

## ANNEX 1

### Committee's questions to the United Kingdom:

*Please elaborate on the provisions of the national law providing for the possibility of the public authorities to refuse a request for environmental information, in particular when it is considered that the disclosure would adversely affect international relations, defence, national security or public safety; or when the information is qualified as "legally privileged".*

*Please also explain:*

- a. what is the discretion of the authorities to refuse disclosure;*
- b. whether and how authorities are instructed on to apply the exemptions; and*
- c. whether there is an established practice to follow to ensure that "grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served".*

### United Kingdom response:

1. The provisions of the Aarhus Convention relating to access to environmental information were implemented at EU level by the repeal and replacement of the original Council Directive 90/313/EEC in February 2003. Directive 2003/4/EC (the 2003 Directive) was transposed in the United Kingdom by the Environmental Information Regulations 2004 (the 2004 Regulations) and the Environmental Information (Scotland) Regulations 2004, which came into force on 1 January 2005.

#### Regulation 12(5)(a)

2. Regulation 12(5)(a) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety. This regulation implements Article 4(2)(b) of the 2003 Directive, which refers to "international security, public security or national defence" and article 4(4)(b) of the Convention, which refers to "international relations, national defence or public security".
3. Disclosure would adversely affect international relations when the information would harm relations between governments or international bodies such as NATO, the EU, or the United Nations, or an international court. In this

communication, the UK's standing with both the European Commission (an international body) and the Court of Justice of the European Union (CJEU – an international court) would have been harmed through disclosure as the CJEU's confidential proceedings would have been undermined and the arguments advanced by the Commission in its pleadings would have been exposed. The United Kingdom owes both bodies a duty of confidentiality, and relations with them would have been adversely affected if we had disregarded the Commission's objections and the Statute of the Court of Justice. Defra quoted the relevant parts in its letter to the ICO of 22 June 2012.

4. In a case involving an infraction being heard by international courts, there is naturally some overlap with the two additional exceptions quoted.
5. Defence, national security and public safety are different, albeit related, issues but were not relevant to the case in point.

#### Legally privileged information - regulations 12(5)(b) and (d) and 12(4)(e)

6. There is no express exception in the 2004 Regulations for information that is qualified as "legally privileged". The ICO considers that "legal professional privilege is a key element in the administration of justice". In the case in point, Defra explained that the concept of legal privilege is based on:

- the need for equality of arms, and
- the sound administration of justice

7. In a purely domestic case (*Rudd v ICO & The Vederers of the New Forest*)<sup>1</sup> the Information Tribunal, which hears appeals from notices issued by the ICO, argued at paragraph 29 that it:

"denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system."

8. Legally privileged information is generally considered to be covered by the exception under regulation 12(5)(b), which provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature".

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<sup>1</sup> EA/2008/0020, available at:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20&%20Verderers%20of%20New%20Forest%20\(EA-2008-0020%20%5BFER0148337%5D\)%20Decision%2029-09-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20&%20Verderers%20of%20New%20Forest%20(EA-2008-0020%20%5BFER0148337%5D)%20Decision%2029-09-08.pdf) (**Annex 14**).

9. This exception implements Article 4(2)(c) of the 2003 Directive:

“(c) the course of justice, the ability of any person to receive a fair trial or the ability of the public authority to conduct an enquiry of a criminal or disciplinary nature.”

10. This in turn transposes article 4(4)(c) of the Convention:

“(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.”

11. However, information relating to legal proceedings can also be protected by the exception in regulation 12(5)(d), which covers “the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.”

12. This exception implements Article 4(2)(a) of the 2003 Directive:

“(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law.”

13. This in turn transposes article 4(4)(a) of the Convention:

“(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law.”

14. In the case in point the nature of the information and proceedings and the rules on confidentiality in the Statute of the CJEU<sup>2</sup> mean that privileged information is covered by both exceptions. The information consisted of both legally privileged information and other documents drawn up as part of the UK’s defence in the CJEU proceedings. In the Defra letter to the ICO of 22 June 2012 we clarified that the information included both defence documents and annexes comprising information referred to in the defence, which includes the legal advice given by lawyers to their client. Litigation privilege was therefore applicable to some of the information within scope, as the arrangement and inclusion of the pleadings and annexes arguably reflects the substance of the legal advice and the strategy relating to the proceedings. However, we consider that the exception in regulation 12(5)(b) covers more than just material subject to legal professional privilege, as shown by our reference to “legally privileged information and other documents”, as the disclosure of information relating to the proceedings may adversely affect Defra’s position in those proceedings even if the information is not legally privileged.

15. Legal privilege would also protect legal advice provided to a public authority by its internal lawyers, and this would be protected additionally by regulation

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<sup>2</sup> See **Annex 11**.

12(4)(e) for internal communications. In this case, this exception was not relied on.

Question (a) - discretion of authorities to refuse disclosure

16. Regulation 12 of the 2004 Regulations implements preamble 16 and sentence 3 of Article 4(2) of the 2003 Directive and sentence 2 of article 4(4) of the Aarhus Convention. Regulation 12(1)(b) allows a public authority to refuse to disclose environmental information requested if “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) states that “a public authority shall apply a presumption in favour of disclosure”.
17. The only discretion that authorities have to refuse disclosure is therefore based on the public interest test. As this test consists of weighing up the arguments for and against disclosure as objectively as possible, and a presumption in favour of disclosure must be applied, this cannot truly be described as “discretion”, which implies a freedom to make the decision.

