Services ("IMPS"), the section within the public authority that processed EIR/FOI requests, had been permitted to carry out the searches of information necessary to fulfil his requests.
15. On 30 January 2009 the public authority informed the complainant that the result of the internal review was to uphold its original decision.

Email 3 – 10 June 2008

16. On 10 June 2008 the complainant emailed the public authority and made a number of requests for information that had been received by the named member of staff. These related to changes to the IPCC guidelines on the deadline by which scientific papers had to be published to be referenced in the final draft of its report. He also requested copies of any correspondence discussing his requests for information with other IPCC participants.
17. On 8 July 2008 the public authority informed the complainant that the named member of staff did receive a copy of the guidelines to which his requests related. However, it stated that the member of staff no longer held any correspondence that referenced the document or the material in any way.
18. In relation to the complainant's request for correspondence related to his requests, he was informed that information was held but that it was exempt from disclosure under sections 40(1) and 40(2) of the Act. The public authority suggested that he make a subject access request under the Data Protection Act for the information exempted under section 40(1).
19. On 11 July 2008 the complainant emailed the public authority expressing his dissatisfaction with the response to his requests for information. He stated that, before making a formal complaint, he wished to clarify what was being said by the public authority. He then made a number of further requests. These are detailed in the section below headed "Email 4".
20. On 10 December 2008 the complainant asked the public authority to carry out an internal review as he was not satisfied with the disclosures that had been made or that IMPS had been permitted to carry out the searches of information necessary to fulfil his requests.
21. On 30 January 2009 the public authority informed the complainant that the result of the internal review was to uphold its original decision.

Email 4 – 11 July 2008

22. On 11 July 2008 the complainant asked:
 - a) in relation to his request made on 5 May 2008 ("Email 2"), for confirmation that the public authority only

held ten documents falling within the scope of his request, with the exception of personal information about him;

- b) in relation to the public authority's response to his requests of 10 June 2008, for confirmation whether the named member of staff selectively deleted emails pertaining to his work as an IPCC Review Editor;
- c) if the answer to (b) was in the affirmative, the dates when the deletions occurred;
- d) whether IMPS was consulted by the named member of staff in respect of the retention of his IPCC correspondence;
- e) how long the public authority retained deleted emails and whether they had been examined to see if any relevant documents were to be found there;
- f) in relation to the documents that had been supplied to him, the public authority to reconsider its decision to redact the names of senders and recipients of emails; and
- g) for his own personal data held by the public authority.

23. On 20 August 2008 the public authority provided the responses outlined below to the issues raised in complainant's email of 8 July 2008. It stated that:

- a) it held no more documents relevant to his request of 5 May 2008 other than those that had already been provided or had been communicated to him in its correspondence;
- b) there had been no deletions of any correspondence that referenced the relevant document or the material in it in any way;
- c) this information was not held by virtue of (b);
- d) there was no record of IMPS being consulted by the member of staff on this matter;

- e) deleted emails were held on back up tapes for 90 days. As no deletions relevant to the complainant's request had been made, the back up tapes had not been checked to see if relevant information was held;
 - f) exception 13(2) of the EIR was applied to personal data after reconsideration of the issues; and
 - g) information was provided on how to make a valid subject access request.
24. On 26 August 2008 complainant made a subject access request and contested the public authority's decision in relation to the issue of withholding personal data.
25. On 28 October 2008 the public authority wrote to the complainant to explain that it believed that there had been a misunderstanding regarding the deletion of emails by the member of staff. It said that the member of staff had interpreted the complainant's question of 11 July 2008, regarding whether he had been selectively deleting emails, as applying since the time of the complainant's requests ie May 2008. It went on to state that
- "[in] other words while he has not deleted these emails since your requests he cannot recall what he did with them now as it is so long ago. As far as your request goes he certainly doesn't hold the emails."*
26. The public authority stated that the member of staff had confirmed that he had provided all the relevant information associated with complainant's requests.
27. The public authority also informed the complainant that it was no longer seeking to withhold information under section 41 of the Act in relation to his request of 5 May 2008 and provided him with that information.
28. On 29 October 2008 the public authority confirmed to the complainant that no other member of staff, other than the one named in the requests, had examined his emails to verify that there was no information requested by the complainant in relation to the IPCC guidelines.
29. On 10 December 2008 the complainant asked the public authority to carry out an internal review as he was not satisfied with the disclosures that had been made or that IMPS had been permitted

to carry out the searches of information necessary to fulfil his requests.

30. On 30 January 2009 the public authority informed the complainant that the result of the internal review was to uphold its original decision.

The Investigation

Scope of the case

31. On 16 March 2009 the complainant made a complaint to the Commissioner about the way that his requests had been handled by the public authority. During the course of the investigation, the public authority disclosed further information to the complainant. The complainant subsequently informed the Commissioner that he was content not to proceed with his complaint. However, he requested that the Commissioner issue a decision notice recording any procedural breaches of the EIR by the public authority.

