

## **Environmental Information Regulations 2004**

### **Decision Notice**

**Date: 21 July 2011**

**Public Authority:       The Marine Management Organisation**  
**Address:                 PO Box 1275**  
**Newcastle upon Tyne**  
**NE99 5BN**

### **Summary**

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The complainant requested information relating to an application for licences to expand two container ship berths at the Port of Southampton. The request focused on correspondence between the public authority, Associated British Ports and the Department for Transport. The public authority initially refused to disclose this information under regulations 12(5)(d) and 12(5)(e). During the investigation the public authority disclosed most of the previously withheld information, although it continued to withhold some information under regulations 12(3) and 13. In addition to this, the complainant stated that she believed that further information was held. After investigating the case the Commissioner decided that no further information was held. In addition to this, he also found that the public authority was correct to rely upon regulations 12(3) and 13 to withhold the outstanding information. Finally, the Commissioner considered that the public authority did not meet the requirements of regulations 5(1), 5(2), 14(1) and 14(3)(a).

### **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 Marine Management Organisation is a non-departmental public body (sponsored by DEFRA) which was established under the Marine and Coastal Access Act 2009. It commenced its existence on 1 April 2010 and incorporated the work of the Marine and Fisheries Agency which ceased to exist. Consequently, although the request for information was submitted to the Marine and Fisheries Agency, responsibility for it passed to the Marine Management Organisation in April 2010. For simplicity the Commissioner will refer to both bodies as "the public authority" throughout the rest of this notice.
3. This case focuses on an application by Associated British Ports ("ABP") for licences to carry out capital dredging to the approach channel to the Port of Southampton, to deepen Berths 201 and 202 at the container terminal of that port, and to reconstruct the quay wall to support the revised berths.<sup>1</sup>

## The Request

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4. The complainant wrote to the public authority on 19 January 2010 and requested the following information,

*"...copies of all correspondence between ABP and the Marine and Fisheries Agency and/or the Department for Transport in relation to ABP's applications and relating to the period from our original objection letter (1 September 2009) to the date of the publication of the new press release notice (we have not been able to obtain a copy of the original notice but your email dated 12 January 2010 confirms that this was published no earlier than 18 December 2010[sic should be 2009])."*

5. A similar request had been made by the complainant to the public authority on 14 August 2009 for copies of all application documents submitted by ABP in relation to the proposed expansion works at the Port of Southampton. This request sought access to information which predated the information sought in this case. A complaint regarding the public authority's handling of this earlier request has been considered separately by the Commissioner under case reference FER0297270.<sup>2</sup>

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<sup>1</sup> <http://www.southamptonvts.co.uk/pinfo/DevelopmentProjects.htm>

<sup>2</sup> [http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fer\\_0297270.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fer_0297270.ashx)

6. The public authority responded in a letter dated 25 February 2010, and refused to disclose this information, stating that it was exempt from disclosure under regulation 12(5)(d) of the EIR. In this letter it informed the complainant that its internal review procedure meant that any internal review would be carried out by the Department for Environment, Food and Rural Affairs ("DEFRA").
7. The complainant wrote to DEFRA on 25 March 2010 and asked for an internal review.
8. DEFRA carried out an internal review, and responded in two letters.
9. The first letter, dated 8 April 2010, dealt with the procedural aspects of the handling of the request. DEFRA acknowledged that the public authority had not met the requirements of regulation 5(2), and that it had not properly explained why it had dealt with the request under the EIR rather than the Freedom of Information Act 2000.
10. The second letter, dated 27 May 2010, dealt with the substantive elements of the handling of the request. It clarified that when handling the request the public authority had considered that it related to the period between the first objection letter from the complainant (1 September 2009) and the date of publication of its new press notice (31 December 2009). After reviewing the handling of the request DEFRA stated that it believed that the requested information was exempt from disclosure under regulation 12(5)(d). In addition to this, it added that it also believed that this information was exempt under regulation 12(5)(e).

