Department
for Environment
Food & Rural Affairs

Nobel House
17 Smith Square
London SW1P 3JR

T: 08459 335577
helpline@defra.gsi.gov.uk
www.defra.gov.uk

Aphrodite Smagadi
Secretary to the Aarhus Convention Compliance Committee
Economic Commission for Europe
Environment, Housing and Land
Management Division
Bureau 348
Palais des Nations
CH-1211 Geneva 10
Switzerland

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Dear Ms Smagadi,

UK response to communication ACCC/C/2013/83.

1. Thank you for your letter of 2 May 2013 inviting the United Kingdom to provide a response to this communication.

Observations on the communication

2. We note that the Committee has requested that the communicant provides a "**well-structured** chronology of events", full details of requests and responses, and confirmation of the specific elements of the Convention with which the communicant alleges non-compliance by the United Kingdom. We share some of the Committee's concerns, which are implicit in these requests, about the clarity of the communication and note the difficulties such issues present for a Party considering its response to a communication.

3. We have responded based on the content and structure of the information provided, but highlight the section titled 'Processing communications from the public' on page 16 of the UNECE *Guidance Document on the Aarhus Convention Compliance Mechanism*. This states, in the second paragraph, the following:

> "If the communication lacks certain mandatory or essential information, the secretariat will resolve any problems by contacting and discussing them with the communicant before forwarding the communication to the Committee."

4. We respectfully submit that the sorts of questions asked by the Committee in the letter – questions that are perfectly reasonable in our view – should be asked by the secretariat and Committee and answered by the communicant *before* the communication is formally brought to the attention of the Party concerned. This will help ensure that the Party can provide a comprehensive and focused response to the communication and that it is less likely to have to rely on assumptions about the communicant's allegations. We strongly encourage the secretariat and Committee to adopt this approach in the future when handling communications that raise these sorts of issues in order to make the most efficient use of the compliance mechanism.

5. We would be happy to discuss this issue further with the Committee outside the context of this particular communication if that would be preferred.

Factual background

6. Given that the Committee has decided to accept this communication and forward it to the United Kingdom despite the absence of important information, we have set out a summary of the events as we understand them. We reserve the right to make additional submissions in light of any further information provided by the communicant in response to the Committee's request.

- The communicant states in the communication that he requested a copy of a "2010 study" after learning of it in the course of infraction proceedings against the UK in Case C-301/10. The case concerned compliance with the Urban Waste Water Treatment Directive at sites in London and Whitburn.

- The communicant wrote to Defra in April 2012 requesting "correspondence along with written proof from the Environment Agency to confirm that the Whitburn system was designed to spill at 4.5xDWF and for calculations that show that the combined sewer overflows are spilling at 4.5xDWF".

- The request was handled under the Environmental Information Regulations 2004 (the 2004 Regulations) and a response was provided by Defra on 17 May 2012. Information was disclosed in the response relating to the design of the Whitburn system, but some of the requested information was not disclosed where this amounted to "material relating to the conduct of Defra's defence of infraction proceedings currently before the Court of Justice of the European

Union (ECJ) relating to the requirements of the Urban Waste Water Treatment Directive in London and Whitburn".

- This information concerned was material produced specifically to support the defence of the UK case before the Court of Justice of the EU (CJEU) and was withheld on the basis that the disclosure of pleadings submitted by the UK in its defence would adversely affect international relations, the course of justice and the confidentiality of proceedings protected by law, with the balance of public interests lying against disclosure. This applies three of the grounds for exclusion provided in the 2004 Regulations, derived from the Environmental Information Directive (2003/4/EC) (the 2003 Directive) and the Aarhus Convention in turn. Essentially this turned on the fact that infraction proceedings were still ongoing at the time of the request and that disclosure would be at odds with the duties owed to the Court, rules on the confidentiality of ongoing proceedings and the ability of the UK to present its strongest case.

- The Defra response stated that, with regard to the information forming part of the United Kingdom's defence in infraction proceedings, the request would be reconsidered after the CJEU's judgment was given. A standard annex – which was not reproduced by the communicant in the documents submitted to the Committee – set out what a person making a request may do if they are unhappy with the decision. A complete copy of the Defra response is provided at Annex 2.

