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Public access to environmental information

Experience gained in the application of Directive 2003/4/EC

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THE EXPERIENCE GAINED IN THE APPLICATION OF DIRECTIVE 2003/4/EC CONCERNING ON PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION

1. General description

Summarize the implementation of the Directive in particular at national and regional level.

The Directive was transposed into UK law on 21 December 2004 as The Environmental Information Regulations 2004. The Regulations came into effect on 1 January 2005 and cover England, Wales and Northern Ireland. The Environmental Information (Scotland) Regulations 2004 were made on 30 November 2004 and came into effect on 1 January 2005. National legislation, which deals with access to non-environmental information, the Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002, also came into force on 1 January 2005. The Report on the Scottish Regulations can be found in a separate document.

2. Experience gained

Describe which have been, according to your experience, positive and negative impacts of the application of the Directive so far (for instance, increased involvement of civil society/stakeholders in specific environmental matters, facilitating the decision-making-process and implementation of the consequent decisions, administrative burden ...).

The simultaneous implementation of the domestic Freedom of Information Act 2000 (FOIA), which provides a right of access to information other than environmental information, and of Directive 2003/4/EC through the Environmental Information Regulations 2004 has served both to heighten awareness of the legal rights enjoyed by citizens with regard to access to information generally and to create the necessary administrative and enforcement framework within which these access to information regimes can operate effectively. In this way:

- the provisions on access to justice in Article 6 of the Directive are met through the enforcement mechanisms established under FOIA, which creates an independent regulator, the Information

Commissioner, and a system of administrative justice in the Information Tribunal and allows for the further interpretation of the Directive within this jurisdiction through developing case law (see 7.2 below).

- the publication scheme required by FOIA has served as a vehicle for the proactive dissemination of environmental information as required by Article 7 (see 8.1).
- it has also allowed for the volume of requests for environmental information to be measured at the level of central government.

In particular, the legislation has placed an obligation on a public authority to determine whether or not a request is for environmental information and, therefore, whether it falls to be considered under the Directive or not. As a result there have been some significant disclosures of information at national and local level during the last four years. For example, at the central government level it led to disclosure of information on CAP payments in 2005 followed by more detailed disclosures in 2008. This is over and above European Union requirements (Council Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) and Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of that Regulation).

It is not yet possible to demonstrate conclusively any causal link between disclosures under the Directive and increased participation and decision making. Academic research on this subject in the United Kingdom is at an early stage and focuses predominantly on the impact of FOIA. Moreover, both central and local government have well-established processes for evidence-based policy making. In particular, there is a well-defined consultation process regulated by a Code of Practice which takes place as part of any major policy development. The criteria in this code apply to all UK national public consultations conducted on the basis of a document in electronic or printed form. The Code states that, although they have no legal force, they are generally regarded as binding on UK departments and their agencies, unless Ministers conclude that exceptional circumstances require a departure or other statutory or other mandatory external requirements prevail. Their main purpose is to improve decision-making by ensuring that decisions

are soundly based on evidence and they take account of the views and experience of those affected by them.

In addition it has become increasingly the case that stakeholders with a major interest in a policy, including business interests, trade and industry organisations, the voluntary sector and other non-governmental organisations provide continuous input into the policy process through stakeholder and advisory consultation groups.

Nonetheless, access rights under the Directive have served to add to and enhance this existing participative and consultative decision-making approach. In particular there have been a number of requests for information about, for example, government departments' achievements against targets for green procurement, energy conservation and water usage. Similarly, there have been a large number of requests to local authorities about their waste management contracts and recycling levels. Of particular note are requests from small, often local, action groups, which make requests for information on matters of environmental significance in their areas in support of their campaigns against what they consider to be activities or initiatives which may have a detrimental environmental impact. This can cause difficulties where public authorities hold third party information. It is possible that the third parties may refuse to continue supplying information to public authorities if information that they consider should be withheld is released by public authorities.

In addition there is some evidence that the presence of the legislation is promoting greater openness through proactive publication of information. For example, Defra's Waste Infrastructure Delivery Programme (supporting local authorities to accelerate investment in the large-scale infrastructure required to treat residual waste) encourages participating public authorities to make public as much of their documentation as possible as part of a robust stakeholder consultation process, in line with the Directive.

The press and other media are also big users of the access to information legislation. Journalists make requests in order to gain information for newspaper articles or television programmes, which can often be about environmental subjects. Recent examples have included requests about the Government's announcements over the expansion of Heathrow Airport in London and about the outbreaks of Foot and Mouth Disease in the UK in the last few years. This in turn makes the public more aware of the information that is released by public authorities.

Responding to requests has inevitably created an administrative burden. A report on cost drivers of freedom of information requests commissioned by central government in 2006 estimated that dealing with an average request for information cost £254.¹ The total cost on central government of operating freedom of information was estimated to be £24.4 million per year. This includes overhead costs, the cost of processing internal reviews and appeals to the ICO and the Information Tribunal, and the annual cost of FOI work of both the ICO and the Tribunal. On the assumption that the costs for FOI and requests under the Directive are the same, and on the basis of the proportion of total requests in 2006 which were considered to be for environmental information as defined in the Directive, the total cost of operating the Directive in 2006 can be estimated to have been almost £0.5 million. In addition, as cases have started to come to be appealed to the Information Commissioner and the Information Tribunal, costs have begun to accrue here, in particular when significant cases are appealed to the Information Tribunal. For example, the Environment Agency, a non-departmental public body with a central role in delivering the environmental priorities of central government, spent in excess of £100,000 on one appeal.