## **The Investigation**

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### **Scope of the case**

11. On 22 July 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
12. The Commissioner wrote to the complainant on 19 October 2010. He noted that the public authority had considered that the request related to copies of correspondence dating between 1 September 2009 and 31 December 2009. He informed her that he was proceeding on the basis that her request related to information dating from between these two dates.
13. During the course of the investigation the public authority disclosed a large amount of the previously withheld information, although it informed the Commissioner that some information had been redacted

under regulations 12(3) and 13. In addition to this, the complainant disputed whether all the relevant information held by the public authority had, in fact, been disclosed or identified and redacted.

14. Therefore, the scope of this case has been to consider:
- whether any further relevant information (dating between 1 September 2009 and 31 December 2009) is held, and
  - the public authority's use of regulations 12(3) and 13 to withhold the outstanding redacted information.
15. The Commissioner has also considered whether the public authority has complied with the requirements of regulations 5 and 14.

### **Chronology**

16. The Commissioner wrote to the public authority on 19 October 2010 and asked for a copy of the withheld information. He also asked it to provide further arguments to support its use of regulations 12(5)(d) and 12(5)(e). He asked the public authority to respond by 17 November 2010.
17. The public authority contacted the Commissioner on 12 November 2010 and asked for this deadline to be extended. A new deadline of 1 December 2010 was agreed. On 29 November 2010 the public authority asked for a further extension, and a new deadline of 8 December 2010 was agreed.
18. The public authority contacted the Commissioner on 8 December 2010 and informed him that it now intended to disclose most of the previously withheld information. The Commissioner asked the public authority to make this disclosure, and to notify him when it had been done.
19. On 16 December 2010 the Commissioner wrote to the public authority again and noted that it had not yet informed him that it had made any disclosure to the complainant. He asked it to confirm whether it still intended to disclose this information to the complainant. In relation to any information it still intended to withhold, he asked it to provide him with a copy of that information together with its submissions as to why this information should be withheld. He asked for a response by no later than 4 January 2011.
20. The public authority responded to the Commissioner on 23 December 2010, and informed him that it had disclosed the previously withheld information on 14 December 2010.

21. The Commissioner wrote to the complainant on 4 January 2011 and noted that the public authority had stated that it had now disclosed the previously withheld information. He asked the complainant to confirm whether she was content for the case to be closed.
22. The complainant wrote to the Commissioner on 19 January 2011 and informed him that she was not satisfied that the public authority had disclosed all of the relevant information that it held. She provided further submissions to support this, including a number of examples of information that she believed was missing.
23. The Commissioner contacted the public authority by way of a telephone call on 26 January 2011. He explained that the complainant remained dissatisfied, and in particular believed that further relevant information was held by the public authority.
24. The Commissioner emailed the public authority on the same day, and set out the complainant's concerns. In particular, he listed the examples of allegedly missing information and asked for its comments. He asked the public authority to confirm whether its position was that it had disclosed all the relevant information that it held. He also asked it to provide him with details of the searches it had carried out in order to identify what information it held. Finally, he asked it to provide him with a copy of the information that it had disclosed to the complainant.
25. The public authority wrote to the Commissioner in a letter dated 18 February 2011, and provided a copy of the information that it had disclosed to the complainant. It noted that this had been redacted under regulations 12(3) and 13, and provided limited arguments to support its use of these exceptions. It went through the examples of information that the complainant had stated were missing, and in relation to all but two of these examples stated that either no information was held or that that information would fall outside the scope of the request. In relation to one of the examples, it noted that it had been accidentally omitted from the information it had previously disclosed, and stated that it had now disclosed it. In relation to the other example, it stated that it was currently investigating whether any further information was held. Finally, it provided further details of the searches that it had carried out.
26. The Commissioner responded in an email dated 7 March 2011, and asked the public authority to provide further submissions in regard to its use of regulations 12(3) and 13. In relation to the outstanding example that it had referred to, he asked it to confirm whether it had established whether any further information was held.
27. The public authority wrote to the Commissioner on 18 March 2011. It informed him that it had come to its attention that one of the documents

previously disclosed to the complainant was incomplete. However, it had now disclosed a complete version of that document to the complainant.