Question (b) - whether and how authorities are instructed on [how] to apply the exemptions

18. The United Kingdom Government established the ICO as an independent authority to uphold information rights in the public interest. It enforces and oversees the 2004 Regulations and publishes guidance on implementation, including an examination of each exception. Its website includes specialist guidance for practitioners and a database of its decision notices that can be searched by public authorities wishing to see how the ICO has handled cases involving particular exceptions. When the ICO is investigating complaints against a public authority, it strongly recommends that the public authority’s response is guided by recent decision notices, its guidance and its internal “lines to take”, which demonstrate the ICO’s approach to the exceptions and procedural sections of the 2004 Regulations.
19. The ICO has a statutory duty to provide guidance on the 2004 Regulations. Regulation 16(5) of the 2004 Regulations provides for the Information Commissioner to carry out the same general functions in respect of the 2004 Regulations as he does for the Freedom of Information Act 2000 (the 2000 Act) under section 47. This provides the following:

“(1) It shall be the duty of the Commissioner to promote the following of good practice by public authorities and, in particular, so to perform his functions under this Act as to promote the observance by public authorities of—

(a) the requirements of this Act, and

(b) the provisions of the codes of practice under sections 45 and 46.

(2) The Commissioner shall arrange for the dissemination in such form and manner as he considers appropriate of such information as it may appear to him expedient to give to the public—

(a) about the operation of this Act,

(b) about good practice, and

(c) about other matters within the scope of his functions under this Act,

and may give advice to any person as to any of those matters.”

20. The guidance produced by the ICO is published on its website: [http://www.ico.org.uk/for\\_organisations/environmental\\_information](http://www.ico.org.uk/for_organisations/environmental_information).

21. The Commissioner’s duties in respect of handling complaints are set out in regulation 18 of the 2004 Regulations. This regulation applies the provisions of the 2000 Act (Part IV – Enforcement) to the 2004 Regulations with the modifications specified in regulation 18. The 2000 Act is available at: <http://www.legislation.gov.uk/ukpga/2000/36/contents>.

22. Version 1.2 of the ICO’s detailed guidance on “How exceptions and the public interest test work in the Environmental Information Regulations” can be read at this link:

[http://www.ico.org.uk/for\\_organisations/environmental\\_information/guide/~media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/eir\\_effect\\_of\\_exceptions\\_and\\_the\\_public\\_interest\\_test.ashx](http://www.ico.org.uk/for_organisations/environmental_information/guide/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_effect_of_exceptions_and_the_public_interest_test.ashx)

23. The United Kingdom’s approach is reinforced by section XI of the “Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004”<sup>3</sup>, which requires public authorities to “specify the public interest factors (for and against disclosure) that they have taken into account before reaching the decision”. Paragraph 13 of the foreword to the Code of Practice also encourages public authorities “to contact the Information Commissioner’s Office for advice and assistance about their duties under the Regulations”.

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<sup>3</sup>[https://www.ico.org.uk/Global/~media/documents/library/freedom\\_of\\_information/practical\\_application/foi\\_hints\\_for\\_practitioners\\_handing\\_foi\\_and\\_eir\\_requests\\_2008\\_final.ashx](https://www.ico.org.uk/Global/~media/documents/library/freedom_of_information/practical_application/foi_hints_for_practitioners_handing_foi_and_eir_requests_2008_final.ashx).

24. Guidance in a handy, simplified format has also been produced jointly by the ICO, Defra, the Ministry of Justice (MoJ) and the Ministry of Defence (MoD) to cover both the EIRs and the United Kingdom's Freedom of Information Act 2000. The "Hints for practitioners" booklet is available as a free download in PDF format from the ICO's website and is aimed at staff working in public authorities, whether or not they are information rights specialists.<sup>4</sup> Pages 6 to 17 cover what a public authority must do when refusing to disclose information.
25. Defra additionally publishes guidance on the 2004 Regulations, but this currently sits on the website of the National Archives (TNA)<sup>5</sup> while Defra builds its presence on the [www.gov.uk](http://www.gov.uk) website, which is intended to act as a portal for all government information.

Question (c) - whether there is an established practice to follow to ensure that "grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served"

26. The requirement to interpret the grounds for refusal in a restrictive way is met through regulation 12(1)(b) and (2). See the response to question (a) above.
27. Many decision notices issued by the ICO have examined the public interest arguments put forward by public authorities to support their use of individual exceptions. These can be read on the ICO website. The lessons from some of those decisions have been incorporated into the ICO's guidance on the 2004 Regulations.
28. The ICO guidance document on exceptions and the public interest test quoted above additionally discusses factors that should not be taken into account when weighing the interests for and against disclosure under the section "Irrelevant factors". Their view, as expressed in their guidance on the application of regulation 12(5)(d), that "public interest arguments for maintaining the exception must relate solely to the interest that the exception protects" echoes the Information Tribunal in *Office of Communications*

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<sup>4</sup>[http://www.ico.org.uk/upload/documents/library/environmental\\_info\\_reg/detailed\\_specialist\\_guides/environmental\\_information\\_regulations\\_code\\_of\\_practice.pdf](http://www.ico.org.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf).

<sup>5</sup><http://webarchive.nationalarchives.gov.uk/20121204113252/http://archive.defra.gov.uk/corporate/policy/opengov/eir/index.htm>.

*(Ofcom) v the Information Commissioner and T-Mobile (UK) Ltd*<sup>6</sup>, where it stated at paragraph 58:

“It seems to us that for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception. It is a factor in favour of maintaining that exception, not any matter that may generally be said to justify withholding information from release to the public, regardless of content. If that were not the case then we believe that the application of the exceptions would become unworkable.”

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<sup>6</sup> EA/2006/0078, available at: <http://www.informationtribunal.gov.uk/DBFiles/Decision/i104/Ofcom.pdf> (Annex 15).