3. Definitions (Article 2) – Regulation 2 (1) and 2(2)

3.1 Have you encountered any particular difficulties relating to the interpretation and management of the definition of '*environmental information*'?

There have been difficulties in establishing where the actual boundaries of environmental information as defined by the Directive should be drawn. Part of the difficulty in deciding whether the information is environmental lies in defining precisely what is meant by 'any information [...] on' in Article 2 (1) of the Directive. The tendency has been to interpret the term broadly. The Information Commissioner has increasingly developed its position on interpreting the definition. This is not always disputed by public authorities when they receive a decision notice, but there are occasions when the definition of what should be considered to be environmental information has to be adjudicated by the Information Tribunal.

¹ Frontier Economics Independent Review of the impact of the Freedom of Information Act, October 2006

In *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd*, the Information Tribunal concluded that the definition of environmental information in Article 2(1) 'was not intended to set out a scientific test' and its words should be given their 'plain and natural meaning'. This implies that public authorities should simply determine whether the information is 'information on' one of the matters provided for under Article 2(1).

(<http://www.informationtribunal.gov.uk/DBFiles/Decision/i104/Ofcom.pdf>)

Annex 1 sets out a list of Information Tribunal cases which have gone on to conclude whether information is environmental information as defined. In addition, both the Information Commissioner's Office and Defra have produced guidance in order to assist with the interpretation on the definition of environmental information. In his guidance the Information Commissioner has stated that it means any information about, concerning or relating to, the environment.

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

Defra has produced Guidance on the boundaries between environmental and other information which seeks to apply this non-scientific and pragmatic test to whether information is environmental information or not.

(<http://www.defra.gov.uk/corporate/opengov/eir/pdf/boundaries.pdf>)

Local authorities tend to worry about whether the information is classed as environmental or not only if they are considering a refusal. In a number of cases it is not always clear, so they refuse under both FOIA and the EIRs. Of particular difficulty are cases where the information which may fall within the scope of the request is mixed environmental and non-environmental information and therefore partly subject to both regimes. The leading case is the *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth*, where the Information Tribunal introduced the concept of predominant purpose. In this situation, where a document comprises largely environmental information but also some non-environmental information, the Tribunal concluded that it may be possible to find that the whole document is subject to the EIRs.

(http://www.informationtribunal.gov.uk/DBFiles/Decision/i181/DBERRvIC_FOEFinaldecision_web0408.pdf)

The Tribunal is also being asked to consider those situations where it is not possible to determine whether the information is environmental or not without locating it first. If a request is likely to (i.e. on the balance of probabilities) contain *some* material information which is environmental information, then it should be treated under the EIRs in particular for consideration of whether locating and extracting the information would be considered manifestly unreasonable.

3.2 According to your national/regional situation, give examples of the types of bodies that have been found to be covered by the provisions of Article 2, paragraph 2, letter b, ‘any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment..’ and letter c, ‘any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)’?

Defra has produced detailed guidance on who is covered by the Directive. Practically all public authorities subject to the Freedom of Information Act are also public authorities under the Directive. The guidance goes on to suggest ways in which bodies can determine whether they are covered by Articles 2 (2) (b) and (c), but ultimately it would be for the Information Commissioner, the Information Tribunal and the courts to adjudicate.

<http://www.defra.gov.uk/corporate/opengov/eir/guidance/full-guidance/pdf/guidance-2.pdf>

The Information Commissioner and the Information Tribunal have found that different types of bodies are public authorities under the Directive including:

- (i) port authorities falling under Article 2 (2) (b) of the Directive
- (ii) private companies contracted to undertake services of an environmental nature on behalf of a public authority under Article 2 (2) (c) of the Directive; and
- (iii) housing associations in Northern Ireland which are considered to fall under both Article 2 (2) (b) and (c).

Bodies which have been found not to be subject to the Directive include power generating companies and Network Rail, which owns and runs

Britain's rail infrastructure. This is because the provision and regulation of such services is a matter for which the state takes responsibility but those who deliver the service are not themselves performing a function of public administration, nor are they under the control of such a body. In the case of Network Rail, for example, much of the information relating to their projects and operations is available under the EIRs or FOIA through the Office of Rail Regulation (ORR), which is a public authority for the purposes of these regimes. This would also hold true for power generating companies which are regulated by the Office of the Gas and Electricity Markets (Ofgem).

Where appropriate, formulate suggestions on how the meaning of 'public authority' may be further clarified.

It would be helpful to have clear definitions of what is meant by the terms 'control' and 'public administrative function' in order to define in a more legally certain manner which bodies fall under the scope of the Directive.

3.3 Do you have any other observations relating to the practical application of Article 2?

No

4. Access to environmental information (Article 3) – Regulations 5, 6, 7

4.1 What are the practical arrangements as referred to in Article 3(5) c), set up by, in particular, national and regional authorities? Please provide examples of these practical arrangements.