28. It wrote to the Commissioner again on 22 March 2011 and provided further submissions to support its use of regulations 12(3) and 13. It also stated that it was now prepared to disclose some of the previously redacted information which showed the name and contact details of one individual.
29. The Commissioner wrote to the public authority on 24 March 2011 and asked it to confirm when the information showing the name and contact details of the individual referred to in the previous paragraph had been disclosed. In addition to this, he noted that it had not yet clarified whether it held any further information in relation to the example given by the complainant. He again asked it to confirm whether it held any further information in relation to this example.
30. The public authority responded on 8 April 2011. It confirmed that it had now arranged for the disclosure of the information showing the name and contact details of the individual referred to in the previous two paragraphs. In addition to this, it also confirmed that in relation to the example of missing information given by the complainant, after carrying out an extensive search it had been unable to identify any information that fell under the type described in the example that would fall under the scope of the request.

## **Analysis**

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### **Substantive Procedural Matters**

#### **Is it environmental information?**

31. Both the public authority and the complainant agree that the requested information falls under the definition of environmental information as set out in regulation 2 of the EIR. After considering the details of the request and the information that has already been disclosed to the complainant the Commissioner is also satisfied that it falls within the definition of environmental information, as set out in regulation 2.
32. The full text of regulation 2 can be found in the legal annex at the end of this notice.

### **Regulation 5(1) – Duty to make available environmental information on request**

33. As noted above, the public authority believes that it has now disclosed all of the information that holds that falls under the request – albeit with personal information redacted from these documents under regulations 12(3) and 13. However the complainant has argued that further information (other than that disclosed in a redacted format) is held by the public authority that would fall under the scope of the request.
34. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. If – as is alleged in this case – a public authority does not identify all of the information that it holds that is subject to a request under the EIR, it will be in breach of this regulation. Therefore the Commissioner has considered whether the public authority has complied with the requirements of regulation 5(1).
35. The full text of regulation 5 can be found in the legal annex at the end of this notice.
36. In cases such as this the standard of proof to apply in determining whether a public authority holds requested information is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information is held, including whether it is inherently unlikely that the information so far located represents the total information held.
37. Therefore the Commissioner has first considered the quality of the searches carried out by the public authority. During the investigation the Commissioner asked the public authority to detail the searches that it had carried out in order to establish what information it held that fell under the scope of the request. His questions, and the public authority's responses to these questions, are detailed below:
  - What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

*Response: "The searches carried out for information falling within the scope of this request was focussed on reviewing information held locally and on the case file. All information handled by the case officer(s) throughout the process is stored between Microsoft Outlook, a shared team network drive and the hardcopy*

*case file with formal chronological indexing. I believe that the searches of Microsoft Outlook, the network drive and the case file in this matter was likely to retrieve any relevant information taking into account the fact that the storage mediums identified are there to represent a comprehensive record of the complete process and offer the most relevant source of all relevant information in this instance."*

- If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

Response: The search for information included information held locally on personal computers and on networked resources and in emails.

- If searches included electronic data, which search terms were used?

Response: When the searches included electronic data, key information was drawn from the scope of the request to include the date range and the parties identified as being of interest, in order to form the search terms.

- If the information were held would it be held as manual or electronic records?

Response: Information held by the public authority included both electronic and manual records.

- Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

Response: *"It is our belief that no information relevant to the scope of this request was held prior to subsequent deletion or destruction"* (Bearing in mind the next two bullet points below, the Commissioner has interpreted this to be a statement that it believed that no relevant information had been deleted or destroyed.)