- The communicant requested an internal review of this decision in an e-mail of 21 May 2012 (not provided among the documents submitted to the Committee).

- The Defra response of 16 July 2012 confirmed that, following an internal review, the decision stood, and emphasised again that Defra had stated in the original letter that the position would be reconsidered once the CJEU had published its judgment. The letter set out how to contact the Information Commissioner's Office (ICO) if the person making the request remained dissatisfied.

- It appears that the communicant approached the ICO in respect of an earlier request (not provided among the documents submitted to the Committee). This was a wider request for "all correspondence, statements, records, reports, memos, emails etc. that Defra used to defend the Whitburn case". That request had been made by the communicant on 14 December 2011 and Defra responded on 16 January 2012, relying on the same three grounds for withholding the information as were relied on in the Defra response of 17 May 2012 to the communicant's later request for "correspondence along with written proof from the Environment Agency to confirm that the Whitburn system was designed to spill at 4.5xDWF and for calculations that show that the combined sewer overflows are spilling at 4.5xDWF". The reply to the earlier request is included at Annex 3.

- In a decision notice dated 30 July 2012, the ICO upheld the Defra decision, stating that the Department had correctly applied the first exception (regulation 12(5)(a) of the 2004 Regulations) concerning adverse effects on international relations. As the Defra decision on the first exception was upheld, the ICO did not examine the other two exceptions and the ICO required no steps to be taken.

- The ICO letter set out how to appeal against its decision notice to the First-tier Tribunal. It does not appear that the Communicant made use of this appeal mechanism.

- The communicant also appears to have made an approach to the European Commission to access documents relating to the infraction (although the communicant's request has not been included).

- In a letter dated 22 May 2012, the Commission stated that access could not be given at that stage as the CJEU had not yet given judgment. Their letter stated that the communicant could approach the Court directly and gave details of how to review the Commission's decision.

- It appears that the communicant made this request on 29 May (although again this was not included in the documents) and in a Commission letter of 19 July 2012 relating to the request for a "study carried out in 2010" by UK authorities the original decision not to disclose was confirmed. The letter stated that the means of redress available to the communicant were to bring proceedings before the General Court or to file a complaint with the European Ombudsman.

- A further request to Defra was received on 20 September 2012 requesting copies of calculations "showing how 4.5 DWF=129 l/s". A response dated 17 October 2012 noted that the request was very similar to the April 2012 request and confirmed that the original decisions not to disclose information relating to the UK's defence under the infraction had been upheld by the ICO and that the request would be reconsidered after the CJEU had given judgment on 18 October 2012.

- A Defra letter of 5 November 2012 indicates that a further request for the information provided to the CJEU by the communicant was received on 29 October 2012. The Defra letter explained that the commitment to review the release of the relevant information following the judgment would require consideration and communication with a number of bodies and would require a little further time. Under the 2004 Regulations the deadline for responding to this latest request was stated to be 26 November 2012. On that date Defra wrote to the communicant to explain that further time was needed due to the complexity of the request and the volume of information requested. Subsequently, Defra responded to the request on 20 December disclosing all the material used in their defence of the Court case. This included all the pleadings relating to Whitburn and supporting material, such as environmental

studies (including what is referred to by the communicant as 'the 2010 study' – a study carried out on behalf of the UK by MWH UK Ltd investigating the performance of the Whitburn sewerage system).

- The next piece of correspondence included in the communication is a Defra letter of 9 January 2013 responding to an e-mail of 7 January 2013. This stated that information relating to the design of the collection system at Whitburn and associated modelling on pass forward flow from Whitburn was contained in the United Kingdom's defence document and was provided to the communicant as part of their environmental information request. To assist the communicant, Defra drew attention to the relevant paragraphs in the defence document and the relevant supporting modelling report (namely, the MWH UK Ltd September 2010 study).

