

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

### Decision Notice

**Date: 31 January 2011**

**Public Authority:** Department of Energy and Climate Change  
(‘DECC’)  
**Address:** 3 Whitehall Place  
London  
SW1A 2AW

### Summary

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The complainant requested information under the EIR concerning the financial and/or economic cost of Britain meeting a pledge to cut emissions by 42 per cent of the 1990 levels by 2020. He particularly specified that he wanted the information that was provided to the delegates at the Copenhagen conference. The public authority replied that it held relevant information but could not provide it due to the operation of Regulation 12(5)(a) [disclosure would adversely affect international relations...]. It explained that the weight of the public interest factors in maintaining the exemption outweighed those that favour disclosure. The complainant requested an internal review and the public authority upheld its position and also explained that it believed that Regulation 12(4)(e) [internal communications] applied as well.

The Commissioner has found that 12(4)(e) was engaged in relation to all the information although the balance of the public interest under this exception alone favours its maintenance in relation to only one piece of information. For the remaining items, he has found that both 12(4)(e) and 12(5)(a) were engaged and that the composite weight of the public interest factors in maintaining the exceptions in relation to these items outweigh those that favour disclosure. The Commissioner has also found some procedural breaches of the EIR in the public authority’s handling of the request.

### The Commissioner’s Role

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1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation

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

## Background

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2. The Copenhagen climate change summit took place in December 2009. The complainant's request was to discover the information provided to inform the UK's negotiating position in that summit.

## The Request

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3. On 8 February 2010 the complainant requested the following information from the public authority:

'Freedom of information request for any analysis of the potential cost of strengthened climate change commitments at Copenhagen...

During the Copenhagen conference, it was reported (e.g. here: <http://www.telegraph.co.uk/earth/copenhagen-climate-change-confe/6827738/Copenhagen-climate-conference-Britain-could-make-biggest-emissions-cuts.html>) that the British delegation was working to secure an ambitious deal that would involve the UK committing to a 42 per cent reduction in emissions from 1990 levels by 2020. I am writing to enquire about any analysis that might have been undertaken of the potential cost of honouring such a commitment.

In particular, I am requesting: any and all documents concerning the potential financial and/or economic cost of Britain meeting a pledge to cut emissions by 42 per cent from 1990 levels by 2020. Or, any such analysis provided to the delegation by e-mail.

4. The public authority issued its response on 4 March 2010. It explained that it held relevant recorded information and that it believed it was environmental information. It therefore considered the request under the EIR and explained why it was doing so. It explained that the information requested related to the costs to the UK of the EU moving to a 30% reduction target. It said that it believed that Regulation

12(5)(a) applied to the information and that it would not therefore provide it. It believed there would be an adverse affect because the UK would be disadvantaged in future international climate negotiations and in EU meetings about the UK's share of the burden. This was because its adversaries would have access to its information about costs and this would not be reciprocal. It said that the UK's bargaining position would be considerably weakened. It explained that it believed that the balance of public interest favoured the maintenance of the exception. While the disclosure of the information would provide insight into the development of the policy and accountability about the likely costs of it, it would not outweigh the necessity to protect its negotiating position.

5. On 8 March 2010 the complainant requested an internal review. He explained:

'The public interest is clearly best served by disclosure. Any factor that makes emissions cuts more or less affordable in the UK is likely to affect those countries as well, so it is unlikely that disclosure of any costing will affect Britain's negotiating position. To the extent that there are differences between countries, such as differences of geography, those are pretty well known and DECC's estimate is unlikely to contain any particular surprises for the negotiating teams in other countries.

By contrast, not releasing the information makes it impossible for the public to understand the position the Government is negotiating from, and assess whether they are proceeding reasonably. It prevents any kind of democratic engagement with the Government's decision making and essentially requires the public to simply trust that the position is in the country's best interests. That is clearly unsatisfactory.'

6. The public authority communicated the results of its internal review on 6 May 2010. It explained that it upheld its position in its refusal notice. It also introduced a new exception 12(4)(e) [internal communications] but provided no further details about why it applied the exceptions..

## The Investigation

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### Scope of the case

7. On 25 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

8. On 17 July 2010 the complainant agreed that the scope of the Commissioner's investigation is to determine whether the information that is relevant to the request dated 8 February 2010 can be withheld by virtue of Regulation 12(5)(a) and/or 12(4)(e), or whether this information is suitable for disclosure to the public.

