

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

Decision Notice

Date: 14 December 2009

Public Authority: The Office of Communications (Ofcom)
Address: Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Summary

The complainant requested a copy of *“the IPCC complaint referred to in [Ofcom’s] Broadcast Bulletin Issue 114 of 21 July 2008”*. The public authority initially refused the request under the exemption provided by section 44 of the Act, that disclosure of the information was prohibited under any other enactment. Ofcom cited the prohibition on disclosure provided by section 393(1) of the Communications Act 2003. At internal review, Ofcom advised the complainant that the information he requested was now refused under section 21 of the Act because it was available to him by another means. The Commissioner’s decision is that the information requested is available to the complainant as directed by Ofcom. However the requested information contains environmental information and Ofcom failed to consider the request under the Environmental Information Regulations. Some of the information was therefore not correctly refused by the public authority under section 21 of the Act and should have been refused under Regulation 6(1)(b). By its delayed responses, Ofcom breached Regulations 11(4) and 6(2)(a).

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The Commissioner’s Role

1. The Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (“FOI”, or, the “Act”). This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the “Commissioner”). In

effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

3. On 8 March 2007, Channel 4 broadcast a television programme, "The Great Global Warming Swindle". Ofcom received a number of complaints about this programme, including one, referred to as the 'Group Complaint'. That 'Group Complaint' is substantial, numbering 176 pages and details what it describes as contraventions of the Ofcom Broadcasting Code and the Communications Act by '*presenting misinformation and misleading the public*'. It lists 137 apparent breaches of the Broadcasting Code and 105 apparent breaches of the Communications Act.
4. Ofcom considers complaints under one of two criteria:
 - complaints that a programme breached the Broadcasting Code in general; and
 - complaints that allege breaches of section 7 (Fairness) or 8 (Privacy) of the Broadcasting Code. Complaints under sections 7 and 8 must be made (or authorised) by the person affected by the programme.
5. In its Broadcast Bulletin 114, issued 21 July 2008, Ofcom partly upheld a complaint of fairness about this programme, which it referred to as a "Complaint by the Intergovernmental Panel on Climate Change".
6. The complainant (in the case under consideration by the Commissioner) has argued that the Intergovernmental Panel on Climate Change (IPCC) has not brought, or authorised a complaint and therefore challenges the authenticity of this complaint and, by extension, the validity of Ofcom's decision to accept the complaint for adjudication in its Broadcast Bulletin 114.

The Request

7. On 23 July 2008 the complainant contacted Ofcom and made the following request:

"Please email me a copy of the IPCC complaint referred to in your Broadcast Bulletin Issue 114 of 21 July 2008.

I wish to be sure that your quotations from it are entirely correct. This arises from your statements on page 51 of the bulletin where you say: "If the lead author then wishes to make the change, he/she has to account for the decision to his/her review editor, who will make the final decision." and also "The IPCC stated that no change could be made to the Summary for Policy Makers without the agreement of the IPCC scientists."

The first statement entirely contradicts the internationally agreed Appendix A to the Principles Governing IPCC Work published at the IPCC website, and significantly misleads you and the public as to how the IPCC should operate.

The second statement is demonstrably false, if by "IPCC Scientists" Ofcom and the public is expected to believe this refers to the 'thousands of experts' usually cited as agreeing to the IPCC conclusions. Just 33 scientists had sole responsibility for writing the published version of SPM.

Please also indicate who at the IPCC sent the complaint.

Please also give me an approximate cost either in pounds or man hours of your investigation of the 'Swindle' complaints.

Should it be necessary for you to consider this under FOIA/EIR, please take into account that the IPCC considers environmental issues and the information I am requesting relates to the reliability of the of the organisation, as if your quotations are correct, they do not understand their mandate or actual procedures."