- The communicant e-mailed Northumbrian Water on 7 January 2013 regarding alleged discharges at Whitburn on 25 December 2012 and quoting from the information provided by Defra on 20 December 2012. It asks for information, under the 2004 Regulations, on records and discharge times on that day. A response from Northumbrian Water dated 18 January 2013 states that as a private company it is not subject to the 2004 Regulations and that it operates in accordance with the Environment Agency consent.

- An e-mail from the communicant to Defra of 21 January 2013 stated that he was "asking again" for the information requested in September 2012, mentioning the Defra commitment to reconsidering the request after the Court of Justice judgment in October. The communicant stated that on 24 December he received "over 15,000 items of correspondence but did not receive the information I had requested". The communicant also states that "The last thing I want to do is to involve the Information Commissioner", but threatens to contact the ICO if the information is not provided by the end of the day.

- The Defra response to the communicant of 21 January 2013 date states that the information has been released under the 2004 Regulations and that information was not being withheld.

- The next letter to be included in the communicant's submission is a letter from Defra of 15 February 2013. It refers to an e-mail (not included) of 7 February raising the Aarhus Convention. The letter sets out the transposition of the access to environmental information provisions in EU and domestic law and confirmed that the relevant information had been provided after a review following the judgment of the CJEU in the infraction case. The letter also states that issues raised in respect of public participation are not considered, at this stage, to be relevant, but that public consultation will take place in due course on any proposals that engage them in relation to the Whitburn system.

- The communicant wrote to the Convention Secretariat on 11 March 2013 alleging that the Advocate General's Opinion in the infraction may have been

based on the "2010 study", which in the communicant's view was incorrect and that the Government denied him the opportunity to put the correct evidence before the Court by refusing to disclose the information.

- It appears that the communicant contacted the ICO in respect of the 20 September 2012 request on 25 March 2013. After initially requesting the communicant to ask Defra to undertake an internal review before continuing the case the ICO confirmed on 22 April 2013 that it had accepted the case. Information has been provided to the ICO to explain Defra's handling of the request but the ICO have not yet issued a decision on the case and their review of the environmental information request remains ongoing.

Exhaustion of domestic remedies

7. As the Committee is aware, paragraph 21 of the Annex to decision I/7 of the Meeting of the Parties, states:

> "The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress."

8. The principle of the exhaustion of domestic remedies, as reflected in this paragraph, is a well-established principle of customary international law. The reasons for this include the following: municipal law should be given the opportunity to provide a remedy before an international body intervenes; avoiding forum shopping by potential claimants; preventing international tribunals from being inundated with claims; international tribunals should always be a court of last resort rather than a court of first instance. These principles will apply to the compliance mechanism under the Aarhus Convention.

9. It is clear that the communicant has not exhausted the domestic remedies that were open to them in respect of their request for environmental information. The Defra response to the communicant's original request for environmental information mentioned in the communication (17 May 2012) stated that the person making the request could request that any decision to withhold documents be subject to internal review by Defra. Such a review was requested and duly carried out. In the Defra letter upholding the original decision (16 July 2012) the communicant was informed that if they were still dissatisfied they had the right to directly apply to the Information Commissioner for a decision together with details on how to go about this.

10. The ICO's decision of 30 July 2012, in relation to the earlier request but again upholding an original decision not to disclose the information, set out details of the communicant's right of appeal to the First-tier Tribunal (Information Rights) and how to go about this. As far as we are aware the communicant made no such appeal and provided no explanation of why, if they were not satisfied with the ICO's decision, they did not use the domestic remedies available to them.

11. The communicant made a further request for similar information following the ICO decision (20 September 2012) and Defra re-stated that the decision to withhold information would be reconsidered following the judgment by the CJEU in Case C-301/10. The information was provided to the communicant following a further review after judgment had been given on 18 October 2012. The communicant claimed that he had not received the information he had requested and threatened to take the matter to the ICO (21 January 2013). Defra confirmed both in an e-mail of 21 January 2013 and a letter of 15 February 2013 that the information had been released.

