

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

### **Decision Notice**

**Date: 7 June 2010**

**Public Authority:** Department for Energy and Climate Change  
**Address:** 3 Whitehall Place  
London  
SW1A 2AW

### **Summary**

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The complainant submitted a number of requests all of which focused on a complaint Greenpeace had made to the Market Research Society about a particular public consultation which had been carried out. The consultation in question focused on the role of nuclear power in the UK. The public authority handled all of the requests under the Act, as opposed to under the Environmental Information Regulations (EIR), provided some information but withheld further information on the basis of a number of exemptions. The Commissioner has reviewed all of the requested information and has concluded that all of it constitutes environmental information as defined by the EIR and therefore the requests should have been dealt with under that access regime rather than under the Act. The Commissioner therefore requires the public authority to reconsider these requests under the EIR and provide the requested information or issue a refusal notice compliant with regulation 14 of the EIR.

### **The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation

18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## Background

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3. In July 2006 following an earlier consultation process the government published a report setting out its views on the role that nuclear power could play in the future of UK energy mix and sought views on the framework in which nuclear power generated power stations could be built.
4. In September 2006, following a challenge by Greenpeace, the High Court ruled that the government's decision making process had been unlawful as it had failed to engage in the fullest possible consultation.
5. Following the High Court decision, the government launched a new consultation in May 2007.
6. As part of this second consultation, Opinion Leader Research (OLR), a research consultancy was contracted by the government to undertake deliberative public consultations on nuclear power. Essentially a number of discussions groups around the country were set up, and facilitated by OLR, and at the end of each forum participants were polled on their views regarding nuclear power.
7. OLR was a member of the Market Research Society (MRS) body and therefore subject to the MRS Board's (MRSB) codes of practice. MRSB considers complaints from members of the public who believe that its members may not have complied with its codes of practice.
8. In September 2007 Greenpeace initially complained to MRS regarding the deliberative work carried out by OLR. This was followed up with a formal 33 page complaint in Oct 2007. In essence Greenpeace argued that the stimulus materials provided to the members of the public at the forums, along with the polling questions they were asked, were not objective.
9. In October 2008 MRSB informed Greenpeace of the outcome of its complaint.
10. The public authority to which the complainant originally submitted its requests, Department of Business, Enterprise and Regulatory Reform

(DBERR), ceased to exist on 6 June 2009. Responsibility for energy policy passed to the newly created Department for Energy and Climate Change (DECC). Therefore throughout this Notice the references to the government department responsible for dealing with the requests changes to reflect the machinery of government changes. However, the Commissioner is satisfied that it is appropriate to serve this notice on DECC as the public authority with current responsibility for handling these requests.

## The Request

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11. The complainant submitted the following requests to BERR on 16 May 2008:

(i) Whether Department of Business, Enterprise and Regulatory Reform (DBERR) was informed by the Market Research Standards Board (MRSB) or by Opinion Leader Research (OLR) about the Greenpeace complaint against Opinion Leader Research (OLR).

(ii) Whether DBERR has been involved in any submissions to the MRSB made by or on behalf of OLR and whether it is made any submissions on its own behalf.

(iii) Whether DBERR has made any representations to OLR or to the MRSB about the timing and/or publication of any decision about Greenpeace's complaint.

(iv) Details of any meetings between DBERR officials and OLR or the MRSB, and minutes of any meetings.

(v) We request copies of communications and correspondence between the DBERR and Opinion Leader Research (OLR), Deborah Mattinson, co-founder of OLR, and/or MRSB from September 2007 to April 2008.

(vi) We also request any internal correspondence or documentations regarding the Greenpeace complaint to the MRSB concerning OLR's facilitation and polling of the Talking Energy public consultation'

12. The complainant received a substantive response from DECC on 24 October 2008. This response explained that DECC believed that requests (i) to (iii) were not requests for information but simply

questions although it did provide a response to these questions. In relation to requests (iv) to (vi) DECC explained that it did not consider any of the information it held as 'environmental information' as defined by the EIR for the following reasons: the requested information was about the complaint that was made to MRSB about OLR's conduct of the deliberative events. Although these deliberative events were part of a consultation in relation to nuclear policy that could impact on the environment, DECC did not think that this was a sufficient link to bring the requests within the EIR.