The coming into force of FOIA and the transposition of the Directive in 2004, saw a large exercise by central government to ensure officials were fully aware of their obligations under the legislation. The former Department for Constitutional Affairs (DCA), (now the Ministry of Justice), which was leading implementation of FOIA, organised a series of roadshows – training events – around the country during 2002-2003. These events included a speaker on environmental information provided by Defra.

- DCA produced a short guide on managing training for FOIA and the EIRs

- DCA produced a model action plan for implementation of FOIA which although prepared for FOIA was also used for the EIRs. This was developed for central government use and produced in conjunction with the ICO and the National Audit Office (NAO). The National Archives (TNA) also developed guidance for records management compliant with Section 46 Code of Practice.

Three panels were set up to assist with implementation:

- Advisory group of representatives from different sectors of government (e.g. local authorities) and other key stakeholders – tasked with advising on best practice and encouraging greater openness
- Advisory group of Whitehall senior civil servants – to ensure FOIA was taken seriously and facilitate cultural change to greater openness
- Practitioner group for central government – to support users of FOIA and the EIRs

Ministers also spread the message with speeches ahead of implementation and strategic roadshows. Following implementation there have been sessions on the EIRs at FOI Live, which is an annual conference organised by the Ministry of Justice and the Constitution Unit, University College London. Defra has produced a communications strategy which covers training already undertaken, publicity materials produced and future plans on outreach.

The Introduction to the Section 45 Code of Practice of the Freedom of Information Act states that public authorities should have sufficient staff familiar with the provisions of the Act and that larger authorities should have a central core of staff with particular expertise. In the case of both larger and smaller authorities it is usually the same staff that also have responsibility for the Directive. There are, however, a few local authorities where requests for environmental information are handled by environmental health officers.

Detailed guidance on the use of the exceptions has been in place since implementation. It is in the course of being revised to take account of experience gained and any case law that has developed.

Part I of the statutory Code of Practice introduced alongside the legislation transposing the Directive deals specifically with the training of staff. It states:

'I TRAINING

1. All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided.

2. Requests for environmental information may come in the form of verbal requests which has specific implications for training provision.

3. In planning and delivering training, authorities should be aware of other provisions affecting the disclosure of information such as the FOIA, the Data Protection Act 1998, and anti-discrimination legislation (such as the Disability Discrimination Act)'.

Northumbria University runs a distance learning course, Information Rights Law and Practice (in conjunction with the Ministry of Justice). It is a postgraduate course with three levels of qualification, Postgraduate Certificate, Postgraduate Diploma or a full Master of Laws (LLM). Access to environmental information is one of the core modules of the course.

Defra has undertaken two surveys of local authorities, the first one in 2006 followed up by another in 2008. All local authorities in England, Wales and Northern Ireland were targeted. The response rate varied from 29% in 2006 to 23% in 2008. The results have shown that a number of local authorities have invested in staff training. This is to ensure that their employees are aware of the authority's obligations and the public's rights. Some have produced leaflets for their staff and others have produced guidance manuals.

Establishment of facilities for inspection: in our experience there has been little demand for inspecting information *in situ* and most requests

require public authorities to supply information in electronic or hard copy format. Where the nature of the information lends itself to or the requester demands to examine information on site, case by case arrangements are made for access to the facilities available. However, environmental information held in archives offices where inspection is the primary means of access do provide for such inspection facilities. The material consulted includes historical records of various kinds, including archives of the local authority. An example is rights of way research which is generally based on EIR access.

Many local authorities publish information about the EIRs on their website and some make leaflets available.

Public authorities must hold statutory registers and make them available for inspection on site. The Environment Agency has made some of its registers available online:

- Agricultural Waste Exemptions
- Agricultural Waste Exemptions for Local Authorities in England and Wales
- Agricultural Waste Exemptions for Natural England
- Hazardous Waste
- Waste Carriers
- Waste Brokers
- Water Quality and Pollution Control
- Environmental Permits (previously Integrated Pollution Prevention and Control (IPPC))
- Environmental Permits (previously Integrated Pollution Control (IPC))
- Radioactive Substances Information
- Environmental Permits (Waste Management Licensing)

It still holds some registers in hard copy, and area offices provide facilities for inspection. Given its particular circumstances and in contrast to the experience described by other public authorities, the Environment Agency answers a proportion of its requests by providing access for inspection.

Local authority practice varies, with some making registers available on site and others through the Internet. Examples are given below:

- Register of publicly adopted highways
- Hazardous substances consents register
- Public rights of way register
- Register of common land and town and village greens
- Records relating to hedgerows
- Contaminated land

4.2 In which way has it been ensured that the public has adequate information of the rights they enjoy, as referred to in Article 3 (5) last paragraph?

As well as the steps described above to ensure that the public is aware of its rights of access, both the Department for Environment, Food and Rural Affairs (Defra) and the Information Commissioner have published guidance:

Defra publishes guidance on the EIRs on its own website:

<http://www.defra.gov.uk/corporate/opengov/eir/index.htm>

The site is split into two main sections: one for members of the public and the other for practitioners.