Chronology

32. There were a number of communications between the Commissioner and the public authority, the most significant of which are outlined below.
33. On 2 June 2009 the Commissioner asked the public authority to provide him with copies of any withheld information and detailed arguments supporting the application of any exemptions.
34. On 4 June 2009 the public authority contacted the Commissioner in order to clarify the issues to which the complaint related.
35. On 4 August 2009, following correspondence with the complainant, the Commissioner wrote to the public authority about the issues to which the complaint related.
36. On 28 August 2009, following discussions with the Commissioner, the public authority disclosed to the complainant some personal data that had previously been withheld.
37. On 12 April 2010 the Commissioner wrote to the public authority setting out his understanding of the requests that had been made by the complainant and the responses that had been received. He also

asked a number of detailed questions as to how the public authority had come to the conclusion that no further information was held in relation to the complainant's requests.

38. On 7 May 2010 the public authority wrote to the Commissioner to inform him that, while preparing a response to his letter, a substantial amount of new material relevant to the complaint had been brought to the attention of IMPS. This information fell within the scope of the request of 5 May 2008 but had not been disclosed to the complainant as IMPS had not previously been made aware of its existence.
39. The public authority explained that this new information consisted of 368 emails relating to the named member of staff's correspondence with various individuals in his capacity as IPCC Review Editor. It confirmed that the member of staff had been asked by IMPS to supply all the information to meet the request of 5 May 2008 and then, subsequent to the complainant's challenges on what was held, to verify that he held no more information. However, the 368 emails had not been provided to IMPS because, unfortunately, the member of staff admitted to not having realised that these emails fell within the scope of the request.
40. The public authority subsequently provided the complainant with copies of the emails that had been located.
41. In relation to the complainant's email of 8 March 2008, the public authority explained that in subsequent correspondence with the complainant, it had acknowledged its failure to provide a response. It also explained that most of the points raised in the email were addressed by later disclosures.
42. In relation to the complainant's email of 11 July 2008, the public authority explained that the complainant had agreed to an extension of the deadline for responses to his request for a further 10 working days.

Analysis

Substantive Procedural Matters

Does the requested information fall within the definition of “environmental information” under the EIR?

43. The Commissioner notes that the public authority dealt with the complainant’s requests under FOIA. He considered whether it should have been dealt with under the EIR.

44. Regulation 2(1)(a) provides

“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;

45. The Commissioner’s considers that it is not necessary for information to have a direct effect on the environment for it to fall within the definition in the EIR, only that it needs to be linked to a relevant subsection in regulation 2(1). He is of the view that the phrase “any information...on...” contained in regulation 2(1) should be interpreted widely and in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC which the EIR enact.

46. The Commissioner’s view, in line with the purpose expressed in the first recital of the Directive, is that “any information...on...” will usually include information concerning, about or relating to the element or elements in question. In other words information that would inform the public about the element or elements under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

47. The Commissioner is of the view that information requested by the complainant relates to the involvement of a member of the public authority’s staff in the preparation of the IPCC reports on the causes of climate change clearly falls within the definition of environmental information for the purposes of regulation 2(1)(a) of the EIR. The

requests are also for information on the operation of the EIR, environmental legislation that falls within the definition of measure in regulation 2(1)(c).

Compliance with time limits for responses

Email 1 – 8 March 2008

48. Under regulation 14(2) of the EIR a public authority is required to provide a refusal to a request for information within 20 working days of the date of the receipt of the request. The complainant made his requests on 8 March 2008 and did not receive a response within the time limit provided by the EIR. The public authority therefore breached regulation 14(2).
49. Under regulation 5(1) of the EIR a public authority that holds environmental information should make it available on request. Regulation 5(2) states that this information should be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
50. The public authority did not make some of the information falling within the scope of these requests available to the complainant until June 2008. It therefore breached regulation 5(2).

Email 2 – 5 May 2008

51. Under regulation 5(1) of the EIR a public authority that holds environmental information should make it available on request. Regulation 5(2) states that this information should be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
52. The public authority did not inform the complainant that it held a significant amount of information falling within the scope of his requests and make this available to him until May 2010. The public authority therefore breached regulation 5(2).
53. Regulation 11(3) provides that a public authority must reconsider its response to a request for information upon receiving representations from an applicant. Regulation 11(4) provides that the outcome of a decision under regulation 11(3) must be communicated to the applicant as soon as possible and within 40 working days after representations were received.

54. The complainant made representations to the public authority as to why he believed its decision was incorrect on 10 June 2008 and subsequently. The public authority did not communicate the outcome of the internal review until 30 January 2009. The public authority therefore breached regulation 11(4).

