

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

### **Decision Notice**

**Date: 2 November 2009**

**Public Authority:** Department for Environment, Food and Rural Affairs (Defra)  
**Address:** 3 – 8 Whitehall Place  
London  
SW1A 2HH

### **Summary**

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The complainant requested information relating to a meeting that took place between Lord Hunt (Defra) and the Mayor of London. After a delay in providing a response the public authority refused to disclose the information citing regulation 12(4)(e) which states that internal communications within a public authority can be withheld. The decision was later upheld in the internal review. The Commissioner finds that regulation 12(4)(e) is not engaged and therefore requires the information to be released within 35 working days.

### **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 requested information concerns a meeting between the Mayor of London and Defra in which the complainant believes the air quality of London and the extension of the congestion charging zone were discussed. At present the European Commission is considering an application by the UK Government for an extension to the time limit to comply with legal standards on dangerous airborne particles.

## The Request

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3. On 22 January 2009 the complainant requested the following information from the public authority:

*“any minutes, papers, correspondence or other material relating to any meeting that takes place between Lord Hunt and Mayor Johnson.”*

4. On 01 April 2009 the public authority substantively responded to the request by refusing to disclose the information under regulation 12(4)(e) of the Environmental Information Regulations relating to internal communications within public authorities.
5. On 01 May 2009 the complainant requested an internal review of the public authority's decision.
6. On 15 September 2009 the public authority wrote to the complainant detailing the findings of the internal review and the decision to uphold the original refusal.

## The Investigation

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### Scope of the case

7. On 03 October 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the exceptions applied in the refusal.

### Chronology

8. On 14 October 2009 the Commissioner wrote to the complainant acknowledging the complaint and outlined the next steps in the process relating to the case.

## Analysis

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### Procedural Matters

9. Regulation 14(2) (full wording in legal annex) 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.*

The public authority is in breach of this regulation as the response to the request made on 22 January 2009 is dated 01 April 2009.

10. Regulation 11(4) (full wording in legal annex) states:

*A public authority shall notify the applicant of its decision as soon as possible and no later than 40 working days after the date of the receipt of the representations.*

The complainant requested an internal review on 01 May 2009 and received details of the outcome of the review in a letter dated 15 September 2009 some 96 days after the request was made.

## **Exceptions**

11. Regulation 12(4)(e) (full wording in legal annex) states:

*a public authority may refuse to disclose information to the extent that the request involves disclosure of internal communications.*

12. Regulation 12(8) further clarifies that:

*For the purposes of paragraph (4)(e), internal communications includes communications between government departments.*

13. These regulations formed the basis of the public authority's decision to withhold the information requested. The public authority considered the Mayor of London to be a government department and the information relating to the meeting was internal communication as it related to both public bodies' approach to air quality in London.

14. The public authority has interpreted regulation 12(4)(e) more widely than the Commissioner as covering all of government in the broad sense and therefore including communications between any two public authorities. However the Commissioner disagrees with this approach and does not therefore agree that the information relating to the meeting between Defra and the Mayor constitutes internal communications. Please see below for further explanations of the Commissioner's interpretations of internal communications.

### **What constitutes an 'internal' communication?**

15. *Communications within one public authority*

Communications within any single public authority will be internal for the purposes of regulation 12(4)(e).

16. *Communications between Government departments*

Regulation 12(8) provides that:

"For the purposes of paragraph (4)(e), internal communications include communications between government departments."

17. This regulation was considered by the Information Tribunal in the case of *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*. In that case, the appellant argued that the Directive which the EIRs implement did not intend interdepartmental (ie between government departments) communications to be protected by the internal communications exception. Both the ECGD and the Commissioner argued that “the definition within the Directive itself specifically addresses a case in which a public authority comprises a number of distinct government departments such as to be properly regarded as a ‘public authority’” (paragraph 46). The Tribunal agreed with this view and found that communications between government departments were protected by regulation 12(4)(e). The ICO has therefore adopted this line.
18. The rationale for this view is that the Directive should apply equally to all member states, some of which will have simple government structures, and some of which will be complex, like the UK. Those member states with complex structures of government should not be penalised by having to make their interdepartmental communications available, where a state with a single government body would be able to protect its communications by way of this regulation.
19. *Communications between Government departments and executive agencies*

Defra’s guidance states, at paragraph 7.4.5.4 that “executive agencies are part of their parent department”. The ICO adopted this approach in case FER0088372, where communications between Defra and one of its executive agencies were deemed to be ‘internal’ and therefore the exception applied to the requested information. This interpretation is supported by the MoJ’s guide to which authorities are covered by the Act, which explains at paragraph 3 that executive agencies are “part of their parent department for Freedom of Information purposes and therefore are not listed separately in Schedule 1”.
20. Applying the reasoning at paragraph (i) above, communications between an executive agency and a department other than its parent department, or between executive agencies, will also constitute internal communications and therefore shall fall within the scope of the exception.
21. *Communications between any other two public authorities*

Defra’s guidance at paragraph 7.4.5.5 states that the exception applies to “government administration in the broad sense” and that “the proper scope of the exception for ‘internal communications’ is communications internal to the whole area of the state covered by the definition of ‘public authority’ in Article 2(2)”.
22. The ICO disagrees with this approach, for the following reasons:
  - regulation 12(8) makes specific mention of communications between government departments being covered by this exception. This regulation would serve no purpose if any state communication was to be deemed internal for the purposes of regulation 12(4)(e); and

- it would extend the scope of regulation 12(4)(e) to cover any communication sent between public authorities and therefore potentially reduce the availability of information to the public.
23. Communications between two separate public authorities, for example between a central government department and a local authority, or between two local authorities, will not constitute internal communications for the purpose of regulation 12(4)(e).
  24. A similar approach was taken by the Scottish Information Commissioner in his Decision 052/2008 under the Environmental Information (Scotland) Regulations 2004 (paras 57 to 63).
  25. The above explanations and examples provide insight into the reasoning behind the Commissioner's decision in this case and arguments that the Mayor of London's office is not considered to be a government department. It is within this context that communications between Defra and the Mayor of London cannot be defined as being internal.

## **The Decision**

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26. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Environmental Information Regulations. The Commissioner considers the Mayor of London to be a separate public authority and not part of a government department therefore the information requested would not constitute internal communications and regulation 12(4)(e) and 12(8) would not apply.
27. The Commissioner also finds that the public authority is in breach of two further regulations 14(2) and 11(4) which stipulate the timescales in which a public authority should respond to information requests and requests for internal reviews.

## **Steps Required**

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28. The Commissioner requires the public authority to take the following steps to ensure compliance with the Environmental Information Regulations:

Provide the requested information in accordance with regulation 5(1) (see legal annex).

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

## **Failure to comply**

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30. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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31. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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

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

**Dated the 2<sup>nd</sup> day of November 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

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

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

### Regulation 11 - Representation and reconsideration

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

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

**Regulation 12(4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (e) the request involves the disclosure of internal communications.

**Regulation 12(8)** For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

### Regulation 14 - Refusal to disclose information

**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.