

Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Task Force on Access to Information

Third meeting

Geneva, 3 - 5 December 2014

Items 2 - 7 of the provisional agenda

Statement by the United Kingdom

The UK continues to make progress on a number of the priorities for the Task Force. Transparency remains a key part of the UK Government's efficiency and reform agenda. The gov.uk website <https://www.gov.uk/> is still being developed as a single portal for the public to find government services and information, more simply, more clearly, and faster. The UK recognises that putting more information in people's hands can encourage greater public participation in decision-making. But this raises a number of challenges also. The number of information requests recorded by centrally monitored bodies (largely government departments) is increasing each year, with an overall increase of 47% since 2006. This can be attributed to topical issues that provoke wide-scale public interest as well as an increasing awareness of the information rights legislation. However, increasing demand requires additional resources. Proactive disclosure is helpful for the public, but specialist researchers and the media are more interested in information that is not being disclosed voluntarily. Some environmental information requests can be highly complex and require greater certainty regarding how the UK should interpret, for example, the definition of environmental information, the rules on charging, and the scope of the exceptions for internal communications and confidentiality of proceedings. The Task Force provides an invaluable forum to share and exchange experiences on all these issues, with a view to helping ensure that we share a common and consistent application.

Item 2 - Environmental information: minding the gap

(a) Scope of environmental information

Boundaries between environmental and other information

- The UK has two information regimes – the Environmental Information Regulations 2004 that implement both EU Directive 2003/4/EC and the Aarhus Convention, and the Freedom of Information Act 2000 that is purely domestic

legislation and covers all other information. Scotland has separate but equivalent legislation that applies to Scottish public authorities.

- Both the EIRs 2004 and the FOIA came into effect on 1 January 2005.
- The UK has two information regimes because of subtle but significant differences in approach, including the scope and nature of the FOIA exemptions / EIRs exceptions and other limitations on access rights. Rules on appeals through the domestic courts are, however, aligned.
- The FOIA does not include a definition of non-environmental information, so all public authorities need to understand how the non-exhaustive list of examples in the definition derived from Article 2 of Aarhus works.
- The main difficulties in this area derive from the interpretation of “information ... on” in Article 2(3) of the Aarhus Convention. A broad interpretation, as preferred by the Information Commissioner (the regulator for both FOIA and the EIRs) has led to information that arguably has nothing to say about the primary focus of the Aarhus Convention, i.e. the state of the elements of the natural environment, being handled under the EIRs.
- There can be differences of opinion between public authorities, including the lead Government department with responsibility for the EIRs (Defra), the regulator (the Information Commissioner’s Office) and the appeal courts (primarily the First-Tier Tribunal and the Upper Tribunal) on the interpretation of the definition and its proper application to the information requested.
- The proper classification of information as non-environmental (i.e. subject to the FOIA) or environmental (i.e. subject to the EIRs) is a matter of law. There is still, however, relatively little domestic case-law on the interpretation of the definition to help public authorities decide where information merely has an environmental context. The [First-tier Tribunal decision in Uttlesford](#) clarified where information was “a step further away from the primary focus”, and Judge Hughes stated that handling non-environmental information under the EIRs “[flies] in [the] face of the principle of legal certainty by extending the meaning of words beyond their normal meanings.”
- It is against this background that public authorities need to assess whether the information being requested falls within the types of information covered by the EIRs.

Types of information to be provided in accordance with the Convention

- Identifying the types of information properly falling within scope of the definition supports a purposive approach that reflects the preamble to both the Aarhus Convention and the Directive.
- While the UK understands that the definition is made up of a non-exhaustive list of examples for each of the limbs, there is no guarantee of consensus among Parties to the Convention on the meaning of the terms listed. These include the

interpretation of biological diversity, which the UK suggests does not automatically cover farmed, companion or captive animals, or food and industrial crops. For example, information on diseases of farmed animals or welfare conditions of poultry would fall under the FOIA, whereas information on the disposal of waste produced by farmed animals would fall under the EIRs. There have also been questions over what factors might count as emissions, discharges and other releases into the environment, although the Ville de Lyon case heard by the Court of Justice of the European Union (referred to below) has been helpful here. This can affect the consistent handling of requests both domestically and internationally.

- The meaning of “likely to affect” and “may be affected by” and how this differs from “affecting” and “are affected by” is unclear, with the result that it can be difficult to judge whether the information is caught by the definition. We would welcome clarity regarding whether a public authority is required to assess probability, i.e. whether an effect is more probable than not, or whether “likely” instead requires a judgement of whether that effect will take place if, for example, a measure is implemented in the future.
- To confuse the matter further, the French version of the Aarhus Convention expresses this issue in terms of the risk of having an effect rather than the likelihood, and the Russian version refers to capability of affecting. These may be interpreted as entirely different measures.

Access to the statistical, spatial and hydrometeorological information related to the environment

- Defra is the lead department in the UK for implementation of the INSPIRE Directive which establishes an ‘Infrastructure for Spatial Information in the European Community’. INSPIRE requires public authorities to make their spatial data available for use and re-use through specific open standards and services with the aim of improving environmental decision making across the EU. Defra supports the wider UK public sector in publishing these using open standards and technologies via the UK Open Data portal data.gov.uk. The default is for this data to be open data, although differing business models do not make this possible for all organisations and charging for data use is permitted by INSPIRE in certain conditions.
- Both the UK Government and Defra are strong advocates of Open Data and Transparency. Defra and its network of arms-length bodies (ALBs) are implementing an open data strategy that moves to an Open Data by default approach. Defra's largest ALB, the Environment Agency, is moving its charge-for-data business model to an open data model with some significant releases of flood-related data and underpinning reference data (river boundaries and flood modelling) as open data. Defra is working on a joint project with the Open Data

Institute to establish a re-usable maturity model to assess organisations against open data principles.