Directgov is the UK government's website for citizens, providing a single point of access to public sector information and services. It contains information on the public's rights under the Directive at: 'Environment and Greener Living' and 'Government, and Citizens and Rights'

http://www.direct.gov.uk/en/Environmentandgreenerliving/Greenerworkschoolandcommunity/Environmentalqualityinyourarea/DG_064404

http://www.direct.gov.uk/en/Governmentcitizensandrights/Yourrightsandresponsibilities/DG_4003239

The Information Commissioner publishes guidance for members of the public:

http://www.ico.gov.uk/Home/what_we_cover/environmental_information_regulation.aspx

He has also issued press releases where he considers that an EIR decision is of sufficient merit to warrant this.

Both Defra and the Information Commissioner have a helpline where members of the public can ask for advice and assistance on making a request and other aspects of the Directive.

Defra publishes how it handles requests for information on its website: <http://www.defra.gov.uk/corporate/opengov/defra/staff-guidance/index.htm>

Other public authorities such as the Environment Agency release their guidance on costs and FOI procedures on request.

4.3 Do you have any other observations relating to the practical application of Article 3?

Scope

As the implementation guide to the Aarhus Convention notes, 'Implementation of the Convention would be improved if Parties clarified which entities are covered by this subparagraph. This could be done through categories or lists made available to the public'. The vast majority of public bodies subject to the Directive are also subject to FOIA. Categories of body such as government departments and local authorities as well as individually named bodies are listed in Schedule 1 as subject to the Act. This list is amended from time to time to reflect changes in the organisation of government functions.

It is the case that the definition of public bodies for the purpose of Articles 2 (2) (b) and (c) can be dynamic and liable to change. Public authorities may change contracts or other control arrangements for third party provision of environmental services; such third parties may become or cease to be public authorities for EIR purposes depending on whether they meet the 'control' test set out in the definition. This means that bodies may move out of or into the scope of these Regulations. At times the Information Commissioner and Information Tribunal have been required to decide on who is a public authority (see Question 3.2).

Timing

Under the Directive, the only circumstance where the period for responding to a request for information may be extended is if the volume and complexity of the information are such that it is not possible to comply within one month, whereas in FOIA it is possible to extend the time for compliance to consider the public interests involved. Consideration of the public interest is complex and may involve consulting third parties outside the public authority and taking their views into account. This may lead to delays in responses as public authorities

cannot ensure that third parties reply within the deadline or even that they are available during that period.

The Directive could benefit from clarity around whether such deliberation and consultation about the public interest qualifies for consideration under the provisions in Article 3 (2) (b).

Information Accessible by Other Means

FOIA contains an absolute exemption for information that is accessible by other means. This can cause confusion for both applicants and public authorities as there is not a comparable exception in the EIRs. Article 3 only refers to form and format.

5. Exceptions (Article 4) – Regulation 12

5.1 Amongst the possible exceptions listed in Article 4, which ones have been retained in the implementation of Directive, to refuse access to environmental information?

All the exceptions have been retained.

5.2 Have the Member States or regions issued any guidance (such as circulars or guidelines) governing the granting of exceptions?

Extensive guidance for both public authorities and members of the public has been issued at:

<http://www.defra.gov.uk/corporate/opengov/eir/guidance/index.htm>

http://www.defra.gov.uk/corporate/opengov/eir/pdf/publicity/presentation_slides.pdf

<http://www.defra.gov.uk/corporate/opengov/eir/pdf/publicity/leaflet-publicauthorities.pdf>

The Information Commissioner has also published guidance:

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

Many public authorities have listed the exceptions on their websites. A number of these describe them and have added brief guidance.

5.3 Have any steps been taken to ensure the accessibility of a list of criteria, as mentioned under Article 4(3), on the basis of which the authority concerned may decide how to handle requests?

Extensive guidance has been issued on what the Directive requires public authorities to do, how to handle such requests and how to handle complaints, reconsideration and appeals. This is publicly available at :

<http://www.defra.gov.uk/corporate/opengov/eir/pdf/cop-eir.pdf>

<http://www.defra.gov.uk/corporate/opengov/eir/guidance/full-guidance/pdf/guidance-4.pdf>

<http://www.defra.gov.uk/corporate/opengov/eir/guidance/full-guidance/pdf/guidance-6.pdf>

<http://www.defra.gov.uk/corporate/opengov/eir/guidance/full-guidance/pdf/guidance-8.pdf>

The Information Commissioner has also issued procedural guidance:

http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/practical_application/charging_for_environmental_information_v1.pdf

http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/practical_application/eir_time_for_compliance_faqs.pdf

http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/practical_application/eiradviceandassistance.pdf

5.4 Do you have any other observations relating to the practical application of Article 4?

There is no objective measure in deciding what is manifestly unreasonable (Article 4 (1) (b)). It can be and has been used in different circumstances:

(i). Section 12 of FOIA does not oblige a public authority to comply with a request if the authority estimates that the cost of complying with the request would exceed a limit of £600 for central government or £450 for other public authorities, based on a rate of £25 per hour to cover the cost of determining whether it holds the information requested, and then location, retrieval and, if necessary, extraction of that information. There is no equivalent to this cost limit in the EIRs but the 'manifestly unreasonable' exception can be used in circumstances where supplying the information would be an unreasonable diversion from a public authority's day to day work. Regulation 9 on providing advice and assistance applies only where the request is formulated in too general a manner. Even when advice and assistance has been offered to the

applicant it is possible that a request may still be too broad and locating the information would still impose an unreasonable burden on a public authority. Further clarification on the application of these two exceptions would be helpful.

