

To: **Aarhus Compliance Committee**
Case: United Kingdom ACCC/C/2010/53
Date: 25 June 2012

Dear Committee Members

At the hearing in Geneva in December 2012, the Curator asked with respect to the first pillar of the Aarhus Convention – access to information – why the accepted practice of releasing raw data to residents on a monthly basis had been changed.

The party representing The City of Edinburgh Council, James Maurici, responded by saying that the reason was that “releasing this raw data was proving not to be helpful or useful.”

Following a Freedom of Information request to The City of Edinburgh Council we attach documents that show that the judgement reported by Mr Maurici was made in terms of what was ‘helpful or useful’ to the City of Edinburgh Council, rather than to the residents. Residents wanted to know what was happening to air pollution in residential streets following mass displacement of traffic from commercial thoroughfares claimed to be necessary for the proposed ‘Edinburgh Tram’ (Light Rail System) to meet its business case. Note that the Council’s own analysis from 2003 had indicated that Tram-displaced traffic would affect air quality for the majority of Edinburgh’s residents and hence there was justified public interest in finding out how air quality was changing.

Document 1: Denying access to Information might not be justified, but can be delayed with no risk.

eMail: 27 April 2011
TO: Andrew Mackie
FROM: Legal & Administrative Services

This document responds to Dr Andrew Mackie’s judgement (explained in Dr Mackie’s report in Document 2) that there is a benefit to The City of Edinburgh Council from preventing release of monthly raw pollution data. Dr Mackie is given advice on how he might justify a refusal and how the risk of an appeal to the Scottish Information Commissioner can be effectively ignored, whilst still delaying release of the data. Given the key date of the meeting mentioned in Document 3 of the 30 June 2011 this communication shows how a delay of only 2 months was needed to make sure that data on Environmental Impacts was not considered at the point the decision to proceed or not with the Edinburgh Tram was going to be taken – i.e. at the point where traffic displacement would become permanent.

“..it is difficult to predict how the Information Commissioner would decide if the decision to refuse the information were to be challenged.”

“Rather than arguing that it is incomplete data, (as this would be stretching the definition of ‘incomplete’ slightly), I would say that it is ‘material which is in the course of completion’.”

“If an applicant were to challenge the refusal to supply the information, then it would go through the Review process. The first step of this process is an internal review by one of our solicitors, [name redacted] so [redacted] would be able to reconsider the decision at that stage anyway, and

if [redacted] felt that our justification was wrong the information could be released at that stage without referral to the Information Commissioner.”

Document 2: Access to Information will “cause significant problems for the Council”

Document shows that extensive consultation has taken place regarding ways to prevent release of raw data due to concerns that residents are likely to be able to show that air pollution now exceeds statutory limits due to Tram-displaced traffic.

eMail: 9 June 2011

TO: Susan Mooney, Head of Service, Services for Communities, The City of Edinburgh Council.
FROM: Andrew Mackie, Scientific Services Manager, The City of Edinburgh Council.

In this eMail Dr Mackie notes:

“The basis for not releasing the raw monthly data is presented in the draft letter to the RA [Residents Association] .. I have consulted Legal Services, who have responded with less than definitive advice .. A further weakness in our position is that we provided raw data at the end of last year.”

“The RA [Residents Association] require the data urgently as they are aware that a decision on the tram project is imminent and in my view want to influence the decision against the tram project proceeding by issuing and publicising apparently unsatisfactory air quality data. “

“If the Council provides the monthly raw data, even with provisos on how it should/should not be used, the RA will use the data to cause significant problems for the Council.”

“The RA will calculate the NO₂ levels using the national bias factors to convert the diffusion tube value into the ‘true’ value. This is permissible, except that the national bias factor increases the NO₂ value derived from the tubes ... and may tip the values above the 40mg/m³ limit.”

“The RA will apply a diffusion factor to the calculation of NO₂ levels at the building façade which is larger than the factor we would apply ... use of the larger diffusion factor may tip the values above the 40 mg/m³ limit.”

“.. the combined effect is more likely to tip the value over the air quality maximum.”

“I would like to discuss the way forward ..”

Document 3: Commitment to Openness, but not to “Raw Data”

Document shows that senior council officials are keen to prevent release of raw data to residents before a key meeting on the future of the Tram project.

eMail: 18 June 2011

TO: Sue Bruce, Chief Executive, The City of Edinburgh Council
FROM: Mark Turley, Director of Services to Communities, The City of Edinburgh Council.

“Without being validated there is a likelihood that the raw data will give a falsely negative view of the air quality.”

“My understanding is that when you met with the Moray Feu residents you gave a commitment to openness but not a specific commitment re. raw data.”

“I believe we should respond back to the residents ASAP and ensure the Council's position on this is clear in advance of the Council Meeting on 30th June.”

