

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

Decision Notice

Date: 29 March 2010

Public Authority: Department for Culture, Media and Sport (DCMS).
Address: 2 – 4 Cockspur Street
London
SW1Y 5DH

Summary

The complainant submitted three requests to the Department for Culture, Media and Sport (DCMS) focussing on the sale and development of land in the immediate vicinity on the British Library. The DCMS replied stating that to comply would exceed the cost limit at section 12(1) of the Freedom of Information Act (the Act).

The Commissioner is satisfied that the DCMS has provided a reasonable estimate which demonstrates that the cost of complying with the requests would exceed £600 and thus the DCMS is entitled to refuse to fulfil the request. The Commissioner has concluded that some of the information which would fall within the scope of the complainant's request is environmental information as defined by the EIR. However, the Commissioner is satisfied that the DCMS is entitled to refuse to provide the information because the requests are manifestly unreasonable. However, the Commissioner finds that the DCMS is in breach of section 17(5) of the Act and regulation 14 of the EIR by not responding to the initial request within the required 20 working days.

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

The Request

7. The complainant submitted the following request to the DCMS on 26 October 2007:

"I require all data qualifying under the FOIA relating to:

 1. The sale of the land on the British Library site by St Pancras Station – the Brill Pace site.
 2. The proposed extension to the British Library
 - 3 The proposed service road from the British Library to Ossulston Street."
8. A reminder was sent by the complainant on 26 November 2007. On 4 December 2007 the DCMS apologised for the delay and advised that the original request had not been correctly registered due to a 'technical fault'. It acknowledged that it held information relevant to

the request but that it would exceed the set limit of £600 to provide this information. The DCMS offered some suggestions to refine the request and therefore bring the request below the £600 limit.

9. On 10 January 2008 the complainant asked the DCMS to undertake an internal review of its handling of the request. The complainant did refine his request but asked for that refined request to be treated in parallel to the request being discussed in this decision notice.
10. The DCMS communicated the result of the review to the complainant on 14 February 2008; this advised that the DCMS would continue to use section 12 to refuse to search for the information requested.

The Investigation

Scope of the case

11. On 20 February 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant particularly asked the Commissioner to investigate the DCMS' use of section 12 of the Act.
12. The Commissioner also investigated if any of the information requested was environmental as defined by regulation 2(1) of the EIR and would therefore fall within the scope of the EIR rather than the Act and whether the DCMS could then refuse to fulfil the requests on the basis of regulation 12(4)(b). This regulation allows public authorities to refuse requests that are manifestly unreasonable. This exception is qualified and therefore subject to the public interest test.

Chronology

13. Due to a backlog of complaints about public authorities' compliance with the Act, the Commissioner was not able to begin his investigation of this complaint immediately. Therefore it was not until 9 February 2009 that the Commissioner wrote to the DCMS in relation to this complaint. The Commissioner asked the DCMS to provide further details to support its decision to refuse the request of on the basis of section 12.
14. The Commissioner advised the DCMS that on initial reading at least part of the information being requested was environmental in nature and should therefore be governed by the EIR. The Commissioner therefore asked the DCMS to consider this in relation to the request and the subsequent refusal.

15. The DCMS provided the Commissioner with a substantive response on 9 March 2009. The DCMS stated that it felt the requests had been correctly handled under the Act rather than EIR. It did however, without prejudice to its position, offer submissions to support the view that it could refuse to fulfil the requests on the basis of regulation 12(4)(b) and 12(4)(c).
16. The Commissioner wrote to the DCMS on 27 August 2009 asking it to consider and provide the relevant public interest arguments in respect of the EIR regulations claimed
17. The DCMS responded on 19 October 2009 and confirmed that it felt the first request was not environmental in nature. It did however accept that the other two requests could be treated as environmental. Notwithstanding the above, the DCMS provided arguments and public interest reasoning to refuse all three of the requests under regulations 12(4)(b) and 12(4)(c).

Analysis

Substantive Procedural Matters

Is any of the requested information environmental information?

18. Regulation 2(1) of the EIR defines 'environmental information' as any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

19. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

20. The Commissioner also finds support for this approach in two decisions issued by the Information Tribunal. The first being *The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072). In this case the Tribunal found:

'that the Decision Notice [in which the Commissioner has concluded that none of the requested information was environmental information] fails to recognise that information on 'energy policy' in respect of 'supply, demand and pricing' will often fall within the definition of 'environmental information' under Regulation 2(1) EIR. In relation to the Disputed Information we find that where there is information relating to energy policy then that information is covered by the definition of environmental information under EIR. Also we find that meetings held to consider 'climate change' are also covered by the definition.' (Tribunal at paragraph 27).