(ii). Section 14 of FOIA does not oblige a public authority to comply with vexatious or repeated requests. Again, although there are no equivalent provisions in the EIRs, the 'manifestly unreasonable' exception has been used in these circumstances.

Both the Ministry of Justice and the Information Commissioner's Office have published guidance on vexatious and repeated requests:

<http://www.justice.gov.uk/guidance/foi-procedural-vexatious.htm>

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/vexatious_requests_a_short_guide.pdf

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_22_vexatious_and_repeated_requests_final.pdf

The Information Commissioner's guidance also refers to the 'manifestly unreasonable' exception. Two cases were decided by the Information Tribunal, Carpenter (EA/2008/0046 between Stephen Carpenter, ICO & Stevenage Borough Council 17 November 2008) and Mersey Tunnel Users Association (EA/2009/0001 Mersey Tunnel Users Association and ICO and Halton BC 24 June 2009) In the former case the Tribunal decided the request was manifestly unreasonable in terms of frequency, repetition, tone of the communications and the requests, that information had been previously provided and the allegations of illegality against the local authority. The test in the latter case was whether responding to the request would be likely to entail substantial and disproportionate financial and administrative burdens on the Council. The Tribunal's judgment on a further case relating to central government is awaited.

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i271/Carpenter%20v%20IC%20\(EA-2008-0046\)%20Decision%2017-11-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i271/Carpenter%20v%20IC%20(EA-2008-0046)%20Decision%2017-11-08.pdf)

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i319/MTUA%20v%20IC%20&%20HBC%20\(0001\)%20Decision%2023-06-09%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i319/MTUA%20v%20IC%20&%20HBC%20(0001)%20Decision%2023-06-09%20(w).pdf)

Article 2 (1) (b) defines as environmental information, among other things, factors affecting or likely to affect the environment. This list of factors includes the term 'emissions'. Article 4 (2) provides for an override for the exceptions in paragraph 2(a), (d), (f), (g) and (h), where the request relates to information on emissions into the environment. Neither the Directive nor the Aarhus Convention defines what is meant by emissions. However, the Aarhus Implementation Guide uses the definition from the IPPC Directive. Using this definition, it is possible to conclude that the Regulations deal with industrial pollutant emissions and not naturally occurring gases. In particular, it would be helpful to clarify whether the term 'emissions' in Article 4 (2) should be taken to refer to the term 'emissions' in Article 2 (1) (b).

Article 4 (1) (a) deals with information requested that is not held by or for the public authority to which the request is addressed. As with the other exceptions, the grounds for refusal should be interpreted in a restrictive way, taking into account the public interest served by disclosure. It is difficult to see the public interest in disclosure if the information is not held or does not even exist.

6. Charges (Article 5) – Regulation 8

6.1 According to Article 5 (2) public authorities may make a charge for supplying environmental information. Have public authorities fixed charges? Please give examples of what measures public authorities have implemented on charging.

The statutory Code of Practice states that:

'28. The EIR does not require charges to be made but public authorities have discretion to make a reasonable charge for environmental information. However, if they are providing access to a public register, or if the applicant examines the information at the offices of the public authority or in a drop in library or other place which the public authority makes available for that examination, access to the information shall be free of charge. When making a charge, whether for information that is proactively disseminated or provided on request, the charge must not exceed the cost of producing the information unless that public

authority is one entitled to levy a market-based charge for the information, such as a trading fund’.

The leading case on what constitutes a reasonable charge is *Markinson v the Information Commissioner* [EA/2005/0014]:

http://www.informationtribunal.gov.uk/Documents/decisions/david_markinson_v_info.pdf

As a general rule, government departments do not charge for supplying information. The practice varies across the remainder of the public sector. Some authorities charge only if excessive resource will be required to identify, locate and retrieve information, while others provide information free of charge if it is in electronic format.

There is an issue around charging for information that is inspected *in situ*. It is unclear both in the Directive and the Regulations whether ‘information requested’ relates back to public registers or lists or any information that has been requested. If it relates to the latter there is a cost involved in retrieving and preparing information for inspection which should be taken into account in the same way as for information supplied. This is an issue for some public authorities, if they are to continue to collect and provide information to the public and others in a way which is financially viable and sustainable.

6.2 Please explain how it has been ensured that the applicants are aware of a schedule of charges and circumstances in which a charge may be levied or waived.

The Code of Practice states that:

‘29. Where a public authority proposes to make a charge, a schedule of charges should be made available (including, e.g. a price list for publications, or the charge per unit of work which will be incurred to meet a request).’

6.3 Do you have any other observations relating to the practical application of Article 5?

None

Access to justice (Article 6) – Regulations 11, 16 and 18

7.1 What kind of review procedure is provided for an applicant in cases mentioned in Article 6(1)?, Please specify the appointed authority or independent body?