- If recorded information was held but is no longer held, when did the public authority cease to retain this information?

Response: *"It is our belief that all information relevant to the scope of this request continues to be held by the [public authority]."*



- Does the public authority have a record of the document's destruction?

Response: *"There is no evidence to suggest that any documents have been destroyed."*

- What does the public authority's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the public authority describe the way in which it has handled comparable records of a similar age?

Response: *"With reference to comparable records, the [public authority] commits to ensuring that the shared team network drive and the hardcopy case file contain all information relevant to the case being handled."*

- If the information is electronic data which has been deleted, might copies have been made and held in other locations?

Response: *"It is our belief that no electronic data that falls within the scope of this request has been deleted and/or held in other locations."*

- Is there a business purpose for which the requested information should be held? If so what is this purpose?

Response: *"The purpose of the [public authority] holding the requested information is in line with our commitment to having a transparent and comprehensive record of the process undertaken during the life of a case."*

- Are there any statutory requirements upon the public authority to retain the requested information?

Response: *"The [public authority] has not chosen to retain any part of the requested information and in line with the requirements of the EIRs; the [public authority] did not exercise any of the exceptions to the duty to disclose information and committed to the disclosure of all relevant information identified as falling within the scope of the request."*

38. The Commissioner has gone on to consider whether there is any evidence that further information is held.

39. During the investigation of the case the complainant provided the Commissioner with a list of information that she believed was missing from the bundle disclosed to her. This information was as follows:
- Details of the proposals of ABP to expand the Port of Southampton. The disclosed information contained little correspondence between ABP and the public authority that discussed the nature of its proposals and / or its Environmental Statements.
  - Correspondence with the Department for Transport (the "DfT"). She pointed out that the disclosed information did not contain any correspondence from or to the DfT. Given the potential impact of the proposals the DfT would have had a direct interest in the proposals. Therefore, she argued, the issue would have required discussion and liaison with the DfT.
  - Information relating to the capital dredge application. The complainant pointed out that other than some brief references, the disclosed information contained no details relating to ABP's application for the capital dredge of the Port of Southampton Approach Channel.
  - Correspondence with Natural England. The disclosed information only showed a limited amount of correspondence with Natural England, and the complainant believed that there should be more.
40. The complainant also argued that there were gaps in the bundle of disclosed information. In particular, there were references in the disclosed information to meetings and telephone conversations, but no notes of those meetings or telephone calls had been disclosed. She provided four examples of this. She also stated that some of the disclosed documents were incomplete, and had pages or attachments missing. Again, she provided two examples of these.
41. During the investigation the Commissioner provided details of the complainant's arguments to the public authority and asked it confirm whether, bearing these points in mind, it held any further information that would fall under the scope of the request. The public authority responded on 18 February 2011 as follows:
- Details of the proposals of ABP to expand the Port of Southampton – it confirmed that it held no further information of this type that would fall within the scope of the request.

- Correspondence with the DfT – it confirmed that it held no further information of this type that would fall within the scope of the request.
  - Information relating to the capital dredge application – the public authority stated that during the period in question (1 September 2009 and 31 December 2009) its activities were focusing on the proposed work at Berths 201 and 202 of the container terminal, rather than on the Port of Southampton Approach Channel. Therefore it confirmed that it held no further information of this type that would fall within the scope of the request.
  - Correspondence with Natural England – it confirmed that it held no further information of this type that would fall within the scope of the request.
42. In relation to the examples of information that the complainant had stated had gaps in it, the public authority argued that two of those examples predated the date range of the request (therefore falling outside the scope of the request) and that it did not hold any information in relation to another. However, in relation to the final example it stated that it would carry out a further investigation to establish whether any further information was held. This example was taken from a letter dated 12 November 2009 disclosed to the complainant that referred to a 'recent meeting' between ABP and DEFRA. The complainant noted that no notes or minutes of that recent meeting had been disclosed to her.
43. In relation to the incomplete documents referred to by the complainant it stated that in relation to one of the examples provided by the complainant this had, in fact, already been disclosed in full. However it had disclosed another copy to the complainant. In relation to the second example referred to by the complainant it had discovered that this had only been disclosed in an incomplete format. It apologised for this omission, and confirmed that it had now disclosed it in full.
44. In addition to this, on 18 March 2011 the public authority informed the Commissioner that it had established that another of the documents previously disclosed to the complainant had, in fact, only been disclosed in an incomplete format. It confirmed that it had now disclosed it in full.
45. Finally, on 8 April 2010 the public authority confirmed to the Commissioner that in relation to the notes or minutes of the 'recent meeting' referred to in the letter of 12 November 2009, after carrying out an extensive search, *"...no notes or minutes have been identified as falling within the date range applicable to this particular request..."*