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

second that the term 'environmental information' should be interpreted broadly:

'23. Mr Michaels on behalf of FOE contends that policies (sub-para (c)) on 'energy supply, demand and pricing' often will (and are often expressly designed to) affect factors (sub-para (b)) such as energy, waste and emissions which themselves affect, or are likely to affect, elements of the environment (sub-para (a)) including, in particular and directly, the air and atmosphere and indirectly (in respect of climate change) the other elements.

24. He provides by way of simple and practical example, national policy on supply, demand and pricing of different energy sources (e.g., nuclear, renewable, coal, gas) has potentially major climate change implications and is at the heart of the debate on climate change. Similarly, national policy on land use planning or nuclear power has significant effect on the elements of the environment or on factors (e.g. radiation or waste) affecting those elements.

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

22. Moreover in reaching this conclusion the Tribunal appeared to reject BERR's arguments that there must be a sufficiently close connection between the information and a probable impact on the environment before it can be said that the information is 'environmental information'.
23. The second Tribunal decision is *Ofcom v Information Commissioner and T-Mobile* (EA/2006/0078) which involved a request for the location, ownership and technical attributes of mobile phone cellular base stations. Ofcom had argued that the names of Mobile Network Operators were not environmental information as they did not constitute information 'about either the state of the elements of the environment....or the factors.....that may affect those elements.'
24. The Tribunal disagreed, stating at para 31 that:

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

25. The Commissioner believes that wherever possible the decision as to whether requested information is environmental information should be made on a review of the actual information that has been identified as held by the public authority as falling within the scope of the request, rather than on the wording of the request itself. However, in some cases it is not always possible to review a copy of the requested information. Such a scenario can include where the requested information is not in fact held (but if it would be held could be environmental information) and scenarios such as this case where the DCMS cannot in fact provide the requested information because, in its opinion, to do so would exceed the fees limit at section 12 of the Act.
26. In such scenarios where the public authority has not been able to extract and provide the Commissioner with all of the requested information, he considers the following points in order to assess what access regime(s) the requested information falls under:
 - Whether a sample of the information could be provided.
 - Does the wording of the request suggest that the EIR would apply (e.g. a request for information about waste disposal)?
 - Does the context of the request suggest EIRs would apply? (e.g. if the complainant has been corresponding with a public authority about a proposed building development and then asks for all for copies of correspondence between the public authority and the building contractor)?
 - How does the public authority hold the information and for what purpose is it held (e.g. information is held by the planning department in a planning file)?
27. The Commissioner accepts that from an objective viewpoint the information which falls within the scope of each of the requests would be environmental information by virtue of regulation 2(1)(c). For

information to be environmental information via regulation 2(1)(c) the Commissioner considers that:

- The information itself must be **on** a measure or activity; and
 - The measure of activity (not the information itself) must affect or be likely to affect the elements and factors in 2(1)(a) or (b).
28. The threshold of 'likely to affect' is one where the likelihood need not be more likely than not, but it must be substantially more than remote.
29. In the Commissioner's opinion each of the three requests seeks information on a measure – the sale of land; proposed extension; proposed service road – each of which would be likely to affect one or more of the factors in regulation 2(1)(a). This is because the sale of piece of land is likely to result in the changes to use of the land, particularly in this case: the building of medical research facility whereby the construction of such a building following the sale would affect the land on the site. Similarly, the land and other factors in regulation 2(1)(a) are likely to be affected by an extension to a building and the construction of new road.
30. However, in the circumstances of this particular case the Commissioner has in effect been provided with a sample of the information falling within the scope of these three requests because he has seen the information which falls within the scope of the complainant's refined request which he submitted to the DCMS. In analysing this information the Commissioner has concluded that a small portion of this information cannot be sufficiently linked back by regulation 2(1) so that it can be said to be environmental information. The Commissioner is aware that the requests cover a mixture of environmental and non-environmental information, the Commissioner's approach in such cases is to allow the costs of dealing with the requests under section 12 of the Act.
31. Any request meeting the requirement of section 8 of the Act is a valid Freedom of Information request, including where the request may include environmental information, to which the exemption at section 39 would apply. Therefore in the context of this case although the complainant's right of access to all of the information falling within the scope of his requests is technically provided for by the Act, the actual access regime under which any environmental information may be disclosed is the EIR.
32. The Commissioner, therefore, has initially considered whether to locate and retrieve all potentially disclosable information would exceed the appropriate cost limit and therefore whether the DCMS can rely on

section 12(1) of the Act. The Commissioner accepts on the facts of the case that the cost of complying with these requests can be aggregated.