12. The communicant wrote to the Convention secretariat on 11 March 2013 but also subsequently wrote to the ICO on 25 March 2013 requesting a review of the 20 September 2012 environmental information request. As noted above the ICO has not yet concluded its investigation. The communicant is seeking a review under the Convention compliance mechanism in parallel to a domestic review and having not fully pursued the domestic remedies available in respect of their earlier environmental information requests.

13. There is no suggestion in the communication that the domestic remedies are "unreasonably prolonged" or that they "obviously [do] not provide an effective and sufficient means of redress". Indeed there would be no grounds for making such a suggestion.

14. We have raised the issue of the exhaustion of domestic remedies with the Committee on a number of recent occasions, including in the context of communications ACCC/C/2010/53 and ACCC/C/2012/77. We again note that the Committee decided not to consider an allegation of non-compliance in communication ACCC/C/2009/38 where the communicant failed to make use of the available domestic remedies, that communication ACCC/C/2007/19 (United Kingdom) was deemed inadmissible where domestic remedies were ongoing and that the Committee closed communication ACCC/C/2012/67 (Denmark) where domestic remedies were capable of addressing the issue.

15. We remain of the view that domestic remedies must have been exhausted – provided that they are not unreasonably prolonged or are ineffective – by a communicant before the Committee progresses their communication. This will help ensure that:

    - the whole of a Party's system for delivering compliance with the Convention is examined rather than just part of it;
    - the Committee acts consistently with its previous actions; and
    - the Committee acts consistently with the requirements of customary international law.

Disposal of the communication

16. We invite the Committee to close the communication, applying both the requirements in decision I/7 at paragraph 21 of the Annex and of customary international law on the exhaustion of domestic remedies.

17. If the Committee decides not to close the communication we request that the Committee explains its reasons specifically by reference to these requirements.

Correspondence between the communicant and the European Commission

18. The references made by the communicant to their correspondence with the European Commission are plainly of no direct relevance to a complaint about compliance by the United Kingdom with the Convention. We therefore make no further reference to them other than to observe that the Commission's conclusions are consistent with those of Defra and the ICO, and that the communicant has been made aware of the remedies that were available if they were dissatisfied with the decision.

Application of exceptions

19. Even if the Committee were to allow the compliance procedures to continue in relation to this communication, based on our understanding of the allegations of non-compliance (which must be read in the context of what we have stated in the preceding paragraphs) there is nothing to suggest in this communication that the United Kingdom fails to comply with article 4 of the Convention.

20. It appears that the communicant alleges that the exclusions relied on in not disclosing information at the time of the original request were not applied correctly in respect of the Convention.

<u>Legislation</u>

21. Defra applied three exceptions when withholding requested environmental information relating to ongoing court proceedings. These are derived from the exceptions from the duty to provide environmental information on request within the Convention.

22. Article 4(4) of the Convention provides that:

> "A request for environmental information may be refused if the disclosure would adversely affect:

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

(b) International relations, national defence or public security;

(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;

…

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment."

23. The environmental information pillar of the Convention has been transposed into EU law through the Environmental Information Directive (2003/4/EC). The exceptions mentioned in paragraph 21 above are set out in Article 4(2) of the 2003 Directive:

"Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

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

(b) international relations, public security or national defence;

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

…

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.

…"

24. The 2003 Directive is in turn transposed into the domestic law of England, Wales and Northern Ireland (relevant to this communication) through the 2004 Regulations. Regulation 12 includes the exceptions relied on (see paragraph (5)(a), (b) and (d), in bold) and is set out in full below:

"12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and

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

(2) A public authority shall apply a presumption in favour of disclosure.

(3) 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.

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

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

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

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

(a) international relations, defence, national security or public safety;

(b) 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;

(c) intellectual property rights;

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

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

(6) For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

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

(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

(10) For the purposes of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

(11) 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."

25. It is clear that the 2004 Regulations are a faithful implementation of the 2003 Directive, which are in turn a faithful implementation of the Convention. The wording of the exceptions in the 2004 Regulations closely follows that used in both the 2003 Directive and the Convention.