46. After considering the correspondence from the complainant the Commissioner notes that she feels strongly that further relevant information is held by the public authority. He also notes that during the investigation of this case the public authority informed both him, and the complainant, that after reconsidering the circumstances of the case it had decided to disclose all of the information that it held that fell under the scope of the request, and that this disclosure had been made. However further information was subsequently disclosed to the complainant later on during the investigation of the case that had been omitted from the bundle earlier disclosed to her.
47. Bearing this in mind, the Commissioner has some sympathy with the complainant's concerns that all relevant information has now been identified (and either disclosed or withheld under regulations 12(3) and 13). However, these concerns do not prove that further relevant information is held by the public authority.
48. Instead, in reaching a decision as to whether any further relevant information is held the Commissioner has taken into account the details of the searches carried out by the public authority, and its responses to the complainant's points about missing information. He has also noted that several of the examples of missing information referred to by the complainant would, in fact, fall outside the scope of the request. For example, one of the areas highlighted by the complainant is the lack of correspondence with Natural England. However, given that the request was for correspondence between the public authority, the DfT and ABP, correspondence from Natural England would not fall under the scope of the request unless it was a document attached to correspondence between the three bodies named in the request. Finally, he has taken into consideration the relatively narrow scope of the request which was for correspondence between three bodies, over a four month period (see paragraphs 12 and 14 above).
49. Bearing in mind the arguments presented by the public authority, the details of the searches that it has carried out, and the scope of the request, the Commissioner is satisfied, on the balance of probabilities, that it does not hold any further information – other than that already disclosed or withheld under regulations 12(3) and 13 – that would fall under the scope of the request.

## **Exceptions**

### **Regulations 12(3) and 13 – Personal information**

50. The Commissioner next considered whether the public authority was correct to withhold part of the requested information under regulations 12(3) and 13.

51. Regulation 12(3) states that 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.
52. Regulation 13(1) provides an exception for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in regulation 13(2) or regulation 13(3) is satisfied.
53. One of the conditions, listed in regulation 13(2)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (the "DPA").
54. In this case the public authority has stated that it is relying upon regulations 12(3) and 13 on the basis that the disclosure of this information would breach the first principle of the DPA. Bearing this in mind, the Commissioner considers that the public authority is relying upon the condition listed in regulation 13(2)(a)(i) to withhold this information.
55. During the course of the investigation the Commissioner asked the public authority to provide further arguments to support its use of this exception.
56. The public authority informed the Commissioner that it had applied this exception to the names and contact details of:
  - its employees who did not have senior roles, and had no direct responsibility for making decisions on how public money is spent;
  - ABP employees, on the basis that they were not public facing and were not in a position that involved responsibility for making decisions on how public money was spent; and
  - other individuals, not employed by any of the above – e.g. the names and contact details of individuals contained in consultation responses.
57. With regard to its own employees (including those of its predecessor, the Marine and Fisheries Agency), the public authority argued that these individuals would not have had overall responsibility for the decision making in relation to these licence applications. Therefore it would be unfair to disclose this information when actual responsibility for a particular decision was properly held by their superiors. It argued that disclosure could lead to individuals being held accountable for a decision

or a statement when in fact they were merely drafting and communicating the views of their superiors and/or the organisation.