8. Ofcom replied on 20 August 2008, it refused to disclose the copy of the IPCC complaint on the grounds that the exemption provided by section 44 of the Act was applicable. In this case, Ofcom stated that the statutory bar to disclosure was provided by section 393(1) of the Communications Act 2003. It refused to disclose who at the IPCC made the complaint on the grounds of section 40 of the Act, relating to personal information and it stated that no information was held by Ofcom about the approximate cost, in pounds or man-hours, of its investigation.
9. The complainant requested that the public authority reconsider its response on 25 August 2008. He argued that:
 - Ofcom had not considered his request under the EIR;
 - Ofcom's refusal under section 44 of the Act was invalid, because the statutory bar at section 393(1) of the Communications Act 2003 was not applicable; and
 - Ofcom's interpretation of 'personal data' and therefore its refusal of the names of the IPCC personnel who sent the complaint, is wrong.
10. Ofcom wrote to the complainant on 16 December 2008 with the outcome of its internal review. It stated that the original refusal of his request had been made on the grounds of section 44 of the Act. Having considered this again, the conclusion of the review was that the requested information was already reasonably accessible to him from a website, www.ofcomswindlecomplaint.net , and therefore it was now refused under section 21 of the Act. Ofcom has confirmed to the Commissioner that it became aware of the website after receiving the complainant's request, but before giving its initial response. It nevertheless relied on the exemption provided by section 44 in the first instance, believing this to be more appropriate. The internal review recognised that a more

helpful approach would be to direct the complainant to somewhere where he could obtain the information he required.

11. That website also included the details of who made the complaint and therefore that aspect of his request was also refused under section 21 of the Act. Ofcom clarified that, in order for it to entertain a complaint on behalf of the IPCC as an organisation, it would require authorisation from appropriate individuals within the organisation.

The Investigation

Scope of the case

12. On 7 April 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 following points:
 - Ofcom provided no valid reason for refusal of his request; and
 - Ofcom repeatedly ignored his requests that the matter be considered under the EIR.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act or, Parts 2 and 3 of the EIR.
14. The complainant provided a supplementary document which sought to present his arguments in support of these points. Aspects of those arguments germane to this notice are summarised, below.
 - i. Inconsistencies between the IPCC's own governing principles and procedures, and elements in Ofcom's Bulletin 114 are suggestive of the fact that the complaint was not made by the IPCC in any official capacity.
 - ii. His request had been intended to establish whether the IPCC was deliberately or carelessly misleading the public as to the way it operates, or had been misquoted by Ofcom, or had Ofcom been misled into calling the 'Group Complaint' an official IPCC complaint.
 - iii. Climate change is self-evidently an environmental matter, consequently any information on climate change, certainly anything in connection with an IPCC assessment, constitutes environmental information. The complainant argues that Ofcom disputes this.
 - iv. If the IPCC made a complaint, then this is an administrative measure, designed to protect the elements of the environment, consequently it is environmental information by virtue of Regulation 2(c) of the EIR.

- v. The IPCC is a body, not a business, to which section 393(1) of the Communications Act is not applicable.
 - vi. Full disclosure of all relevant information about climate change is of the highest possible public interest, therefore any refusal of disclosure under an exception provided by EIR must only be made for the most overwhelming reasons.
 - vii. For similar reasons, disclosure the names of key individuals within the IPCC who made the complaint would not be unfair under the data protection principles.
 - viii. Ofcom initially refused his complaint under section 44 of the Act (disclosure prohibited by another enactment), which has no equivalent exception within EIR. Ofcom's refusal to consider EIR, and to make its response under the Act, was perverse.
 - ix. Section 393(1) of the Communications Act 2003 is, in this case, not applicable as the circumstances are not as described in that enactment.
 - x. Despite his explicit request that the response be reviewed under EIR, Ofcom persisted in conducting its internal review under the Act.
 - xi. In its internal review, Ofcom made no reliance on its refusal under section 44, instead refusing the request under section 21 of the Act (information available by another means) and directed the complainant to a website where the 'group complaint' had been published. This was not the complaint requested by the complainant, and Ofcom were aware of this fact.
 - xii. In subsequent correspondence with Ofcom, the public authority explained to him that it would consider a 'fairness and privacy' complaint from the 'person affected' and, in the case of a fairness and privacy complaint from an organisation, the 'person affected' need not be the most senior individual but could be anybody who it considers appropriate to provide such authority in all the circumstances. For Ofcom not to consider the constitution of the organisation appears, to the complainant, to be an unreliable approach.
 - xiii. In summary:
 - Ofcom incorrectly applied section 44 of the Act in circumstances in which the statutory bar invoked by it was inapplicable;
 - Ofcom stated the information was readily available, but was referring to an entirely different complaint; and
 - Ofcom has failed to consider the applicability of EIR.
15. The complainant did not query one aspect of Ofcom's response, that it did not hold information relating to the cost of the investigation, in his 25 August 2008

request for a review. His complaint to the Commissioner made reference to that aspect of his request, but similarly did not ask for this to be investigated.