## **Chronology**

9. On 30 June 2010 the Commissioner wrote to the complainant and the public authority to explain that the complaint that he had received was eligible. He asked the public authority to provide him with a copy of the withheld information and its arguments about why it was withholding the information.
10. The Commissioner also called the public authority on 14 July 2010. He asked for clarification about why Regulation 12(4)(e) had been applied at the internal review stage.
11. On 17 July 2010 the Commissioner received an email from the complainant. It explained why he thought that the information should be disclosed. The Commissioner will consider these arguments in more detail in the analysis section of this Notice below.
12. On 29 July 2010 the Commissioner received a copy of the withheld information along with detailed further arguments about why the public authority was of the view that it was entitled to withhold the information. The Commissioner will also detail these arguments in the analysis section of this Notice.

## **Analysis**

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### **Substantive Procedural Matters**

#### *Is the requested information environmental information?*

13. The EIR define what constitutes environmental information in Regulation 2(1). A full copy of this section of the legislation and any other section that will be referred to in this Notice can be found in a Legal Annex attached to this Notice.
14. The Commissioner has had sight of the withheld information and considers that all of the information relevant to this request would fall within the definition given at regulation 2(1)(c) of the EIR : '

Information on ....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 designed to protect those elements.'

15. The Commissioner considers that information concerning the magnitude of the potential plan for the UK to cut its carbon and the costs thereof is information on a measure likely to affect the state of the elements of the environment. This is because the development of this policy would determine the nature of future of air emissions, which would be likely to affect that state of the air and atmosphere as referred to in regulation 2(1)(a). He considers that all of the information placed correctly in its context would relate to this measure.

### **Exceptions to the duty to disclosure (Regulation 12)**

16. Under the EIR, a public authority may refuse to disclose information if one or more exceptions apply and if, in all circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in disclosing the information.
17. In determining this case, the Commissioner has taken into account the submissions of both the public authority and the complainant.

*Were the two exceptions engaged?*

#### Regulation 12(4)(e)

18. Regulation 12(4)(e) explains that for it to be engaged the release of the information requested must amount:

*'to the disclosure of internal communications.'*

19. The public authority has identified seven items of withheld information in this case. The Commissioner is satisfied that all seven items have been correctly categorised as being internal communications.
20. The first two items are communications that have passed between government departments and therefore are included within Regulation 12(4)(e) by Regulation 12(8). This view is supported by the Information Tribunal decision in *Friends of the Earth v Information Commissioner and Export Credits and Guarantee Department* [EA/2006/0073] where the Tribunal was asked to consider this very issue.

21. A further four items were prepared within the department in order to inform its policy in this issue. These four items amount to communications within a government department and the Commissioner is satisfied that the exception is engaged for these items.
22. The last item was prepared by the Cabinet Office and provided to the delegates (and copied to the public authority). The Commissioner is satisfied this item is an internal communication as well and that the exception is engaged.

#### Regulation 12(5)(a)

23. Regulation 12(5)(a) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

*“international relations, defence, national security or public safety.”*

24. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a higher one than under 12(4), because:
  - Under regulation 12(5), for information to be exempt it is not enough that disclosure of information will have an effect, that effect must be 'adverse';
  - Refusal to disclose information is only permitted to the extent of that adverse affect – i.e. if an adverse affect would not result from disclosure from part of particular document, then that information should be disclosed; and
  - It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner* [EA/2005/0030] in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.<sup>1</sup>

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<sup>1</sup> These guiding principles in relation to the engagement of exceptions contained in regulation 12(5) were set out in Tribunal case *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037).