58. With regard to the other two categories of individuals the public authority argued that they would not have had any expectation that their names and contact details would be disclosed under EIR, as they had passed their information to it in good faith, and it would be unreasonable to assume that those individuals would have expected that their personal information would be disclosed to a wider audience. It also added that these individuals had had no chance to consent to their information being used in this way, or to comment on the potential disclosure of this information. Finally, it added that the redaction of this information did not render the disclosed information incomprehensible, and nor was it pertinent to understanding the disclosed information.
59. In order to reach a view on the public authority's arguments the Commissioner has first considered whether the withheld information is the personal data of third parties.
60. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
  - from that data, or
  - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
61. The Commissioner notes that the withheld information consists of the names and contact details of individuals, and he is satisfied that the individuals can be identified from this information. The withheld information records the involvement of these individuals in the events that lie behind the request in this case. Bearing these points in mind, the Commissioner is satisfied that the withheld information is the personal data of the individuals concerned.
62. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. This requires that personal data is:
  - processed fairly and lawfully, and
  - that at least one of the conditions in schedule 2 is met.
63. The Commissioner has first considered whether the disclosure of the withheld information would be fair.
64. As noted above, the withheld information consists of the names and contact details of:

- employees of the public authority,
  - ABP employees, and
  - other individuals not employed by either of the above bodies.
65. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
- whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned (i.e. the consequences of disclosure);
  - the individual's reasonable expectations of what would happen to their information; and
  - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the data subject.
66. The Commissioner has considered each of these factors, with reference to the withheld information, in turn.
67. In relation to the first factor, the Commissioner notes that the public authority has argued that the disclosure of information relating its staff would potentially lead to them being held accountable for a decision or statement made in relation to the licence application process when, in actual fact, they had no responsibility for this.
68. The Commissioner does not find this argument particularly convincing. After considering the redacted documents he believes that they clearly represent a process between the public authority, ABP and certain interested stakeholders, wherein ABP's licence applications were being considered and discussed. He considers that the individuals concerned were clearly working on behalf of their relevant employer, and he is not persuaded that the individuals listed therein would be held accountable for the decisions made in relation to these applications if the withheld information were to be released. The Commissioner also notes that the public authority has only made this argument in relation to its own staff, and has not made any specific argument of damage or detriment in relation to the other individuals concerned. Therefore the Commissioner does not accept that the disclosure of the withheld information would cause any unnecessary or unjustified damage or distress to the individuals concerned.
69. The Commissioner has gone on to consider the second factor – whether the individuals concerned would have reasonably expected that this information would be made public. In reaching a view on this he has

considered at length the public authority's arguments, as well as the withheld information.

70. Bearing in mind the public authority's arguments in relation to its own employees the Commissioner considers that given the internal nature of this information and their seniority, those individuals would not have a reasonable expectation that information recording their involvement in these licence applications would be made public.
71. In relation to individuals who were not its employees, the public authority has argued that they had passed their details to it in good faith, and would have had no reasonable expectation that their details would be disclosed under the EIR.
72. As regards the names and email addresses of individuals who were not employees of the public authority, the Commissioner finds that there is no evidence that they did or would, if asked, give their consent to the public dissemination of their personal data. In the context of this matter their primary function was to liaise with the public authority regarding the applications of ABP. Their role is therefore not public facing and the Commissioner accepts, from this, that they would be unlikely to have envisaged that this would permit the public dissemination of their personal data. The Commissioner is also unable to identify any credible or realistic public need for the public dissemination of this personal data. Consequently, he considers that it is unfair to release these names (and email addresses) in these circumstances. Therefore disclosure would not be fair.
73. Bearing these points in mind, the Commissioner considers that in relation to the information showing the names and contact details of the individuals which have been redacted under regulation 12(3) and 13, given the reasonable expectations of these individuals, disclosure of this information would not be fair. Therefore this information should be withheld under regulations 12(3) and 13.
74. The full text of regulations 12 and 13 can be found in the legal annex at the end of this notice.