Section 12 – cost of compliance exceeds appropriate limit

33. Section 12(1) of the Act provides that public authorities do not have to comply with a request where the estimated costs of responding to that request exceeds the appropriate limit as specified by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations').

34. Section 4(3) of the Regulations sets out the basis upon which an estimate can be made:

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

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

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

The DCMS's position

35. In correspondence with the complainant the DCMS explained that using an hourly rate of £25 it would cost the DCMS in excess of £600 to undertake the following tasks:

- a. Determine whether it holds the information requested,
- b. Locate the information or documents containing the information,
- c. Retrieving such information or documents, and
- d. Extracting the information from the document containing it (including editing or redacting information)

36. The DCMS advised the complainant in the result of its internal review that his request was 'considerably wide ranging' and therefore the

range of files and electronic documents containing relevant information is considerable and dates back over several years. The DCMS stated that it did not hold any accurate records indicating the precise location of the information falling within the scope of the request.

37. The DCMS originally estimated that it would take somewhere in the region of 40 hours to locate and retrieve the information requested which would equate to approximately £1000 costs.
38. In response to the Commissioner's enquiries the DCMS provided the following information and points in order to clarify and further support its position that section 12 provided a basis upon which to refuse to fulfil the requests. The DCMS also discovered a further 200 boxes containing information that may be of relevance to the request in question.
39. The information falling within the scope of the requests is held by a number of offices, such as the DCMS Estates Team; the Museums, Libraries and Archive Team; DCMS legal advisers; Private Office; Permanent Secretary's Office; and other officials who have a more general interest in the contractual processes and in monitoring the assets of sponsored bodies. The DCMS also noted that there could be passing comments made regarding the sale of the land noted in documents that are largely on a different subject and these documents would be very difficult to identify.
40. The DCMS provided a breakdown of how the cost limit of £600 would be surpassed:

<u>Location</u>	<u>To locate & retrieve</u>	<u>Review & extract</u>	<u>Total:</u>
Individual a's G drive	3 hours	2 hours	5
Individual b's G drive	1.30	30 min	2
Individual c's G drive	45 min	15 min	1
Individual d's G drive	45 min	15 min	1
Paper files 11	3 hours	4 hours	7
Historic files 20	4 hours	3 hours	7
Museums paper files	10 hours	6 hours	16
200 boxes in Records Centre	6 hours	200 hours	206
Consultation with 3 rd parties		1 hour	<u>1</u>
			246

The final estimated cost figure to provide all of the information falling within the scope of the three requests would therefore be 246 hours at £25 per hour which is equivalent to £6,150.

41. The DCMS estimated the above figures working on an average of 15 minutes to skim read a file to ascertain if it holds information relevant to the request.

The Commissioner's position

42. The Commissioner has considered the exercise detailed at paragraph 40 above and accepts that the whole process required to obtain the information for the first request could potentially take in excess of 240 hours but notes that once this exercise had been undertaken it would also have produced the information required to fulfil the other two requests.
43. In considering estimates relied upon by public authorities in relation to section 12, the Commissioner has followed the approach of the Tribunal in *Alasdair Roberts v Information Commissioner* (EA/2008/0050) at paragraphs 9 to 13 in which the Tribunal confirmed that the approach of deciding whether an estimate was reasonable involved consideration of a number of issues, including:
- A public authority has only to provide an estimate rather than a precise calculation;
 - The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - Estimates cannot take into account the costs relating to data validation or communication;
 - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - Any estimate should be 'sensible, realistic and supported by cogent evidence'.
44. The Commissioner notes that the DCMS has included within its estimate time taken to redact the information. Were this estimate to redact relevant information that is within the scope of the request but exempt under some other section of the Act then this would not be allowable. However, in this instance the DCMS have used the term to represent the time taken to extract the information relevant to the request from documents containing information falling outside the scope of the request.
45. The Commissioner notes that the DCMS refusal at the internal review stage was based on an estimate of 40 hours work which equates to £1,000. This is obviously in excess of the £600 limit; therefore were the cost of redaction removed then the estimated cost could be much nearer to the cost limit. However, the DCMS then identified a further

200 boxes of relevant information which took the estimate well above the £600 limit.