16. The matters at items i, ii and xii of the complainant's arguments at paragraph 14 above are not something which the Commissioner has any remit to consider under the powers provided to him by section 50 of the Act and, while they may inform the complainant's reasons for his request and thereby assist the Commissioner in attempting to obtain an outcome consistent with those reasons, the Act itself is blind to the motives of a requester. The points being made by the complainant are more properly a matter for the public authority and the Commissioner will not consider them further.
17. Section 50 (2)(a) of the Act requires a complainant to have exhausted the public authority's own internal complaints process before the Commissioner will entertain a complaint. From this it follows that the Commissioner will, except in unusual circumstances, investigate the public authority's response at the point where it has completed any internal review. This is in accordance with the position of the Information Tribunal in *Mcintyre* (EA/2007/0068)¹ at paragraph 38:

"[...] the Act encourages or rather requires that an internal review must be requested before the Commissioner investigates a complaint under s.50. Parliament clearly intended that a public authority should have the opportunity to review its refusal notice and if it got it wrong to be able to correct that decision before a complaint is made [...]".

18. Ofcom did not rely on the exemptions provided by section 40 or section 44 of the Act at internal review but rather on the exemption provided by section 21 of the Act, that the information is available to the complainant by another means. The Commissioner will therefore not consider points v, vii and ix in the complainant's arguments further, nor the first bullet-point at item xiii of the complainant's arguments.
19. The Commissioner has not considered that aspect of the complainant's request which relates to the cost of Ofcom's investigation because this has not been reviewed by the public authority and, therefore, Ofcom has not had the opportunity to reconsider and, if necessary, rectify that matter by itself. As noted at paragraph 15, above, the complaint did not ask for that matter to be investigated by the Commissioner.

Chronology

20. On 19 August 2009, the Commissioner contacted the public authority to discuss the way it deals with complaints about television programmes. Ofcom explained that, in the case of a complaint about fairness or privacy from an organisation, confirmation or authorisation for the complaint would be sought from somebody sufficiently senior within that organisation. The Commissioner requested copies of that correspondence and it was received on 29 September 2009.

¹ http://www.informationtribunal.gov.uk/Documents/decisions/McIntyreDecision04_11_02_08.pdf

21. On 11 September 2009 the Commissioner wrote to the complainant. He explained that the focus of his investigation would be whether the requested information was reasonably available to him via the web link provided. The Commissioner also explained that as the complainant had not raised the matter of the costs of the investigation, this would not be investigated further.
22. The complainant replied, indicating that he did not consider the matter of the costs of the investigation closed, and that he required the Commissioner to consider the applicability of the EIR to his request and, consequently, Ofcom's failure to do so.
23. On 14 September 2009, the Commissioner also requested a copy of the 'IPCC complaint' from Ofcom, partly in order to assess whether the document could be considered to be environmental information. Following some difficulties with communications, this document was received on 22 October 2009.

Findings of fact

24. The document provided by Ofcom, described as the 'Complaint by the Intergovernmental Panel on Climate Change' is entitled '*Complaint to Ofcom Regarding "The Great Global Warming Swindle"*' and is identical to the document of the same title published online at the web address www.ofcomswindlecomplaint.net

Analysis

Procedural Requirements

The disclosure regime: EIR or FOI?

25. The complainant maintains that the request should have been considered under the EIR. His principal reasons for this position appear to be his observation that the EIR do not contain an equivalent exception to the exemptions provided by section 44 (statutory bar to disclosure) or section 21 (information available by another means) of the Act and that under the EIR, Ofcom would therefore be obliged to disclose the withheld information, unless it could sustain an argument that the public interest in withholding the information outweighed the public interest in disclosure. The complainant does not believe that, in the circumstances, such a public interest test would favour withholding information.
26. The Commissioner has already indicated that the refusal on the grounds of section 44 of the Act is not under consideration.
27. The third bullet point in the summary at point xiii of the complainant's arguments, that Ofcom wrongly refused to consider his request under EIR, is developed at points iii, iv, vi, viii and x of his arguments and considered, below.