When the Chairman of the Compliance Committee asked Mr Maurici to give more information about the refusal, as part of his reply he noted that the raw data had previously been supplied when a Traffic Regulation Order that might affect the residents was being promoted by the City of Edinburgh Council, implying that this was evidence of relevant information being made available only when it might be useful.

The Aarhus Compliance Committee should be aware that The City of Edinburgh Council are currently promoting a Traffic Regulation Order that places a weight restriction on one of the two routes through the centre of Edinburgh that remain after the Tram Traffic Regulation Order that is the subject of this complaint.

This will have the direct result of turning the residential streets for which raw air quality data is still being refused (Randolph Crescent – Great Stuart Street), into the only unrestricted route 24x7x365 for heavy vehicles and general traffic, including coaches, through the centre of Edinburgh [www.edinburgh.gov.uk/download/downloads/id/7555/tro1223_draft_order].

The City of Edinburgh has not released any traffic modelling or environmental impact analysis of this ‘HGV Ban’ despite public claims that there will be no impact on Great Stuart Street and Randolph Crescent. They also continue to dispute any responsibility for measuring noise impacts of the traffic that they have chosen to displace.

This additional displacement of HGVs is despite Council acknowledgment that Great Stuart Street already has ‘Edinburgh's most dangerous unassisted crossing’ [www.edinburgh.gov.uk/download/meetings/id/35664/item_10-pedestrian_crossing_prioritisation-new_priority_list]

In short, the procedures have not improved, the engagement cannot be described as meaningful, and the outcomes are now worse in prospect than when we raised our original complaint.

I trust that you will look at this latest evidence carefully and hope that you are able to help improve matters.

Yours sincerely,



Ashley Lloyd

Chair,

Traffic and Environment Subcommittee - Moray Feu Residents Association

Andrew Mackie

From: [REDACTED]
Sent: 27 February 2012 11:58
To: Andrew Mackie
Cc: [REDACTED]
Subject: FW: Release of incomplete environmental monitoring data

From: [REDACTED]
Sent: 13 February 2012 14:50
To: Andrew Mackie
Subject: FW: Release of incomplete environmental monitoring data

From: [REDACTED]
Sent: 27 April 2011 16:19
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Release of incomplete environmental monitoring data

Dear [REDACTED]

I have been passed your query below by [REDACTED] and have considered the situation. I would say there is definitely an argument for the application of the exception in these circumstances, although being a unique case it is difficult to predict how the Information Commissioner would decide if the decision to refuse the information were to be challenged.

Rather than arguing that it is incomplete data, (as this would be stretching the definition of 'incomplete' slightly), I would say that it is 'material which is in the course of completion'. The definition of this for the purposes of the Commissioner's Guidance is material which will have 'more work done on it in a reasonable time frame'. If the Commissioner were to accept that the reasonable timeframe could be as long as 11 months, then it could be argued that the materials which contain the data fall into this category. The 'work' being done would be the 'corrections' that you refer to in your email.

Essentially, the decision whether or not to release the information is yours, as long as you justify it. If you want to give me a phone when drafting a refusal letter then please feel free. If an applicant were to challenge the refusal to supply the information, then it would go through the Review process. The first step of this process is an internal review by one of our solicitors, [REDACTED] so [REDACTED] would be able to reconsider the decision at that stage anyway, and if [REDACTED] felt that our justification was wrong the information could be released at that stage without referral to the Information Commissioner.

If you have any further questions please give me a call.

I hope this helps,

[REDACTED]

[REDACTED] | The City of Edinburgh Council | Corporate Services | Legal & Administrative Services | Waverley Court Business

16/03/2012

From: Andrew Mackie
Sent: 09 June 2011 22:39
To: Susan Mooney
Subject: Moray Feu Residents - Release of Raw NO2 Data

Importance: High

Follow Up Flag: Follow up
Flag Status: Green

Susan

Since Tuesday I have received two requests from members of the Moray Feu Residents Association, as well as the request at the meeting, for provision of the raw NO2 monitoring data for 2011. Data for the individual months of January- April is currently available. The RA require the data urgently as they are aware that a decision on the tram project is imminent and in my view want to influence the decision against the tram project proceeding by issuing and publicising apparently unsatisfactory air quality data. I am certain that if the Council refuses to provide the raw data the RA will take up the matter with the Information Commissioner.

The basis for not releasing the raw monthly data is presented in the draft letter to the RA, which I copied to you. Under Environmental Information Regulations, it is permissible not to release data where work is 'in progress', and it is on this basis that the Council could refuse to provide the raw data. I have consulted Legal Services, who have responded with less than definitive advice (I copied the email to you with the draft letter). A further weakness in our position is that we provided raw data at the end of last year.