*The public authority's position*

25. In this case, the public authority has maintained that disclosure would adversely affect international relations, in that it would prejudice:
- (i) the UK government's negotiating position in future international climate change negotiations; and
  - (ii) the UK government's negotiating position within the European Union (the EU) in determining what its national share would be in the future.
26. The public authority has provided the Commissioner with detailed submissions which explain why it considers the requested information to be exempt from disclosure on the basis of regulation 12(5)(a). In the circumstances of this case the Commissioner cannot set out in detail the public authority's arguments because to do so would reveal the nature and content of the withheld information itself. (However, as this is so, in relation to some other factors relevant to this case the Commissioner has included a Confidential Annex which provides some additional detail - to the public authority alone - as to his reasoning.)
27. However, he can explain the main pivots of its argument and will do so below:
- 1. It proved that at the date of the request there was active consideration about the feasibility for the EU to move from a 20% target (see the background above) to a 30% target;
  - 2. It stated that the provision of the information that is subject to this request will cause it to enter the above negotiations with a weaker bargaining position. It would reveal aspects of its negotiating position and allow the other nations to have more information about the UK's position than the UK will have about their position. The UK would not be able to negotiate effectively where their limits were known;
  - 3. It provided evidence about why the nature of the withheld information would have this effect; and
  - 4. It believes that the timing of the request intensifies the very significant risk of the above.

*The complainant's position*

28. The complainant argued that the effect on international relations was likely to be minor in this case. While his arguments were generally

focussed on the public interest that favoured disclosure, the Commissioner has taken the following from them:

1. Other factors such as geography and existing fuel mix are generally responsible for the percentage share that the UK is likely to acquire. The financial data that has been requested would have a very limited effect taken in the context of all the information already provided; and
2. It was already understood at the date of the request that in the event that the EU moved to a 30% target that the UK's target would be likely to be 42%. He believed that this share was unlikely to be changed and that the disclosure of the data would not therefore have an adverse effect on international relations or inhibit its negotiating position.

*The Commissioner's position*

29. Regulation 12(5)(a) does not explain how to determine whether 'international relations' would be harmed and the exception engaged. However, the Commissioner is satisfied that the public authority has provided adequate evidence to show that the disclosure of the withheld information would have an adverse effect on international relations and would thus fall within scope of regulation 12(5)(a). The Commissioner does not doubt that international relations must also include the UK's relationship with the EU.
30. However, with regard to the likelihood as to whether disclosure would adversely affect the UK's international relations, the Commissioner believes that the disclosure would at the date of the request make international relations more difficult for the UK. He does not feel able to explain in great detail why he has concluded that disclosure would be likely to result in the prejudicial effects outlined above, for the reasons already given. However, after careful examination of the withheld information and the public authority's submissions, he is satisfied that there is sufficient evidence to support the view that this is a sound conclusion to reach.
31. In order to support this conclusion, the Commissioner is able to make the following points:
  1. The Commissioner has been satisfied that other nations' negotiating position would be enhanced with access to this data to the detriment of the UK. He believes that the data is valuable as it provides a base line from which a negotiating position could be calibrated. It



offers sufficient detail to allow another nation to readily compare the effect the policy would have on it with the UK's government's view;

2. The Commissioner has also been satisfied that the issue is one that is in active development. It is not an issue that has been already decided and negotiation is necessary;

3. The Commissioner has carefully considered the information that would be available to another nation to potentially 'reverse engineer' the withheld information<sup>2</sup>. He is satisfied that while the complainant is correct that the size and cost of the share is possible to roughly estimate, it is not possible to do so with the specificity that would be available if the withheld information was disclosed; and

4. It is necessary for the UK to provide its negotiators with the full information in order for it to get the best available deal for the UK. The information is provided with the expectation of confidence because the disclosure of it would inhibit the negotiators.

32. The Commissioner is also satisfied that it would not be possible to provide either some items of the withheld information or redacted versions of those items without the UK experiencing the same adverse effect outlined above. The Commissioner considers that, as a consequence, the harm to the international relations would be probable rather than just possible and therefore satisfies the test that disclosure would have an adverse affect.

#### *The public interest test*

33. As explained above the exception is subject to a public interest test. Under Regulation 12(1)(b) information may only be refused if an exception applies and 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) explains that the public authority must apply a presumption of disclosure when considering the information. This means that in the event the weight of public interest is balanced, the information should be disclosed.

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<sup>2</sup> For example the Commissioner has considered the findings of the Stern Report available here (correct as of 6 January 2011):

[http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/stern\\_review\\_report.htm](http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/stern_review_report.htm)

The Commissioner has also considered in this context the House of Lords Select Committee Report on Economic Affairs – Second Report on the Costs of Tackling Climate Change:

<http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeconaf/12/1208.htm#a44>

While he is barred from considering evidence from Select Committees due to Parliamentary Privilege, he believes that the report illustrates the real difficulties in calculating the future cost of climate change prevention from information already in the public domain.