Regulation 11 of the EIRs provides for an applicant to request an internal review in writing within 40 working days. The public authority must:

- consider any supporting evidence produced by the applicant
- decide whether the original request had been dealt with according to the Regulations
- notify the applicant of the outcome as soon as possible and no later than 40 working days after the date of receipt of the request for an internal review.

7.2. What kind of procedure is provided for an applicant in cases mentioned in Article 6(2)? Please specify three institutions entitled to review.

If they are dissatisfied with the outcome of an internal review, members of the public have a further right of appeal to the Information Commissioner.

The Information Commissioner will review the facts of the case and issue a Decision Notice which may either uphold the decision of the public authority or order the public authority to supply all or part of the information requested. This is undertaken on paper and applicants do not require legal representation. All decision notices are legally enforceable by the Commissioner, as are information notices and enforcement notices. Failure to comply would lead to an action for contempt of court. The Information Commissioner also has the power to issue practice recommendations where a public authority has breached the legislation.

The Information Commissioner's decision can be appealed further to the Information Tribunal, which will consider the case afresh.

Applications to both the Information Commissioner and the Information Tribunal are free of charge.

7.3 Is the decision issued by the institution referred to in question 7.2 final? If not, please specify what kind of procedures could follow this one to get a final decision?

The Decisions of the Information Tribunal can be appealed to the High Court on a point of law.

7.4 Do you have any other observations relating to the practical application of Article 6?

The Information Commissioner treats all complaints on merit and they are handled free of charge. There have, however, been an unexpectedly high number of cases going before him. Although a formal appeal route exists, the Commissioner has successfully managed to settle just under 50% of complaints informally. This informal resolution is quicker, can avoid costs for both the public authority and the Information Commissioner, avoids a long process of going through the courts and, importantly, satisfies both parties involved.

8. Dissemination of environmental information (Article 7) – Regulation 4

8.1 Which measures have been taken to ensure that public authorities organise the environmental information, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunications and/or electronic technology?

The statutory Code of Practice Part II outlines the steps that a public authority should follow:

‘II PROACTIVE DISSEMINATION OF INFORMATION

4. Under Regulation 4, a public authority has a duty to progressively make information available to the public by electronic means which are easily accessible, and to take reasonable steps to organize information relevant to its functions with a view to active and systematic dissemination.

5. Consideration should be given to making web sites accessible to all and simple to use, so that information can be readily found, for example by enabling search functions and having an

alphabetical directory as well as tree structures. Information should not be 'buried' on a site.

6. Public authorities should consider how to publicise applicants' rights to information, for example as part of general information on services provided by the authority.

7. When public authorities are considering what information to disseminate proactively, they should not restrict themselves to the minimum requirements as listed in the Directive. For example, consideration should be given to disseminating frequently requested information, which will reduce individual requests for such information in the future. It is the experience of the Department for Transport that formal documentation (e.g. reports) can be and are often intended for publication. However, requests for the often large amounts of related information such as emails and other transient information are common but proactive publication creates difficulties in terms of volume, practicality, cost and occasionally sensitivity of that allied information with regard to timing.'

<http://www.defra.gov.uk/corporate/opengov/eir/pdf/cop-eir.pdf>

and detailed guidance on proactive dissemination has also been issued:

<http://www.defra.gov.uk/corporate/opengov/eir/guidance/full-guidance/pdf/guidance-5.pdf>

However, the definition of environmental information is a broad one as observed at Paragraph 3.1 above. Certain classes or types of information may be considered to be environmental information where it is information concerning or relating to one of the matters in Article 2 (1) (a)-(f) of the Directive. In this way, for example, legal advice on a factor affecting or likely to affect the environment (Article 2 (2) (1) (b)) or on an environmental agreement (Article 2 (2) (1) (c)) may itself be considered to be environmental information, whereas legal advice on any other matter may not. For this reason it is not always practicable or desirable to identify environmental information as a class for specific dissemination.

Instead, dissemination of information, usually by electronic means and published on websites, forms part of the wider Government objective to publish information proactively.

In particular, under FOIA each public authority is obliged to publish information proactively in accordance with their publication scheme. Guidance has been issued on how this publication scheme should be used to disseminate environmental information:

<http://www.defra.gov.uk/corporate/opengov/eir/pdf/article7report.pdf>

The last annual report on Transformational Government from July 2007 had this to say:

'Finding government information and accessing services on the web should be a simple process. In the last year the Government has moved forward with plans to rationalise the main public-facing sites to just four. A strategy is also being developed to make it easier to search for government information online.'

Historical records may contain environmental information but may never be digitised. Ideally catalogues and indices would make it clear where a collection contained environmental information.

The Re-use of Public Sector Information Regulations 2005 require public authorities to identify information assets that are available for re-use. Information asset lists are usually available on-line, and for central government a central information asset list is also available – see inforoute at:

<http://www.opsi.gov.uk/iar/index>

8.2 What are the measures taken to ensure that information is updated, as appropriate?

Under Section 19 of FOIA every public authority has a duty to review its publication scheme from time to time. This would include any environmental information published in the scheme. Regulation 5 (4) of the EIRs requires that, where information is made available by a public authority, it shall be up to date, accurate and comparable, so far as the public authority reasonably believes. Historical records are by definition non-current and the information that they contain is likely to be out of date. That does not undermine their value and can indeed add to it, for example, the records on climate change would clearly show changes in the climate over time.