Email 3 – 10 June 2008

55. Under regulation 5(1) of the EIR a public authority that holds environmental information should make it available on request. Regulation 5(2) states that this information should be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
56. The public authority did not inform the complainant that it held information falling within the scope of his requests and make this available to him until May 2010. The public authority therefore breached regulation 5(2).
57. Regulation 11(3) provides that a public authority must reconsider its response to a request for information upon receiving representations from an applicant. Regulation 11(4) provides that the outcome of a decision under regulation 11(3) must be communicated to the applicant as soon as possible and within 40 working days after representations were received.
58. The complainant made representations to the public authority as to why he believed its decision was incorrect on 11 July 2008 and subsequently. The public authority did not communicate the outcome of the internal review until 30 January 2009. The public authority therefore breached regulation 11(4)

Email 4 – 11 July 2008

59. Under regulation 5(1) of the EIR a public authority that holds environmental information should make it available on request. Regulation 5(2) states that this information should be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
60. The public authority did not inform the complainant that it held information falling within the scope of his requests and make this available to him until May 2010. The public authority therefore breached regulation 5(2).

61. Regulation 11(3) provides that a public authority must reconsider its response to a request for information upon receiving representations from an applicant. Regulation 11(4) provides that the outcome of a decision under regulation 11(3) must be communicated to the applicant as soon as possible and within 40 working days after representations were received.
62. The complainant made representations to the public authority as to why he believed its decision was incorrect on 26 August 2008 and subsequently. The public authority did not communicate the outcome of the internal review until 30 January 2009. The public authority therefore breached regulation 11(4)
63. Under regulation 14(2) of the EIR a public authority is required to provide a refusal to a request for information within 20 working days of the date of the receipt of the request. The complainant made his requests on 11 July 2008 and did not receive a response until 20 August 2008. The public authority therefore breached regulation 14(2).

The Decision

64. The Commissioner's decision is that the public authority did not deal with the some of the complainant's requests in accordance with the requirements of the EIR in the following respects:
 - it failed to make available requested information within 20 working days of the requests of 8 March, 5 May, 10 June and 11 July 2008 and therefore breached regulation 5(2);
 - it failed to communicate the outcomes internal review within 40 working days of receiving representations from the complainant in respect of the requests of 5 May, 10 June and 11 July 2008 and therefore breached regulation 11(4); and
 - it failed to provide a refusal within 20 working days in respect of the requests of 8 March and 11 July 2008 and therefore breached regulation 14(2).

Steps Required

65. The Commissioner requires no further steps to be taken as the complainant has indicated that he is content not to proceed with his complaint.

Other matters

66. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
67. The Commissioner is concerned that the public authority failed to identify a significant amount of information falling within the scope of the complainant's requests until after his investigation had started. He expects the public authority to ensure that it has in place procedures which will reduce the possibility of such events occurring in future. This should not only include effective procedures regarding the handling of request for information but procedures regarding the effective management of its records to help facilitate, for example, the identification and retrieval of information that may be requested. The Commissioner reminds the public authority of the Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000.¹
68. The Commissioner, however, notes that the public authority has informed him that, as a consequence of this complaint, it has revised its training and processes to ensure that all staff are aware of the obligations imposed by the EIR and FOIA. In addition, that it has revised its procedures at the internal review stage to provide that, in the event of doubt over whether information is held or not held in relation to staff, independent and trained IMPS or IT Services staff can be instructed to conduct technical searches for information.
69. The good practice issues in relation to the public authority are of concern to the Commissioner and, in keeping with his duty to promote observance of the legislation, he will now consider whether further action is appropriate to secure future compliance.
70. Following the Muir Russell Inquiry into the "climategate emails" at the University of East Anglia² the Commissioner is aware that the records

¹ <http://www.justice.gov.uk/guidance/docs/foi-section-46-code-of-practice.pdf>

² www.cce-review.org/

management related to emails may be a particular issue that needs to be addressed across the Higher Education ("HE") sector. He will therefore be working with the sector to consider whether guidance for HE can be improved in this area.

Right of Appeal

71. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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

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

Dated the 21st day of October 2010

Signed

**Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

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

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

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

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 11 - Representation and reconsideration

Regulation 11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

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

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

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

Regulation 11(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

Regulation 14 - Refusal to disclose information

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

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

Regulation 14(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).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

Regulation 19 Offence of altering records with intent to prevent disclosure

(1) Where -

(a) a request for environmental information has been made to a public authority under regulation 5; and

(b) the applicant would have been entitled (subject to payment of any charge) to that information in accordance with that regulation,

any person to whom this paragraph applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to which the applicant would have been entitled.

(2) Subject to paragraph (5), paragraph (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.

(3) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) No proceedings for an offence under this regulation shall be instituted

-

(a) in England and Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions; or

(b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland.

(5) A government department is not liable to prosecution in relation to an offence under paragraph (1) but that offence shall apply to a person in the public service of the Crown and to a person acting on behalf of either House of Parliament or on behalf of the Northern Ireland Assembly as it applies to any other person.