28. In order for the EIR to be applicable, the requested information must be classed as environmental information. Environmental information is defined at regulation 2(1) of the EIR as *'any information in written, visual, aural, electronic or any other material form on-'* various categories which are then described in subsections 2(1)(a) to 2(1)(f). The Commissioner has issued guidance to public authorities to assist them with the classification of environmental information².
29. In essence, environmental information will be classed as such if it is information which is **'on'** any of the various categories defined at regulation 2(1)(a) to 2(1)(f). A wider interpretation also considers the use of the term **'any information [...]** *on-* ' in the same sentence.
30. In this case, the requested information is a document, written to a regulator, which makes a complaint about a television programme. To the extent that it is 'on' anything, the complaint is 'on' the television programme at issue.
31. If it contains information 'on' any of the categories listed at EIR 2(2), it is because it quotes the information provided in the programme and takes issue with it. The television programme, 'The Great Global Warming Swindle' may itself be considered environmental information because, for example, it is 'on' the state of the elements of the environment, such as air and atmosphere [...], as defined at EIR 2(2)(a), and possibly by various other definitions within EIR 2(2).
32. The complainant argues that the 'IPCC complaint' is itself a *"measure [...] designed to protect those elements"* [in regulation 2(1)(a) and (b)] and therefore constitutes environmental information under regulation 2(1)(c). To describe a complaint, about something which is considered environmental information to be, almost by default, environmental information itself, appears to the Commissioner to be making a consequent link between subject and object, a link which the interpretation of the word 'on' may not be sufficiently strong to support.
33. The complainant offers no evidence to support an argument that the 'IPCC complaint' was a measure 'designed' by the IPCC for the purposes he infers. An examination of the complaint itself suggests that it may otherwise be interpreted as a measure designed to protect the professional reputations of the scientists who were misrepresented. Indeed one stated purpose, and the reason for Ofcom's actions in seeking corroboration of the complaint, is in order to permit it to entertain a 'fairness and privacy' complaint on behalf of affected individuals. This is considered further at paragraph 51, below.
34. However, an examination of the specific 'IPCC complaint' submitted to Ofcom would support the interpretation that it does, itself, contain environmental information. That is because, in taking issue with various arguments made during the television programme, the complaint seeks to rebut those arguments and provides evidence in support of its rebuttals. That evidence constitutes environmental information in the terms described by regulation 2 of the EIR. For example, a comment on page 7 of the complaint states:

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http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/introductory/eirwhatisenvironmentalinformation.pdf

“The programme made numerous factual misrepresentations regarding the “carbon cycle”, in order to support its thesis that human CO₂ emissions are “not important. [sic] For example, the programme claims that volcanoes annually produce more CO₂ emissions than humans. This statement is completely incorrect; their emissions are approximately 1% that of humans”

35. This is, itself, information ‘on’

“(a) the state of the elements of the atmosphere, such as air and atmosphere [...]” and

“(b) factors, such as [...] emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)”

Consequently, the Commissioner has concluded that, while a complaint about something which is environmental information may not, in itself, necessarily **be** environmental information, in the circumstances elements of this complaint do meet the necessary criteria to be classed as environmental information under regulation 2(1) and these elements should therefore have been considered by Ofcom under the EIR.

36. The complainant requested the public authority reconsider its response on 25 August 2008 and Ofcom’s response was issued on 16 December 2008, a total of 80 working days. In his submission requesting the review, the complainant requested that Ofcom reconsider the request under the EIR and set out why he considered this to be the relevant access regime. Ofcom’s response did not demonstrate that this had been considered in conducting its review and the limited content of the review in general does not appear to justify the unwarranted delay in its conduct and communication to the complainant.

Disclosure under EIR

Exceptions

37. The complainant argues that the EIR do not contain an exception which would be considered analogous to the exemption provided by section 21 of the Act and therefore, if considered under EIR, the information should not have been withheld by Ofcom.

38. The second bullet-point in the summary at point xiii of the complainant’s arguments, that Ofcom has wrongly refused his request under section 21 of the Act because the information it has referred him to is not that which he has requested, is developed at point xi of his arguments and considered, below.

39. The Commissioner has compared the copy of the complaint document received by Ofcom with that published on the website referenced by Ofcom on 16 December 2008. The contents of the documents are identical and each page of the online copy bears the same title and revision date as the copy received by

the public authority. When downloaded and printed-out, the Commissioner noticed two very minor pagination discrepancies in which text had flowed onto the top of the next page rather than sitting at the foot of the current page. The Commissioner considers these may be attributed to the way the documents have been dealt with by the different printers in use, rather than being indicative of differences in the document itself. In both cases, the content and text is identical.