If the Council provides the monthly raw data, even with provisos on how it should/ should not be used, the RA will use the data to cause significant problems for the Council. I consider that the following will happen,

- 1 The RA will ignore all provisos and limitations on the meaning and use of the data and proceed to use the data in an inappropriate and misleading manner (they did this with the raw data supplied previously).
- 2 The RA will calculate NO2 levels on a monthly basis, whereas the values should be used only to determine the annual average value. It is not appropriate to determine monthly values owing to the inherent variability in results from individual tubes.
- 3 The RA will calculate the NO2 levels using the national bias factor to convert the diffusion tube value into the 'true' value. This is permissible, except that the national bias factor increases the NO2 value derived from the tubes, whereas we use a locally derived bias factor, which reduces the NO2 value derived from the tubes. Although use of either bias factor is allowed, I consider that the locally-derived bias factor is scientifically more valid as it is derived from local co-located data for tubes all analysed by one laboratory, thus minimising the effects of analytical and systematic errors. The national bias factor is derived from averaging of co-location studies throughout the UK with different labs being used and co-location in a variety of environments. Using the national bias factor will produce higher NO2 levels than I consider represents the true level of NO2 in the Street, and may tip the values above the 40mg/m3 limit.
- 4 The RA will apply a diffusion factor to the calculation of NO2 levels at the building facade which is larger than the factor we would apply. The diffusion factor is related to the distance from the diffusion tube location to the pollution source (in this case vehicles in the road). The RA have argued that the pollution source is in the middle of the road, whereas we have taken the source to be the outside edge of the kerbside parking bays. This difference has been the subject of debate and the RA's view has been rejected by DEFRA and [REDACTED] who have endorsed our approach. Use of the larger diffusion factor may tip the values above the 40mg/m3 limit.
- 5 The net effect of using the national bias factor and the larger diffusion factor is that the calculated levels of NO2 at the building facade will be greater than the value which CEC would calculate, and the combined effect is more likely to tip the value over the air quality maximum.
- 6 The RA will carry out this calculation on the raw value from each month and present this as a trend or to demonstrate a constant elevated NO2 level. Due to the inherent variability of individual diffusion tubes, it is possible that a high level of NO2 may be obtained for a particular month. (This occurred at the end of last year). Single high values may be anomalous outliers and would normally be discounted from the annual dataset, or if included, the effect would be minimised by the other data values. However, if the data is presented as monthly values, an anomalous high result would be shown and a misleading interpretation put on the result (as was done with the high

result from last years data)

7 Diffusion tube monitoring is only intended to establish the annual mean value of NO₂ at the location. Similarly, the 40mg/m³ air quality standard is an annual mean value. The standard is not breached if NO₂ levels exceed 40 mg/m³, only if the yearly average exceeds this value. However, the RA are likely to present the standard as an absolute maximum applicable at all times

8 The Council will not be able to present alternative data calculations as this would involve also misusing the monthly data. We would not be able to provide alternative, true values until April/May 2012.

I would like to discuss the way forward early next week so that a decision can be made on the Residents Association request. As the validated 2010 data is now available and in view of other statements made by the RA at the meeting, the letter requires some modifications and additional paragraphs. I also intend to draft a covering letter this w/e to accompany [REDACTED] responses to the supplementary air quality questions and send next week.

Andrew

Andrew Mackie | Scientific Services Manager | Edinburgh Scientific Services | Services for Communities | 4 Marine Esplanade | Edinburgh | EH6 7LU.

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From: Mark Turley
Sent: 18 June 2011 14:30
To: Sue Bruce (Chief Executive)
Cc: Dave Anderson; Susan Mooney; Andrew Mackie; Alastair Maclean
Subject: Moray Feu
Follow Up Flag: Follow up
Flag Status: Green
Attachments: Moray Feu briefing note 14 June.doc; Moray Feu Residents Ass Appendix 1.doc

Sue - the residents of Moray Feu have requested air quality data for 2010 and 2011. The raw data (from the diffusion tubes etc) has to go through a validation process which can only be done annually. Without being validated there is a likelihood that the raw data will give a falsely negative view of the air quality. I attach a short briefing note for you and my recommendation is that we give them the validated data for 2010 (even though this has not yet been reported to Committee) but withhold the 2011 data because it is not yet validated.

My understanding is that when you met with the Moray Feu residents you gave a commitment to openness but not a specific commitment re raw data. [REDACTED] is, I understand, arguing that the Tram Sub Committee (at a Special Meeting to discuss this issue) gave a commitment to providing raw data but that is not our understanding, nor does the Committee minute suggest that.

I believe we should respond back to the residents ASAP and ensure the Council's position on this is clear in advance of the Council Meeting on 30th June. Throughout this process we have had our recommendations and analysis double checked by a well-regarded independent expert and I believe the recommended approach is sound. The residents will not be content but I believe this is a solid position for the Council to take.

I would welcome your views on this matter and obviously happy to discuss

Many thanks
 Mark

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