8.3 Is there an obligation to report on the state of the environment, next to the national, also at regional and local levels and if so, according to which timetable?

Article 7 (3) of the Directive obliges Member States to take the necessary measures to ensure that national and, where appropriate, regional or local reports on the state of the environment are published at regular intervals not exceeding four years; such reports shall include information on the quality of, and pressures on, the environment.

These provisions of the Directive are not implemented through the EIRs but through other legislation. For example, under Section 5(2) of the Environment Act 1995 the Environment Agency has a statutory duty to compile information to enable it to form an opinion on the general state of pollution of the environment.

The Environment Agency publishes state of the environment reports:
<http://www.environmentagency.gov.uk/research/library/publications/34019.aspx>

Natural England, an independent public body whose purpose is to protect and improve England's natural environment, has published a State of the Natural Environment Report 2008:

<http://www.naturalengland.org.uk/soner/>

The Committee on Climate Change will be producing annual reports to Parliament on our progress on emissions reductions:

<http://www.theccc.org.uk/reports/progress-reports>

Regional publications have included the Mayor of London's State of the Environment Report for London, also available through OPSI, published in 2003 and 2007:

<http://www.london.gov.uk/mayor/environment/soereport.jsp>

8.4 What mechanisms are used to publicize these reports?

These reports are published on the authorities' websites.

8.5 Do you have any other observations relating to the practical application of Article 7?

Making information proactively available can be resource-intensive and may be limited by constraints on webspace. In seeking to progressively disseminate information it is important therefore to focus on information which will add to public debate and enhance decision making. In particular it should reflect frequently requested information as an indicator of public demand. This is not always practicable when the material concerned is original archival material which may be hand-written and difficult to decipher.

9. Quality of environmental information (Article 8) – Regulation 5 (4) and (5)

9.1. What are the measures taken to ensure that any information that is compiled by public authorities or on their behalf is up to date, accurate and comparable?

It is the responsibility of each public authority to ensure the accuracy of the information that it publishes or is responsible for. Regulation 5 (4) of the EIRs requires that, where information is made available by a public authority, it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

9.2. To ensure that information is comprehensible, accurate and comparable, the method used in compiling the information is important. Have you received any request about the method used? Please give any other information you consider useful.

An informal and random survey conducted among government departments, local authorities, fire services, health authorities and higher education has not revealed that any of these public authorities has received a request about the methods used.

9.3 Do you have any other observations relating to the practical application of Article 8?

None.

10. Statistics

Where statistical data has been collected on the items below, it would be useful to forward this data to the Commission.

- **Number of requests made.**
- **Areas to which the requests for information relate.**
- **Percentage of requests handled within the one-month period and those within the extended term.**
- **Percentage of requests accepted/refused; in the case of refusal, please give a breakdown by exemption cited in support of the refusal.**
- **Number of procedures introduced according to Article 6.1 and 6.2 of the Directive; average duration and average cost of the procedures; percentage failures and successes at the end of the procedures.**

The Ministry of Justice, which is responsible for FOIA, publishes quarterly statistics on requests handled by central government. These statistics distinguish between requests under the EIRs and FOIA. They can be found at:

<http://www.justice.gov.uk/publications/freedomofinformationquarterly.htm>

Other public authorities collect statistics of the numbers of requests received but do not distinguish between the two regimes. The Constitution Unit, University College London, has undertaken three surveys of local government and FOIA. These surveys do not distinguish between FOIA and the EIRs:

<http://www.ucl.ac.uk/constitution-unit/foidp/local.htm>

The Information Commissioner does not distinguish between complaints handled under the EIRs and FOIA in his annual reports. The most recent statistical information can be found at:

http://www.ico.gov.uk/about_us/what_we_do/corporate_information/annual_reports.aspx

However, all EIR decisions are available on the ICO website and are indexed by the regulation concerned. An informal discussion has revealed that there have been 696 EIR cases recorded as received and of those 122 have resulted in a decision notice.

The Information Tribunal lists cases on its website by the lead regime. They can be found at:

<http://www.informationtribunal.gov.uk/Decisions/eir.htm>

The Tribunal has so far considered 35 cases relating to the Directive.

The Tribunal's Management Office has estimated that an average case with a one day hearing costs the Tribunal £2,888. This figure does not take account of the costs to the parties, which can be significant.