46. Given the breadth of the requests and the fact that relevant information could be in numerous locations the Commissioner accepts that to find all the required information the DCMS would have to undertake a manual search of all the files and all of the electronic information held in those locations. The DCMS has provided logical explanation of how this search would be undertaken and the Commissioner is persuaded that the sheer volume of information would necessitate a search taking far in excess of the 18 hours limit.
47. On the basis of the above the Commissioner accepts that the DCMS has provided estimates that are sensible, realistic and supported by cogent evidence and moreover support the conclusion that the cost of fulfilling the requests would significantly exceed the £600 limit.
48. The complainant states that he has, in the past, worked in the civil service and believes that the information would be more readily identifiable and retrievable. The Commissioner notes this argument but in the absence of any proof otherwise he must accept the argument presented by the DCMS that the information is not comprehensively indexed and therefore not easily retrievable.
49. The Commissioner recognises that the DCMS can only rely on section 12(1) to refuse to disclose the non-environmental information and the above analysis is based upon the cost of providing **all** of the information which falls within the scope of the requests. Whilst the costs of identifying, locating, retrieving and extracting the information to meet the request in full will be allowed under section 12, any costs related to identifying and redacting environmental information under section 39 is not permissible.
50. However, in the circumstances of this case it is clear that in order to determine which access regime a piece of information falls under, the DCMS must be in a position to actually examine that information. Therefore before it can make a determination as to how much of the information is non-environmental information it must have first located, retrieved and extracted all of the requested information. Therefore the Commissioner is satisfied that the DCMS can include in the estimate needed to support the application of section 12(1) the time it would take to carry out the activities listed in the Regulations in order to locate and retrieve all potentially disclosable information.

Regulation 12 of EIR

51. Although the cost of dealing with the whole (aggregated) request is found to exceed the appropriate limit under section 12 of the Act, as the Commissioner believes that there is also environmental information held by the DCMS that is relevant to the request, the applicant still has a right of access to this information under EIR. Therefore, the Commissioner will consider the public authorities separate obligations under the EIR. The DCMS has argued that such information is exempt from disclosure on the basis of the exceptions contained at 12(4)(b) and 12(4)(c) of the EIR. This states that a public authority can refuse to disclose information if:

'the request for information is manifestly unreasonable, and the request for information is formulated in too general a manner and the public authority has complied with regulation 9.' (Duty to provide advice and assistance).

The Commissioner has initially considered the DCMS' reliance on regulation 12(4)(b).

52. As noted above, the Commissioner accepts in this case that before the DCMS is in a position to provide the environmental information falling within the scope of the requests, it must first determine what environmental information it holds and before it does that it must locate **all** of the information falling within the scope of these requests. Therefore in relation to whether the DCMS can rely on regulation 12(4)(b) the decision the Commissioner effectively has to reach is whether fulfilling the requests in their entirety would place a burden on the DCMS that is manifestly unreasonable.

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

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

54. In determining whether the cost of complying with a request would be manifestly unreasonable the Commissioner will use the Regulations as a starting point to ascertain what costs or diversion of resources would be involved in answering a request. This does not mean however that a request exceeding the appropriate limit will necessarily be manifestly

unreasonable under regulation 12(4)(b). Again the Commissioner notes the comments of the Tribunal in *Platform*:

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

And:

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

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

Public interest test

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

Public interest arguments in favour of disclosing the information

57. When challenged by the Commissioner to present a public interest argument the DCMS considered the following arguments in favour of disclosure:
- 'The general interest in openness and greater confidence in government and the process of government which comes from releasing information.
 - The benefit to the public in knowing why the land was sold to the BLISS consortium, and what the environmental impact of the proposed development would be.'
58. There is an inherent public interest in disclosure of information to ensure that the government is accountable for, and transparent about, its decision making processes.
59. The complainant has argued that if the land is developed as a medical research centre then there may be security risks involved. He has also suggested that the public at large may prefer an alternative development.