### **Procedural Requirements**

75. As noted above, regulation 5(1) states that a public authority that holds environmental information should make that information available on request (subject to issuing an appropriate refusal notice when it can rely on an exception).
76. During the course of the Commissioner's investigation the public authority disclosed some information that it had previously withheld under regulations 12(5)(d) and 12(5)(e). As this information was not



made available to the complainant on request the Commissioner finds that the public authority failed to meet the requirements of regulation 5(1).

77. Regulation 5(2) states that public authorities should make information available under regulation 5(1) within 20 working days. In this case the public authority failed to provide the information subsequently released in 20 working days. Therefore the Commissioner also finds that the public authority failed to meet the requirements of regulation 5(2).

78. Regulation 14(1) states:

*"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 shall comply with the following provisions of this regulation."*

79. Regulation 14(2) states:

*"The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request."*

80. Regulation 14(3) states:

*"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)."*

81. During the investigation of this case the public authority informed the Commissioner that it sought to rely upon regulation 12(3) and 13 to withhold the information in question. This exception had not previously been cited to the complainant.

82. In failing to inform the complainant of one of the exceptions it was seeking to rely upon, the public authority failed to meet the requirements of regulation 14(1) – as it had failed to comply with the provision laid out in regulation 14(3)(a) to inform the applicant of any exception relied upon.

83. The full text of regulations 5 and 14 can be found in the legal annex at the end of this notice.

## **The Decision**

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84. 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 in that:

- It correctly relied upon regulations 12(3) and 13 in order to withhold the outstanding information

85. However, the Commissioner has also decided that public authority did not deal with the request in accordance with the requirements of the EIR in that:

- It failed to meet the requirements of regulations 5(1), 5(2), 14(1) and 14(3)(a).

## **Steps Required**

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86. The Commissioner does not require any steps to be taken.

## Right of Appeal

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87. 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: 0300 1234504

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)

88. 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.

89. 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 21<sup>st</sup> day of July 2011**

**Signed .....**

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

## Legal Annex

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### Regulation 2 - Interpretation

(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);

"historical record" has the same meaning as in section 62(1) of the Act;

"public authority" has the meaning given in paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

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

"Scottish public authority" means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

"transferred public record" has the same meaning as in section 15(4) of the Act; and

"working day" has the same meaning as in section 10(6) of the Act.

(2) Subject to paragraph (3), "public authority" means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
  - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
  - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
  - (i) has public responsibilities relating to the environment;

- (ii) exercises functions of a public nature relating to the environment; or
  - (iii) provides public services relating to the environment.
- (3) Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.
- (4) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(b), namely –
  - (a) “data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
  - (b) “the data protection principles”;
  - (c) “data subject”; and
  - (d) “personal data”.
- (5) Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

### **Regulation 5 - Duty to make available environmental information on request**

- (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.
- (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.
- (3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.
- (4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.
- (5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so

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

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

### **Regulation 12 - Exceptions to the duty to disclose environmental information**

- (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.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (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.
- (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.
- (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.
- (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).
- (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.
- (8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.
- (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).

- (10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.
- (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 13 - Personal data**

- (1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.
- (2) The first condition is –
  - (a) in a case where the information falls within any 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 these Regulations would contravene –
    - (i) any of the data protection principles; or
    - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.
- (3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

- (4) In determining whether anything done before 24<sup>th</sup> October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –
  - (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
  - (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

#### **Regulation 14 - Refusal to disclose information**

- (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.
- (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.
- (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).
- (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.
- (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.