ANNEX 1

INFORMATION TRIBUNAL DECISIONS ON THE DEFINITION OF ENVIRONMENTAL INFORMATION

CASE REFERENCE	FINDING OF THE INFORMATION TRIBUNAL
<p>Malcolm Kirkaldie v IC Additional Party Thanet District Council EA/2006/0001</p>	<p>Thanet District Council sought legal advice as to the enforceability of a s.106 Agreement under the Town & Country Planning Act 1990, land use and other planning matters relating to the way Kent International Airport operated. The Tribunal found such information came within the definition of environmental information under Regulation 2 EIR as it was the sort of measure which “is likely to affect the elements and factors” set out in the definition such as “air, atmosphere and noise” as well as measures or activities designed to protect these elements such as a night flying policy. Therefore the Tribunal found that s.39 FOIA applied and the case should be dealt with under EIR.</p>
<p>Benjamin Archer v IC Additional Party Salisbury District Council EA/2006/0037</p>	<p>The Tribunal held that the information comes under the EIR. Following Kirkaldie, this makes it exempt information under the FOIA and it must be dealt with under the EIR. The Council was in breach of the procedural requirements of the EIR, in particular Regulation 14(3) (requirement to specify the reasons for refusal including the EIR exceptions relied on).</p>
<p>The Office of Communications v IC Additional Party T-Mobile (UK) Limited EA/2006/0078</p>	<p>The Tribunal decided that the definition could be said to cover “factors, such as ...energy, ..., radiation ... emissions ... affecting or likely to affect ... the state of the elements of the environment, such as air and atmosphere”. Those words, when given their plain and natural meaning, included the radio wave emissions generated by a base station. The Appellant argued that, even if the broader body of information in the database fell within EIR, the identity of</p>

	<p>the individual operators, by reference in each case to its ownership of a base station, did not. However, the Tribunal decided that it would create unacceptable artificiality to interpret the language of the definition as referring to the nature and effect of radiation, but not to its producer. It concluded that the name of a person or organisation responsible for an installation that emits electromagnetic waves fell comfortably within the meaning of the words "any information... on...radiation" for the purposes of the definition.</p>
<p>Mr Robin Philip Burgess v IC Additional Party Stafford Borough Council EA/2006/0091</p>	<p>The parties have agreed that the EIR contain the appropriate regime to consider whether or not the Council is obliged to provide this information to Mr Burgess. For completeness, the Tribunal views the subject matter of this Appeal as coming within the definition of environmental information in Regulation 2(1)(a) and (c), namely <i>“(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;”</i> and <i>“(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 to try and protect those elements;”</i> The Barrister’s Report concerns the landscape and it will affect the Council’s policy towards the issues it addresses.</p>
<p>Peter Graham Robinson v IC Additional Party East Riding of Yorkshire Council EA/2007/0012</p>	<p>The Tribunal found that the information in question on planning issues clearly comes within the scope of regulation 2(1) (c), and therefore, the request should have been dealt with under the EIR. However, the provisions of FOIA and the EIR relevant to the issues in this case</p>

	<p>are, in substance, the same under both legislation. The fact the Commissioner considered the Appellant's application under FOIA rather than the EIR makes no difference to the substantive outcome of his decision, nor of this appeal.</p>
<p>Mark Watts v IC EA/2007/0022</p>	<p>It seemed to the Tribunal that reports about the premises used for processing food for human consumption do relate to the state of human health as it may be affected by at least one of the factors listed in subparagraph (b) operating through at least one of the elements listed in sub paragraph (a). We also observe that sub clause (f) has the effect of including in the definition conditions of the built environment (which would clearly include the premises that were investigated) and that those premises might be affected by any waste or discharges (i.e. factors falling within sub paragraph (b)) present on the premises and operating through air, atmosphere or water (elements of the environment included in sub paragraph (a)). The Tribunal therefore concluded that the information requested, being information contained in reports about premises where food processing was undertaken and from which contamination of the food chain may have emanated, falls within the definition of "environmental information" and that this Appeal should accordingly be determined under the information regime established under EIR.</p>
<p>Department for Business, Enterprise and Regulatory Reform v IC Additional Party Friends of the Earth and CBI EA/2007/0072</p>	<p>The Tribunal needed to decide under which jurisdiction this case fell. They held that documents or parts of documents which dealt with energy policy and climate control were covered by EIR. It was further decided that where a document contains predominantly environmental information, it is possible to find that the whole document is subject to the EIR. However, where there are a number of purposes, none of which are dominant, a review of the whole</p>

	<p>document must take place. Therefore, in this case the IC was correct to take the approach of reviewing the documents in detail. Where the Tribunal found that EIR applied, DBERR was able to transfer FOIA claimed exemptions to closely related exceptions under EIR.</p>
<p>North Western and North Wales Sea Fisheries Committee v IC EA/2007/0133</p>	<p>The applicant had requested i) copies of the licences to the four lay-holders; ii) copies of the returns showing imports and exports from each of the six fishery areas for the last ten years. It was the judgement of the Tribunal that the requested information falls within the definition of environmental information.</p>
<p>Mersey Tunnels Users Association v IC Additional Party Halton Borough Council EA/2009/0001</p>	<p>The Tribunal decided that there is no dispute that the Mersey Gateway Project will have a significant impact on the state of elements of the environment, such as, at least, the land and the landscape, and on factors such as emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to, such that information relating to it would fall squarely within the definition of environmental information under Regulation 2(1) of the EIR. The question was whether information on “tolling” of the Mersey Gateway Project would also fall within that definition. It satisfied itself that tolling is an integral part to the Project and its viability and concluded that the information requested falls within the definition of environmental information set out in Regulation 2(1) (c) of the EIR.</p>