13. With regard to request (iv) DECC confirmed the dates of the relevant meetings but withheld the minutes on the basis of the following exemptions contained within the Act: sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 41 and 43. In response to request (v) DECC disclosed some information but redacted certain personal data on the basis of section 40 of the Act. It withheld the remainder of information falling within the scope of this request again on the basis upon which it withheld the minutes falling within the scope of request (iv). In response to request (vi) DECC again provided the complainant with some information, redacted on the basis of section 40, but withheld information on the basis of same various exemptions it relied upon in respect of request (iv).
14. The complainant contacted DECC 10 December 2008 and asked for an internal review to be conducted. The complainant explained why it believed that DECC had been incorrect to withhold the information falling within the scope of the requests (iv) to (vi) which it had not been provided with and provided detailed submissions to support its arguments.
15. DECC informed the complainant of the outcome of its internal review on 16 April 2009. As a result of this review DECC explained that it was prepared to disclose some further information falling within requests (iv) to (vi) - this was provided to complainant along with the outcome of the review - however it believed that the remainder of the information was exempt from disclosure on the basis of the exemptions quoted in the refusal notice. DECC also informed the complainant that some of the information that continued to be withheld was also exempt from disclosure on the basis of section 42.

## The Investigation

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### Scope of the case

16. The complainant contacted the Commissioner on 22 May 2009 in order to complain about DECC's handling of requests (iv) to (vi). The complainant argued that the exemptions that DECC had relied upon had been applied too broadly and had given inadequate regard to public interest arguments in favour of disclosing the information. The complainant provided detailed submissions to support these points of complaint. The complainant also noted that where some documentation had been disclosed there were repeat copies of certain documents but the redactions that had been applied to such documents were not consistent.

### Chronology

17. Due to a backlog of complaints about public authorities' compliance with the Act, there was a delay before the Commissioner was able to begin his investigation of this complaint. Therefore the Commissioner did not contact DECC until 9 February 2010 in order to discuss this complaint. In this correspondence the Commissioner explained that he had now reviewed the documents referred to in the 'Request' section above along with the information that had been disclosed to the complainant by DECC. The Commissioner explained to DECC that having reviewed information that had been disclosed to the complainant he believed that at as least some of the requested information fell within the definition of 'environmental information' contained within the EIR and therefore should have been considered under that access regime. However, the Commissioner acknowledged that documents that had been disclosed to the complainant were redacted and moreover DECC had withheld further documents in their entirety and therefore he had not been able to establish whether all of the requested information constituted environmental information. The Commissioner therefore asked DECC to provide him with copies of all the information falling within the scope of requests (iv) to (vi) broken down into the various requests, along with a schedule of the information that catalogued the information that fell within the scope of each request.
18. DECC provided the Commissioner with copies of the information on 22 March 2010 and an accompanying schedule. DECC explained that this information has been broken down into the following categories:

- Documents released with redactions – this information was contained in 4 lever arch folders;
- Documents withheld in full after the internal review – this information was contained in 10 lever arch folders; and
- All potentially relevant documents found to be in the possession of DECC. These were then subject to consideration as to whether they fell within the scope of the requests. This information contained in 26 lever arch folders.

## Analysis

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### Substantive Procedural Matters

#### What access regime does the requested information fall into?

19. The Commissioner has considered the focus of the requests and has reviewed all of the information that he understands to fall within the scope of the complainant's requests (iv) to (vi) and has concluded that all of the information requested can be correctly described as 'environmental information' as defined by regulation 2(1) of the EIR. The Commissioner has set out his reasoning for this decision below.

#### Regulation 2(1) – defining environmental information

20. 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)'

21. 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.

22. 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).

23. 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 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.'

24. Moreover in reaching this conclusion the Tribunal appeared to reject DBERR'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'.
25. 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.'
26. 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.'

27. As the quote from regulation 2(1) above suggests there are a number of different ways in which information can be classed as environmental information. In the Commissioner's opinion **all** of the information falling within the scope of the requests constitutes environmental by virtue of regulation 2(1)(c).
28. In order to be environmental information under this regulation the Commissioner believes that the following two criteria have to be met:
  - The information itself must be on a measure or activity;
  - The measure or activity (**not** the information itself) must affect, or be likely to affect, the elements and factors in 2(1)(a) and (b), or be designed to protect the elements in (a).
29. In the Commissioner's opinion all of the withheld information is effectively on the deliberative events, or some aspect of them, and these events were clearly part of the second consultation on nuclear power. The consultation is an activity which is likely to affect the elements and factors in 2(1)(a) and (b) because the outcome of the consultation will shape the government's approach to energy policy. For example, by placing a greater emphasis on nuclear power rather than renewable energy, such a change in energy policy is likely affect the elements and factors for instance by the building of more nuclear power stations.
30. Furthermore, the Commissioner believes that some, though by no means all, of the withheld information can also be said to be environmental information via regulation 2(1)(b). In order to be environmental information under regulation 2(1)(b) the following criteria must be met:

- The information itself must be on a factor;
  - The factor (not the information itself) must affect or be likely to affect the elements in 2(1)(a).
31. The Commissioner has established that a number of the withheld documents contain detailed references to carbon dioxide which he considers to be a factor for the purposes of regulation 2(1)(b). In the Commissioner's opinion it is clear that carbon dioxide is a factor that will clearly affect the air and atmosphere, both of which are listed in 2(1)(a) as states of the environment. Indeed in the context of many of the documents where carbon dioxide is referenced or discussed it is in the context of how the generation of carbon dioxide in energy production can contribute to climate change.
32. As is clear from the Chronology section above, in handling these requests DECC responded under the Act rather than under the EIR. In light of the Commissioner's conclusion that all of the withheld information is environmental information DECC should have therefore have considered these requests under the EIR.
33. The Commissioner therefore requires DECC to re-consider requests (iv) to (vi) under the EIR and provide the complainant with a response in line with regulation 5(1) of the EIR which requires that subject to the application any exceptions, a public authority should make environmental information available on request.
34. When undertaking this re-consideration of the requests, the Commissioner requires DECC to take into account the affect of regulation 12(9) which states that:
- '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).'
35. This means that where any of the withheld information contains information on emissions, such as the information which contains references to carbon dioxide, regulations 12(5)(d) to (g) cannot be relied on to withhold such information. The Commissioner notes that although he has identified the fact that parts of the requested information contains references to carbon dioxide and this is information on emissions, he does not consider this to necessarily be the only environmental information which relates to an emission which is referred to in the requested information. For example, the Commissioner has noted that there are a small number of references to nuclear waste material and the potential leaks or emissions from

such material which could be accurately described as relating information on emissions.

### **Procedural Breaches**

36. Both the Act and the EIR require that a public authority responds to any request it receives promptly and in any case within 20 working days following the date of receipt. In the EIR this requirement is provided for by regulation 5(2). As DECC did not respond to these requests for environmental information within 20 working days the Commissioner must conclude that DECC breached regulation 5(2).

### **The Decision**

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37. The Commissioner's decision is that the public authority did not deal with the requests for information in accordance with the Act and the EIR. This is because the requests should have been considered under the EIR rather than under the Act as all of the requested information constitutes environmental information as defined by regulation 2(1).
38. Furthermore by failing to respond to the requests within 20 working days the Commissioner has concluded that DECC breached regulation 5(2) of the EIR.

### **Steps Required**

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39. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Provide the complainant with a response to requests (iv) to (vi) in line with regulation 5(1) of the EIR, i.e. disclose the requested information.
  - If DECC considers any of this requested information to be exempt from disclosure under the EIR it should issue a refusal notice which complies with the requirements of regulation 14.
  - In considering the application of any of the exceptions contained within the EIR, DECC should take into account the affect of regulation 12(9).

40. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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41. 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.

### **Other matters**

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42. The Commissioner wishes to confirm that should DECC conclude that some of the information is exempt from disclosure on the basis of any of the exceptions contained in the EIR, he expects the complainant to exhaust DECC's internal review procedure before he will accept a further complaint about its potential refusal to provide information under the EIR.
43. When conducting this internal review, the Commissioner expects DECC to comply with requirements of regulation 11(4) which states that an applicant must be informed of the outcome of the internal review as soon as possible and no later than 40 working days after the date of receipt of the request for an internal review.
44. When re-considering these requests the Commissioner also requires DECC to be clear as to the nature of the information which falls within the scope of the relevant requests. The Commissioner has made this point because as paragraph 18 above suggests when DECC provided him with the information relevant to these requests it was clear that 10 lever arch files of documents were withheld in their entirety at the internal review stage. The Commissioner was also provided with 26 files which were, as DECC explained, subject to consideration as to whether they fell within the scope of the requests. However DECC has not been explicitly clear with the Commissioner as to whether it actually concluded whether any of this information fell within the scope of the requests.

## Right of Appeal

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45. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 7th day of June 2010**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**

**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.”

#### **Effect of Exemptions**

**Section 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

#### **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.”

## **Refusal of Request**

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, 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.”

## **Prejudice to effective conduct of public affairs**

**Section 36(2)** provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

## **Personal information**

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

**Section 40(3)** provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

### **Information provided in confidence**

**Section 41(1)** provides that –

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

### **Legal Professional Privilege**

**Section 42(1)** provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."



## **Commercial interests**

**Section 43(2)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

## **Environmental Information Regulations 2004**

### **Regulation 2 - Interpretation**

**Regulation 2(1)** In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“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 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 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 –
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
  - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

**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.

### **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.