34. It is important to note that the Commissioner must consider the public interest at the time of the request (8 February 2010). The fact that the date is important has been stressed by the Tribunal a number of times including in *Scotland Office v the Information Commissioner* [EA/2007/0070]<sup>3</sup>:

'...[T]he timing of a request is of particular importance. Disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within Government. As a general rule, the public interest in maintaining an exemption diminishes over time.' [at paragraph 70]

35. It is also important to stress that the "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public.<sup>4</sup>

36. In light of the Court of Appeal decision of *Office of Communications v Information Commissioner*<sup>5</sup> the Commissioner is also obliged to ensure that:

"where more than one exception is found to apply, they must at some point be considered together for the purpose of the public interest balancing exercise; that is to say, the aggregate public interest in maintaining the exceptions must be weighed against the public interest in disclosure."

37. For clarity, this means that because the public authority has applied both exceptions to all of the information, the Commissioner must consider the aggregate public interest at some point in his analysis.

38. As this is so, the Commissioner will conduct three separate public interest tests. He will conduct one for each exception, before finally considering an aggregate test. He will discuss the public interest factors that favour disclosure first and consider their weight. Only if the aggregate test finds in favour of disclosure will the information need to be disclosed.

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<sup>3</sup> This decision can be located at:

[http://www.informationtribunal.gov.uk/Documents/decisions/Scotland\\_Office\\_Determination\\_final4.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/Scotland_Office_Determination_final4.pdf)

<sup>4</sup> *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

<sup>5</sup> [2009] EWCA Civ 90; [2009] WLR (D) 71

***Public interest arguments in favour of disclosing the requested information***

39. In respect to the arguments that favour disclosure, the Commissioner is entitled to consider all relevant arguments about the 'public interest'. It follows that he needs only one section to discuss the factors that favour the disclosure.
40. The public authority has explained that it is fully aware that it should be accountable where possible. It stated that it recognises that there is a clear public interest in being able to scrutinise government decisions and that in this case there is a clear public interest in understanding better why the UK government took the position that it did in the climate negotiations in Copenhagen. It explained that the disclosure of the withheld information about the potential costs of the commitment would assist the public in doing this.
41. The complainant has also provided the Commissioner with detailed arguments about why he feels that the public interest favours the disclosure of the information in this case.
42. He has explained that the weight of the issue at stake should matter. The negotiations that have taken place and will take place are likely to commit the UK Government to potentially many billions of pounds of expenditure. In order to ensure that there is democratic scrutiny, it is necessary to understand the scope of the commitments as this is a major decision about future policy.
43. He explained that in his view it is crucial that the UK Government is held accountable and that the public has access to the information to come to an informed view about whether the pledge is right, both in fact and principle. He explained that this information was required for the public to debate in confidence and to assess the quality of the arguments from groups (and other nations) that are resisting it.
44. He argued that this information would also feed into a fundamental public debate about whether the action to address emissions can boost economic growth or whether it will require sacrificing a substantial proportion of expected GDP. The outcome of this debate is likely to have a profound effect on each individual member of the public's way of life.
45. He also commented that the Climate Change Act 2008 has already been passed<sup>6</sup>. This piece of legislation already commits the UK

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<sup>6</sup> [http://www.opsi.gov.uk/acts/acts2008/ukpga\\_20080027\\_en\\_2](http://www.opsi.gov.uk/acts/acts2008/ukpga_20080027_en_2)

Government to targets for reductions by 26 per cent of 1990 level by 2020 and 80 per cent by 2050. He explained that the Government has estimated that this had an overall cost of between £324 and £404 billion. He said that it is clear from this data that a substantial strengthening of the short term target could potentially cost the public tens or hundreds of billions of pounds. This made the weight of the necessity of accountability unassailable in his opinion. In addition, the timing is crucial as the issue needs to be debated by the public before the pledge is made.