40. The Commissioner is therefore satisfied that the requested information “[...] a copy of the IPCC complaint referred to in your Broadcast Bulletin Issue 114 of 21 July 2008” is already publicly available and easily accessible to the complainant, and that Ofcom provided the complainant with a link from which the information could be obtained.
41. The nearest equivalent to section 21 of the Act within the EIR would be regulation 6, which provides that a public authority shall make information available in a particular form or format, unless *“the information is already publicly available and easily accessible to the applicant in another form or format”*. Regulation 6 only applies in circumstances where information is requested in a particular form or format. If a request is made for information, without specifying a particular form or format, then regulation 6 would not apply.
42. In this case, the complainant requested *“Please email me a copy of the IPCC complaint [...]”* and therefore his requested form or format is ‘an (emailed) copy’ of the information. The EIR were introduced in response to the European Directive 2003/4/EC on public access to environmental information, which states, at Article 3(4):
- “4. Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless:*
- (a) it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants”*
43. It is therefore clear that the Directive intends that the provision of copies be included in the consideration of ‘form or format’. By referring the complainant to a location where the information is located in a different form, ie as a downloadable document, the Commissioner considers that under regulation 6(1)(b) the public authority has no duty to make the information available under regulation 5.
44. In reaching this conclusion, the Commissioner has also considered whether, if the requested information were available to download from Ofcom’s own website, the public authority would nevertheless be obliged under the Regulations to email a copy to the requester. Regulation 5(1) requires a public authority to ‘make available’ environmental information on request. Having published the information, a public authority would therefore have already ‘made available’ the information and a response which directed the requester to the information published would appear to the Commissioner to be all that would be required of a public authority in those circumstances.

45. With reference to paragraph 41, above, the Commissioner also considered whether, if the complainant had not specified a form or format in his request, the public authority would then have been obliged to send him a copy of the information. He has concluded that, even if the complainant had not specified a form or format, the public authority would have no such obligation as directing the complainant to the website where the information was available would be sufficient to comply with regulation 5(1).
46. The Commissioner observes that, by locating an online copy of the information and directing the complainant to it, Ofcom may be considered to have made the information available to the complainant in terms not dissimilar to those envisaged by paragraph 42-44, above, and the Commissioner would not wish to argue that the public authority should have gone further. To insist that a public authority should nevertheless make efforts under the EIR to email a copy of a publicly available document, would have the effect of requiring public authorities to duplicate work which has already been undertaken elsewhere and the Commissioner would not, in general, consider this to be in the public interest.
47. Ofcom does not, however, appear to have explained its procedures sufficiently clearly, so the complainant did not understand that this was indeed the complaint referred to in Ofcom's Broadcast Bulletin 114. He continued to argue for the disclosure of the 'IPCC complaint' in correspondence with Ofcom for several months subsequent to the internal review outcome of December 2008. Most of his arguments centred on either the internal operating procedures of the IPCC, or the requirement to consider his request under EIR. From an examination of this correspondence, it does not appear to have occurred to either party to clarify the nature of the complaint published online.
48. The complaint document itself is lengthy, 176 pages with appendices, references and notes. It bears the names of the lead authors and other contributing authors and peer-reviewers and provides further background on each in two appendices. The Commissioner is therefore satisfied that the document itself contains copious information relating to the individuals who prepared and submitted the complaint including, where applicable, their roles within the IPCC. Consequently, the Commissioner considers that the public authority's response to the complainant's request for "*Please also indicate who at the IPCC sent the complaint*", that this information is easily accessible to him, is also correct.
49. This has been explained by the Commissioner to the complainant, who subsequently argued that, in order to consider the complaint Ofcom has, by its own admission, sought confirmation from various individuals within the IPCC and that, without this confirmation, Ofcom would not have accepted the complaint. By this logic, the complainant argues that any letters or statements from IPCC personnel which support the complaint themselves constitute an integral part of the complaint and should be disclosed.
50. The Commissioner does not accept this argument. Attempts by a regulator to verify or corroborate information provided to it do not, themselves, constitute the information itself. Nor should Ofcom's actions, taken in compliance with its own

policies, be considered to somehow modify the complaint to the extent that they become part of that complaint.

51. Furthermore, the complainant has gone to considerable trouble to advance his reasons for requiring a copy of the complaint, both in his original request for information, and in subsequent correspondence with both Ofcom and the Commissioner. He states, for example, in his original request that *"I wish to be sure that your quotations from it are entirely correct"*. As Ofcom's quotations are derived from the complaint itself, not from any letters of corroboration, this purpose may be achieved without sight of those letters.