26. The Convention and 2003 Directive requirement that the grounds for refusal be interpreted in a restrictive way is reflected in paragraph (2) of regulation 12, with public authorities required to apply a presumption in favour of disclosure. The requirement that the decision takes into account the public interest served by disclosure is reflected in paragraph (1) under which the public authority may only refuse to disclose where an exception is available and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Requests by the communicant

27. As indicated above there are a number of missing documents relating to the various requests for environmental information made by the communicant.

28. The correspondence provided by the communicant that is relevant to an allegation of non-compliance by the United Kingdom can be put into two groups:

- The communicant's request for "all correspondence, statements, records, reports, memos, emails etc. that Defra used to defend the Whitburn case" of 14 December 2011. The communicant has not provided documents relating to this request, apart from the ICO's decision of 30 July 2012.

- The communicant's request for "correspondence along with written proof from the Environment Agency to confirm that the Whitburn system was designed to spill at 4.5xDWF and for calculations that show that the combined sewer overflows are spilling at 4.5xDWF" of April 2012. The communicant has provided some correspondence relating to this request, including further requests for similar information on 20 September 2012 and, after the information had been disclosed to the communicant, on 7 January 2013 and 21 January 2013.

29. The communicant has made a number of requests for environmental information from Defra, the Environment Agency and the National Audit Office under the 2004 Regulations relating to the Whitburn system since 2008. Some of these have resulted in appeals to the ICO and decision notices are provided at **Annexes 4** to **6**. The Committee will note the reference in the ICO decision notice of 17 February 2009 to a list of 699 communications mainly between the public authority the complainant and others regarding the issues raised in their request (paragraphs 13 and 17).

30. There has also been correspondence outside the formal environmental information requests between the communicant and Defra regarding the Whitburn system and dry weather flow calculations. Examples are provided at **Annexes 7** to **9**.

31. Both of these groups of requests concerned information which was the subject of live EU infraction proceedings against the United Kingdom in Case C-301/10. Defra

therefore relied on the same exceptions in relation to each and these are discussed further below.

32. It should again be noted that Defra stated throughout the correspondence that the decision not to disclose the information would be reviewed following judgment by the CJEU in the infraction case and that the information was subsequently disclosed to the communicant once the circumstances preventing disclosure had changed.

Regulation 12(5)(a): adversely affecting international relations

33. The communicant alleges that this exception "cannot be justified" in relation to the '2010 study'. The justification for using this exception in relation to this and the original request in December 2011 was set out in the Defra letter of 17 May 2012 and the earlier response to the December 2011 request.

34. The disclosure of material relating to ongoing court proceedings in which the United Kingdom was a party would have adversely affected international relations. The term "international relations" includes relationships between the United Kingdom and other governments or international bodies or Courts such as the European Commission and the CJEU.

35. The exception was applied to material relating to the conduct of Defra's defence in proceedings still before the CJEU at the time of the requests. Before completing the internal review on the December 2011 request Defra checked the views of the European Commission on disclosure. The European Commission's advice was that as this was an ongoing case disclosure of the information would undermine the CJEU's proceedings. The Commission therefore objected to disclosure. The disclosure of documents relating to the United Kingdom's defence would also expose the arguments advanced by the Commission as part of their case. The United Kingdom owes the European Commission and the CJEU a duty of confidentiality, and disclosure against the Commission's wishes and against the practice of the CJEU would adversely affect relations with those institutions.

36. The ICO found that the exception in regulation 12(5)(a) was correctly applied in its decision of 30 July 2012, noting at paragraph 11 that:

> "…as the European Commission has expressly stated that disclosure would undermine court proceedings relating to ongoing infraction proceedings, disclosure in this case would adversely affect international relations."

37. This finding was consistent with earlier ICO decisions concerning Whitburn and the use of the exception in regulation 12(5)(a) in the context of infraction proceedings against the United Kingdom (see **Annexes 5** and **6**).

38. The communicant also suggests that the '2010 study' was "flawed" and that "[he] should have had the opportunity to examine the study and demonstrate that it contained errors". As the Committee has already stated in earlier findings, it is:

> "…not in a position to ascertain whether the technical information disseminated by the Party concerned, or the communicant for that matter, is correct."[1]

39. These aspects of the communicant's allegations are therefore irrelevant to the Committee's consideration of the communication.