Public interest arguments in favour of maintaining the exemption

60. The DCMS considered the following arguments:
- The issue of why the land was sold to the BLISS consortium has largely been met by the information already released.
 - With regards to the environmental impact of the proposed planning application this will become public knowledge on the publication of the Environmental Impact Statement which is to be issued in support of the planning application to Camden County Council.
 - Much of the relevant information held within the 200 boxes is likely to be from early stages of the process and relate to purely speculative consideration of who may or may not be interested in buying the land in question. It was thought that such public interest would be superseded by 'the interest in knowing what actually happened' and what is happening currently.
61. The DCMS argued that the amount of relevant information held within the 200 boxes will be limited and it would therefore be a disproportionate use of time to undertake such an extensive search for a potentially limited number of documents.
62. There is a public interest in the public authority being able to carry out its core functions without the distraction of having to comply with requests that would impose a significant burden in both time and resources. The Commissioner is also mindful of the fact that the DCMS'

ability to comply with other more focused requests for information would be undermined if it had to routinely deal with wide ranging requests for large amounts of information covering a timeframe of a number of years.

63. The DCMS also suggested that release of the information would only serve to reopen discussion as to whether the land should have been sold. The DCMS suggest that this is analogous to an earlier decision issued by the Commissioner where he determined that to release a report on whether a bid should be made to host the Olympics would serve only to reopen a debate which was now closed and distract staff from their current duties.

Balance of public interest arguments

64. The Commissioner has weighed the opposing arguments of open government and greater transparency together with greater access to environmental information against the arguments of the request being a disproportionate burden on the public authority's resources and it therefore affecting its ability to carry out its core functions. The Commissioner has also taken into account the amount of information that is already in the public domain. On balance, on the facts of the case the Commissioner accepts the arguments presented by the DCMS to support its use of section 12 of the Act and regulation 12(4)(b) of the EIR.
65. The Commissioner has not addressed the use of regulation 12(4)(c) in the light of the fact that he has accepted the argument of regulation 12(4)(b).

Procedural Requirements

Section 16 – duty to provide advice and assistance

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

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

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

68. The Commissioner is satisfied that in the circumstances of this case, the DCMS provided the complainant with a reasonable level of advice and assistance in order to allow the request to be refined. The Commissioner has reached this conclusion by considering the actions of the DCMS when it suggested the request could be refined and narrower in its scope. It suggested that a request specifying information on the sales process or perhaps the Union Railways occupation of the site or a more precise timeframe may be successful.

Regulation 9 – advice and assistance

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

The Decision

70. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The DCMS was entitled to refuse the requested information on the basis of section 12(1) of the Act.
 - To the extent that the requested information falls within the scope of the EIR, the DCMS was entitled to refuse to provide the information on the basis of regulation 12(4)(b) of the EIR.
 - The DCMS provided sufficient advice and assistance to fulfil its obligation under section 16 of the Act and regulation 9(1) of the EIR.
71. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act;
- The DCMS breached section 17(5) of the Act as it failed to respond to the original request within 20 working days.
 - The DCMS also breached regulation 14 of the EIR in respect of the time taken to comply.

¹ Freedom of Information Act, Section 45 Code of Practice:

- The DCMS breached section 17(1) of the Act in its initial refusal by stating section 12 of the Act rather than the precise subsection of the section it wished to rely on.

Steps Required

72. The Commissioner requires no steps to be taken.

Right of Appeal

73. 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 served.

Dated the 29th day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

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

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

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

Section 1(2) provides that -

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

Time for Compliance

Section 10(1) provides that -

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 10(2) provides that -

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that -

"If, and to the extent that -

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection

does not affect the time by which any notice under section 17(1) must be given."

Section 10(4) provides that –

"The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations."

Section 10(5) provides that –

"Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner."

Section 10(6) provides that –

"In this section –

"the date of receipt" means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

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

Section 12(2) provides that –

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

Section 12(3) provides that –

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

Section 12(4) provides that –

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

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

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

Section 12(5) – provides that

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

Duty to provide Advice and Assistance

Section 16(1) provides that -

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

Refusal of Request

Section 17(1) provides that -

"A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(3) provides that -

"A public authority which ... is to any extent relying:

- on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or
- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Environmental information.

Section 39(1) provides that –

"Information is exempt information if the public authority holding it-

- (a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or
- (b) would be so obliged but for any exemption contained in the regulations."

Section 39(2) provides that –

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

Section 39(3) provides that –

"Subsection (1)(a) does not limit the generality of section 21(1)."

The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

The appropriate limit

3. - (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.

(3) In the case of any other public authority, the appropriate limit is £450.

Estimating the cost of complying with a request - general

4. - (1) this regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act^[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

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

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

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

Environmental Information Regulations 2004

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 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 9 - Advice and assistance

Regulation 9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Regulation 9(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –

- (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
- (b) assist the applicant in providing those particulars.

Regulation 9(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

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 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.