46. Finally, he argued that the failure to provide the information would add to the perception that policy in this area is formed without regard to the views of the public and this would undermine trust.
47. The Commissioner adds to these arguments that there is also a clear public interest in understanding how the estimated costs of the additional pledge have been calculated. There are numerous ways to model costs and the figures would possibly allow economists to interrogate the Government's position and develop the debate.
48. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in disclosing the information:
  - The strong public interest factor in transparency in respect to matters of this scale;
  - The strong public interest factor in accountability in respect to both the Copenhagen summit and the position of the UK government;
  - The strong public interest factor in enabling the possibility of public debate both on the effects of the potential policy and the nature of the withheld information;
  - The obligations that the UK government already have in this area; and
  - The potential expenditure of a large amount of public money that this information is likely to discuss.

***Public interest arguments in favour of maintaining the exception 12(4)(e)***

49. In this section, the Commissioner can only consider arguments which are inherent in the exception. This means that the only arguments that are to be considered are those that relate to the disclosure of internal communications.

50. In the Commissioner's view there are two categories of information in this case. Both require separate consideration and therefore will be considered apart. The first category concerns the general policy information that developed the public authority's view about the economic costs of potentially making a new pledge. The second category concerns a document prepared for and considered within the Prime Minister's ad-hoc Committee on climate change.

*Category one – General Policy information*

51. The public authority has explained that all the documents play an integral part in internal policy thinking and formation and that it is appropriate that there is space in which to develop ideas and think in private. It reminded the Commissioner that this idea was recognised in the Aarhus Convention. It explained that it believed that it is correct and proper for it to develop competing economic models of the costs of pledges and to test them in private.
52. The public authority explained that it believed that disclosure would have the effect of hindering the development of good policy. The subject matter of the request is continuously developing, new ideas and methods are constantly evolving and it is necessary that members of staff should be able to think creatively in the expectation of privacy.
53. The Commissioner believes that the arguments in the two preceding paragraphs can be correctly characterised as 'safe space' arguments. This is the public interest in allowing the government to develop policy away from external scrutiny. The Tribunal has recognised that importance of 'safe space' in a number of its decisions. For example, in *Department for Education and Skills v the Information Commissioner and The Evening Standard* [EA/2006/0006] the Tribunal stated:
- "Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy" (para 75, point iv).
54. The Commissioner is satisfied that these arguments should have weight in this case because the development of the UK government's policy on climate change was still ongoing at the date of the request and the potential scope of its obligations were yet to be confirmed. The Commissioner acknowledges that the weight of this public interest factor would decrease as the policy became more certain and the result

is communicated to the public<sup>7</sup>. However, this is a situation where there is active consideration still ongoing and therefore the 'safe space arguments' have real weight.

55. The public authority explained that the documents were all prepared with a view to inform the UK's negotiating position in respect to negotiations which have not been concluded. It explained that the nature of government business meant that officials are sometimes asked to provide analysis in tight timescales for the negotiating delegation. If it was known that the advice would enter the public domain before the negotiations had concluded, then it is likely that the individual with the necessary skills would be reluctant to provide such advice and this would lead to the UK having less comprehensive advice for negotiations in the future.
56. It explained that the effect of the disclosure of this information would be wider than just this case. It stated that its view was that it would significantly undermine future advice and internal government discussions. It stated that this was particularly so in an area such as this one, which is high profile in nature.
57. The Commissioner believes that the arguments in the two preceding paragraphs can be characterised as arguments about there being a 'chilling effect'. This concept was helpfully defined by the Information Tribunal in *Scotland Office v the Information Commissioner* [EA/2007/0070] as arguments that concern "the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause". The loss of boldness and candour would not be in the public interest because it would ultimately result in poor decision making and less robust or effective policies and decisions.
58. The Commissioner believes that this effect would be likely to be multifaceted in this case. The disclosure of the withheld information could affect the frankness and candour of future contributions in respect to this very issue. It could also lead to the adverse affect to the frankness, scope and candour of future policy debates on other live issues too. The Commissioner believes that the narrower scenario is considerably more convincing than the wider one in this case.
59. The High Court considered the chilling effect in *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) where Mr Justice Mitting stated:

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<sup>7</sup> This follows the decision in *DBERR v the Information Commissioner and Friends of the Earth* (at paragraph 114) [EA/2007/0072].