Regulation 12(5)(b): adversely affecting the course of justice

40. The communicant argues that this exception was used because "the disclosure would adversely affect the UK Government's case before the Court".

41. Defra set out its justification for the use of this exception in its letter to the ICO of 22 June 2012 relating to the December 2011 request for information and we refer the Committee to this letter.

42. In summary, this referred to the difficulties in disclosing legally privileged information and other documents relevant to live proceedings, including putting into the public domain the substance of legal advice and strategy relating to proceedings. Such a disclosure could have undermined the need for equality of arms between parties, exposing the United Kingdom's arguments to a public debate and influencing the position being defended regardless of the actual legal significance of any criticisms that resulted. Other parties involved in the litigation would not have had to deal with the same issues, upsetting the balance between the parties during the course of proceedings. It would also change the context in which the parties are able to put forward their arguments before the Court and in which the Court would be able to carry out its deliberations.

43. The letter noted the confidentiality of the CJEU and that neither the Statute of the CJEU[2] nor the Rules of Procedure[3] provide for any third party rights of access to information submitted to the Court as part of its proceedings.

44. Reference is made to the joined cases of *Sweden* v *Association de la Presse Internationale ASBL (API) and Commission*[4] in which the Court stated the following at paragraphs 92 to 94:

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[1] Findings in ACCC/C/2010/54 (European Union) at paragraph 89 (**Annex 10**).

[2] Protocol (No 3) on the Statute of the Court of Justice of the European Union, available in an unofficial consolidated form at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/staut_cons_en.pdf (**Annex 11**).

[3] Rules of Procedure of the Court of Justice (OJ No L 265, 29.9.2012, p.1) http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf (**Annex 12**).

[4] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P (**Annex 13**): http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0514:EN:PDF.

> "92 As regards, secondly, the sound administration of justice, the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity.
>
> 93 Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.
>
> 94 It is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings...".

45. Although the specific case concerned pleadings lodged by an EU institution (the European Commission), these principles should be equally applicable to submissions made by any party to the CJEU.

46. Disclosure in breach of the United Kingdom's duty to the Court and without the European Commission's consent where there is no other obligation to provide the information would have adversely affected the United Kingdom's relationships with those institutions and would have been detrimental to the United Kingdom's standing before the CJEU.

Regulation 12(5)(d): adversely affecting the confidentiality of proceedings provided by law

47. The communicant states that an exception regarding the confidentiality of proceedings is "perverse and completely contrary to the Aarhus Convention that aims to improve access to information".

48. We refer the Committee to article 4(4)(a) of the Convention on which this exception is based, note that the public interest test was applied here and that the information was subsequently disclosed once circumstances changed so that it was in the public interest to make the disclosure. It is clear that the Convention provides for an exception to be used in certain circumstances and it is not correct to suggest that its use is contrary to the Convention's aims.

49. Again it was noted in Defra's letter to the communicant of 17 May 2012 that the requirements of the CJEU – based on its rules and jurisprudence – are that infraction proceedings are conducted in confidence. Public disclosure would have adversely affected confidentiality because it would have involved putting in the public domain that which is otherwise confidential in accordance with the procedures of the CJEU.

50. The Committee is also referred to the comments made in relation to the exception in regulation 12(5)(b) above and in the Defra letter to the ICO of 22 June 2012.

Public interest test

51. Under the 2004 Regulations the application of one or more of the exceptions does not in itself provide sufficient grounds for withholding environmental information that is the subject of a request. The public interest in withholding the information must be balanced against the public interest in disclosure.

52. This balancing exercise was duly carried out in relation to each request. It was acknowledged that there was a strong public interest in the Whitburn area in disclosure, because the communicant had, over a long period of time, made arguments about the environmental impact of waste waters in the area.