Disclosure under FOI

Exemptions

52. The public authority refused the request on the grounds of section 21 of the Act. The Act applies to the information only in respect of those elements of the requested information which do **not** constitute environmental information. The Commissioner agrees that, for the reasons expressed at paragraph 24, and paragraphs 37-40 above, the refusal of those elements under the exemption provided by section 21 of the Act was correctly given.

Conclusion

53. Regardless of all the arguments, above, the Commissioner is satisfied that the complainant has been enabled, by Ofcom, to obtain a copy of the requested information and can therefore use it to achieve his stated purpose. While the Act and the EIR themselves are blind to the motives of a requester, the Commissioner is grateful to the complainant for explaining his reasons, thereby assisting the Commissioner in achieving an outcome consistent with the underlying purpose of the Act and the Regulations.

The Decision

54. The Commissioner's decision is that the public authority dealt with the following aspects of the request for information in accordance with the Act and the Regulations.
- The refusal of those elements of the information which are not environmental information was not in breach of section 1(1)(b) of the Act as section 21 was correctly applied to the information.
 - The refusal of those elements of the information which are environmental information was not in breach of Regulation 5(1) as Regulation 6(1)(b) is applicable to the information.

55. The Commissioner's decision is that the public authority did not deal with the following aspects of the request for information in accordance with the Regulations.

- By its failure to explain the reason for its decision, Ofcom has breached Regulation 6(2)(a) of the Environmental Information Regulations.
- By its failure to reconsider or review its response within 40 working days, Ofcom has breached Regulation 11(4) of the Environmental Information Regulations.

Steps Required

56. The Commissioner requires no steps to be taken.

Other matters

57. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

58. The complainant did not query Ofcom's statement, that it does not hold information on the costs of the IPCC complaint investigation, with the public authority at internal review. Therefore, as Ofcom has not had the opportunity to review or reconsider its response, it would not be appropriate to record the matter within the formal decision. The Commissioner has nevertheless, at the complainant's request, clarified the public authority's position in this regard.

59. Ofcom has explained that it does not calculate time and resource on a case-level basis, but at team-level. As a caseworker has several cases in his caseload, and complex cases may be worked on by more than one caseworker, Ofcom has no means by which it can isolate the time and resource allocated to an individual complaint.

Right of Appeal

60. 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.
Website: www.informationtribunal.gov.uk

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

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

Dated the 14th day of December 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Legal Annex

S.1 General right of access

Section 1(1) provides that -

'Any person making a request for information to a public authority is entitled –

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

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

Section 1(2) provides that -

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

Section 2(2) provides that –

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

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

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

Section 2(3) provides that –

'For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

(a) section 21

S.21 Information Accessible by other Means

Section 21(1) provides that –

'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.'

ENVIRONMENTAL INFORMATION REGULATIONS 2004 (EIR)

R.2 Interpretation

Regulation 2(1) provides that –

'In these Regulations –...

... "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

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

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

R.5 Duty to make available environmental information on request

Regulation 5(1) provides that –

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

Regulation 5(2) provides that –

'Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.'

Regulation 5(3) provides that –

'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.'

Regulation 5(6) provides that –

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

R.6 Form and format of information

Regulation 6(1) provides that –

'Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless -

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.'

Regulation 6(2) provides that –

'If the information is not made available in the form or format requested, the public authority shall –

(a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;

(b) provide the explanation in writing if the applicant so requests; and (c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18.'

R.11 Representations and reconsideration

Regulation 11(1) provides that –

'Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.'

Regulation 11(2) provides that –

'Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.'

Regulation 11(3) provides that –

'The public authority shall on receipt of the representations and free of charge –

*(a) consider them and any supporting evidence produced by the applicant;
and*

(b) decide if it has complied with the requirement.'

Regulation 11(4) provides that –

'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 date of receipt of the representations.'

Regulation 11(5) provides that –

'Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of -

(a) the failure to comply;

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken.'

R.12 Exceptions to the duty to disclose environmental information

Regulation 12(1) provides that –

'Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

an exception to disclosure applies under paragraphs (4) or (5); 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) provides that –

'A public authority shall apply a presumption in favour of disclosure.'

Regulation 12(3) provides 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.'

Regulation 12(5)(d) provides that –

'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –...

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law...'

Regulation 12(11) provides that –

'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.'

R.14 Refusal to disclose information

Regulation 14(1) provides that –

'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) provides that –

'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) provides that –

'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) provides that –

'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) provides that –

'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.'