'There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'

(at paragraph 38)

60. The Commissioner has carefully considered the content of the withheld information and alongside the arguments provided by the public authority. He has been satisfied that the provision of this particular information is likely to have a 'chilling effect' particularly in respect to the debate on the UK Government's response to climate change.
61. He has also carefully considered whether he believes that the provision of this information to the public at the date of the request would be likely to have a reverse 'chilling effect' – in that it may inspire more complete and rigorous analysis with the knowledge that the information was likely to be released to the public before the negotiations were complete. The Commissioner accepts that this layer of scrutiny may emphasise further the need to get it right. However, in respect to this matter the Commissioner does not believe that further emphasis is required. He does not believe that the competing arguments reduce the weight of the potential 'chilling effect' on the facts of this case.
62. The public authority has also explained that its arguments about 'safe space' and the 'chilling effect' are stronger due to the timing of this request. This issue remains a live and ongoing issue and the disclosure of it would expose it to active comment, which would make officials less willing to provide such analysis and advice in the future. The Commissioner agrees that both the 'safe space' and 'chilling effect' arguments are strengthened by the timing of the request in this case. The timing is crucial because further debate is highly likely to be required when the Government receives further information from other nations about their position within the negotiations.
63. Finally, the public authority explained that the content of the information that has been requested will enter the public domain when the UK publishes its impact assessment should there be a legislative proposal from the European Commission. At this time, the disclosure would accord with the expectations of the individual contributors. It

argued that there was a public interest in maintaining a clear process that accorded with the expectations of the individual contributors and the Commissioner recognises there is value in maintaining such a process.

64. In summary, the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in maintaining the exception found in 12(4)(e) to the category one information:

- The strong public interest factor in the preservation of 'safe space' to develop its negotiating position and policy in this case;
- The strong public interest factor in the prevention of there being a 'chilling effect' in respect to the development of its position in respect to climate change both now and in the future;
- The enhancement of the above two arguments because the negotiations were ongoing at the date of the request; and
- The public interest in accountability can be mitigated by providing relevant information later in the process (balanced by the need for it earlier in the process).

*Category two – Committee on climate change*

65. The public authority explained that the nature of this information should be considered particularly carefully. It explained that the disclosure of this information would be likely to erode the convention of collective cabinet responsibility. That is, its disclosure would prevent Ministers from arguing freely and frankly in private in the expectation that when decisions are made they will present a united front.
66. The Commissioner believes that these arguments also relate to there being a potential 'chilling effect'. This applies where ministers exchange correspondence that may express divergent views, yet once a position is taken the convention dictates that it must be supported fully. The Commissioner accepts that there is an additional public interest in allowing the Cabinet to promote and defend an agreed position without revealing divergent individual views should they exist.
67. The Commissioner also notes that all the arguments mentioned for the category one information also apply to this information. He notes that he must consider the additional weight that the nature of this category of information, in relation to the convention of cabinet collective responsibility, gives to the 'chilling' effect on the facts of this case.



***Balance of the public interest arguments for 12(4)(e)***

68. When considering the weight of public interest for Regulation 12(4)(e), the Commissioner has been influenced by the analysis that was provided in the Tribunal's decision in *DfES v the Commissioner and the Evening Standard* [EA/2006/0006]. This follows the comments in *Lord Baker v Information Commissioner and the Department for Communities and Local Government* [EA/2006/0043] which confirmed that the DfES case while relating to section 35 of the FOI Act (formulation of government policy), should provide 'broad' guidance in relation to Regulation 12(4)(e). There were eleven principles in that case and the Commissioner believes that there are seven of those principles that need to be discussed on the facts of this case. They are:

- (1) The analysis must be based on the content of the information requested;
- (2) The 'status' of the information is not relevant in itself;
- (3) The exception should protect Civil Servants rather than politicians. It is not to be used to protect politicians from legitimate criticism;
- (4) The timing of the request is of paramount importance;
- (5) Any other information in the public domain is not a significant factor;
- (6) Civil servants should be considered to be robust in temperament, although the effect of disclosure should be carefully considered in the circumstances; and
- (7) The expectations of junior officials should be considered when deciding whether it would be appropriate to attribute positions to them.

69. The Commissioner believes that different outcomes are merited for different categories of information and therefore will deal with each in turn:

***Category one - General Policy information***

70. The Commissioner has carefully considered the relevant recorded information alongside the detailed arguments of both sides. He considers that the public interest factors that favour the maintenance of the exception have weight due to the time of the request. However, the Commissioner notes that the importance and nature of the information means that in his view there is considerable weight of public interest in providing the information for accountability and transparency which is at least equal to those factors considered relevant in respect of the maintenance of the exception. He has therefore come to the view that the public interest in maintaining the

exception is outweighed and that this category of information cannot be withheld by reference to this exception alone.