53. However, it was found that on balance the greater public interest lay in applying the exceptions because the infraction proceedings to which the information related had not yet concluded. This analysis was set out in the final two pages of Defra's letter to the communicant of 17 May 2012 and in the Defra letter to the ICO of 22 June. There are strong public interests in maintaining the confidentiality of proceedings, avoiding actions prejudicing the United Kingdom's relations with the CJEU and its standing in that and future cases. This view was shared by the ICO in its decision of 30 July 2012, stating at paragraph 23 that there is:

> "…a very strong public interest in the European Commission and the CJEU being able to conduct effective infraction proceedings against the UK for breaches of the Urban Waster Water Directive and that this may not be possible if the requested information were disclosed whilst these proceedings are ongoing."

54. The information was subsequently released once the infraction proceedings were concluded, which underlines that the exceptions provided for by the Convention are applied in a restrictive way and taking into account the public interest served by disclosure as circumstances evolve.

Conclusions on the communication

55. It is clear that the communicant's requests for environmental information were handled in accordance with the EU and domestic legislation transposing the requirements of the Convention.

56. Where the communicant chose to make use of the mechanisms available for challenging the initial decisions to withhold the information those original decisions were upheld. The decisions were revisited when the circumstances in which the exceptions and public interest in withholding changed and the communicant was provided with the information he requested. The communicant is still making active use of the domestic mechanisms available in parallel to his request to the Committee.

57. The communicant has presented no evidence to suggest that the EU or domestic legislation incorrectly applies the requirements of the Convention, that the decisions

made in this case were incorrect or that the communicant was denied the opportunity to challenge those decisions.

58. The communication demonstrates that the United Kingdom is fully in compliance with article 4 of the Convention. If the Committee decides not to close the communication in accordance with our request in paragraph 16 we invite the Committee to confirm that there is no issue of non-compliance raised by the communication.

Questions from the Committee

59. The Committee set out some questions for the United Kingdom. A response is annexed to this letter (**Annex 1**).

60. The Committee also asked the communicant a number of questions. We have set out our understanding of the events above together with comments on how the communication has been handled. In question 3 the Committee asks the communicant whether they received the '2010 study'. As explained at paragraph 6, this study, conducted by MWH UK Ltd on behalf of the United Kingdom into the performance of the Whitburn sewerage system formed part of the United Kingdom defence of the infraction proceedings. The study was withheld from the communicant under the exceptions in the 2004 Regulations while the infraction proceedings were live but, following the CJEU's judgment it was disclosed to the communicant under cover of a Defra letter of 20 December 2012, along with all other material used in the United Kingdom defence of its case regarding Whitburn.

61. Fifteen Annexes are attached to this letter, which are listed below.

Yours sincerely,

Ceri Morgan

LIST OF ANNEXES

Annex 1	**United Kingdom responses to Compliance Committee's questions in secretariat letter dated 2 May 2013**
Annex 2	**Complete copy of letter from Defra to the communicant dated 17 May 2012 and enclosures**
Annex 3	**Letter from Defra to the communicant dated 16 January 2012**
Annex 4	**ICO Decision Notice dated 17 February 2009 (FER0230659)**
Annex 5	**ICO Decision Notice dated 20 October 2009 (FER0219897)**
Annex 6	**ICO Decision Notice dated 7 March 2011 (FER0319747)**
Annex 7	**Letter from Defra to the communicant dated 20 February 2012**
Annex 8	**Letter from Defra to the communicant dated 16 April 2012**
Annex 9	**Letter from Defra to the communicant dated 10 May 2012**
Annex 10	**Aarhus Convention Compliance Committee findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union (UNECE/MP.PP/C.1/2012/12)**
Annex 11	**Unofficial consolidated version of the Statute of the Court of Justice of the European Union**
Annex 12	**Rules of Procedure of the Court of Justice (OJ No L 265, 29.9.2012, p.1)**
Annex 13	***Sweden and others* v *API & Commission*, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P**
Annex 14	***Rudd* v *ICO & The Vederers of the New Forest* (EA/2008/0020)**
Annex 15	***Office of Communications (Ofcom)* v *the Information Commissioner and T-Mobile (UK) Ltd* (EA/2006/0078)**