*Category two - Committee on climate change*

71. The Commissioner has also carefully considered the relevant recorded information alongside the detailed arguments of both sides. He believes that the balance is different in respect to this category of information. The important factors are the prejudice due to the timing of the request against the need for accountability. His view is that the extra arguments about collective responsibility in respect to the 'chilling effect' tips the balance and makes the weight of public interest in maintaining the exception outweigh the public interest in disclosure. He finds that the exception can be applied by itself to correctly withhold this category of information..

***Public interest arguments in favour of maintaining the exception 12(5)(a)***

72. In this part the Commissioner can only consider arguments which are inherent in the exception. This means that the only arguments that are to be considered are those that relate to the adverse effect on international relations.
73. As noted above, the public authority's view is that disclosure would have a very significant risk of having an adverse effect on the UK's negotiating position. The Commissioner agrees that the disclosure of this information would be likely to make international relations more difficult and that this is a strong public interest argument that favours the maintenance of the exception. He cannot provide any more detail than above about this matter in order to preserve the integrity of the withheld information.
74. The Commissioner also accepts that there is a strong public interest in the UK being able to negotiate on equal footing with its international partners. The potential distortion that the disclosure of this information would cause is a further factor in favour of the maintenance of the exception.

***Balance of the public interest arguments for 12(5)(a)***

75. The Commissioner notes that in this case there are very strong public interest factors on both sides. He believes that there is a strong public interest in not inhibiting international relations and an equally strong public interest in accountability and transparency in this case. Given that he believes that the weight of public interest factors are balanced

in respect to 12(5)(a), he must apply the presumption that favours disclosure outlined in Regulation 12(2).

### ***Balance of the factors taking an aggregate balance***

76. Given the outcome above, it is necessary for the Commissioner to consider the aggregate balance of public interest for the category one information that was not found to be exempt by virtue of a single exception in this case.
77. It is therefore necessary to balance the weight of the public interest factors in disclosure against the combined weight of the factors that favour the maintenance of 12(4)(e) and 12(5)(a).
78. The Commissioner's view is that the supplementing of the 12(5)(a) arguments with the 12(4)(e) arguments changes the balance of the weight of the public interest in this test. The extra public interest factors in favour of maintaining the exceptions mean that the balance is no longer equal, but now favours the maintenance of the two exceptions taken together. This is because there is only one set of arguments that favours disclosure (which are of the same weight as the 12(5)(a) public interest factors alone) and there are two different sets of arguments that favour the maintenance of the exceptions, which once weighted together have greater weight. (He believes this to be the case in respect of all the information falling within category one.) It follows that the Commissioner is of the view that the exceptions can be applied correctly together and no relevant recorded information is required to be provided to the complainant. The Commissioner has come to this view in light of all the evidence at the time of the request for information and also the timing in this case, which the Commissioner considers crucial.

### **Procedural Requirements**

79. Regulations 14(2) and 14(3) require that a public authority specifies any exception that it is relying on to withhold information within twenty working days. The public authority failed to explain that it believed that Regulation 12(4)(e) applied to the information until its internal review. It therefore breached Regulation 14(2). Regulation 14(1) requires that any refusal notice issued complies entirely with the remainder of Regulation 14. Therefore the breach of Regulation 14(2) also meant that the public authority breached Regulation 14(1).

## The Decision

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80. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
- It was entitled to withhold all of the relevant recorded information because both exceptions found in Regulations 12(4)(e) and 12(5)(a) were engaged and the combined weight of the public interest factors that favour the maintenance of those exceptions outweighed the public interest in disclosure of the information at the date of the request.
81. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- It failed to state that it believed it was entitled to rely on the exception found in Regulation 12(4)(e) until its internal review. This was a breach of both Regulations 14(2) and 14(3).

## Steps Required

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82. The Commissioner requires no steps to be taken.

## Right of Appeal

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83. 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)

84. 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.
85. 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 31<sup>st</sup> day of January 2011**

**Signed .....**

**Alexander Ganotis  
Group Manager – Complaints Resolution  
Information Commissioner’s Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex: The 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 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 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 the 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.