Further needs in relation to the subject:

Changes in the ways that governments develop policy since the negotiation of the 1998 Convention:

- The exceptions for internal communications (Article 4(3)(c)) and confidentiality of proceedings (Article 4(4)(a)) are too inflexible to take account of systemic differences and developments in the ways that individual governments make and deliver policy.
- Changes in the way the UK Government makes and delivers policy mean that a wide range of bodies is brought into the “safe space” that is required for effective government. “Open Policy Making” means that expertise for evidence-based policy making is sourced from a wide range of stakeholders, specialist advisers, voluntary organisations and external experts, including through the [Contestable Policy Fund](#). Non-departmental public bodies or arms-length bodies are widely involved in delivering Government policy.
- The “right to know” must be balanced against the need to enable effective government. The inability to protect exchanges of information with third parties, which in some administrations might take place entirely within a single government ministry and thereby more readily be protected, gives the appearance that Government is effectively paying the price for being more inclusive and open.
- The broad definition of “public authority” does not acknowledge that certain activities and functions that were once the responsibility of Central Government have long since been privatised, often pre-dating the Aarhus Convention. The Convention can lead to private industry, including foreign-owned companies, being counted as UK Government bodies and being expected to bear the burden of responding to requests for “public” information on the environment.

The scale of the use of information rights in the UK

- There are many thousands of public authorities in the UK, most of which are listed in Schedule 1 to the Freedom of Information Act 2000 (FOIA). Subject to minor differences, bodies that appear on that schedule are public authorities for the purpose of the Environmental Information Regulations 2004, and a number of EIR bodies are not subject to the FOIA. Similar arrangements apply to Scottish public authorities listed in the Freedom of Information (Scotland) Act 2002, and those bodies are also subject to the Environmental Information (Scotland) Regulations 2004.
- An internet-based request-handling website called “What do they know” ([WDTK](#)) lists over 15,000 bodies as public authorities in England, Wales, Northern Ireland

and Scotland. Together these have responded to over 231,000 requests on that website alone.

- Many of the UK's public authorities under the EIRs have responsibilities that are not remotely environmental – e.g. schools, museums and art galleries, the police – but they will hold some environmental information, for example on the waste, recycling and energy policies relating to their own premises.
- Statistics published annually by the [Ministry of Justice](#) show an average increase in the number of information requests (FOIA and EIRs) received by a group of 41 central government bodies of 6% per year from 2006 to 2013. The total for 2013 was nearly 52,000 requests. Of these, 3.6% were handled under the EIRs.
- The UK has a very strong history of politically engaged investigative journalism, and journalists make heavy use of information access regimes. However, some investigative journalists make speculative requests in an attempt to unearth material. Requests for searches on a list of key terms or names are unlikely to result in a story that contributes to the protection of the environment and can add to the pressure on public resources.
- Central Government made an early policy decision not to charge for the provision of environmental or non-environmental information, and this decision applies irrespective of the nature of the request or requester. A private individual is treated the same as an investigative journalist or a group of activists.
- Not all of the requests meet the agreed ideals of the Convention preamble, which are intended to increase participation in environmental decision-making and awareness of environmental issues; many relate instead to issues that are personal to individuals, and a minority are bizarre requests such as contingency planning in the event of asteroid crashes or dragon attacks, or requests for assistance in historical research.

(b) Quality of environmental information

- The UK has many excellent examples of proactive disclosure of environmental information at both national and local level – e.g. [Defra](#) and [the Environment Agency](#) on the Government portal, local authorities on their own websites, e.g. [Torridge District Council](#).
- A good deal of the Central Government effort on proactive publication has been focused on providing information that can be re-used or “mashed” creatively to provide new datasets and commercial products. The Government's Open Data programme (<http://data.gov.uk/>) and Transparency Agenda are just two measures ensuring that re-usable and comparable data and statistics are placed in public hands in formats that are widely accessible. See the website of [The National Archives](#) for more information on common standards and the [Local Government Association](#) website for more on a new work programme for local authorities.

- The concept of “armchair auditors” has been used to describe the stakeholders who will pore over the environmental (and non-environmental) information that has been published. Armchair audit is described by researcher Dr Ben Worthy of Birkbeck College (University of London) as “a form of ‘crowd sourced’ accountability where citizens use newly ‘opened up’ information on spending, contracts and crime to hold public bodies to account”. Dr Worthy has pointed out on a number of occasions that the expected “army” of armchair auditors has failed to materialise: <http://theodi.org/blog/guest-blog-where-are-armchair-auditors>. A lack of interest in re-using the published data risks discouraging continued investment of scarce public authority resources in preparing data in this way.
- While information compiled by a public authority and published on its website should be expected to be accurate, this cannot apply to information released in response to a request – this may be draft material, may have been contributed by third parties, etc. Incomplete data and unfinished documents produced by the public authority may not be accurate, e.g. if work is at an early stage or has been set aside and there is no need to revise it.
- Quality can be relative, depending on the use to which the information is put. What is important is whether the data are fit for purpose. For example, the UK’s national scale for flood mapping is appropriate to land planning, which is the purpose for which it was designed. However, the dataset may not provide the required “quality” for use at a local scale to determine whether an individual house is at risk of flooding. A public authority could be wasting public money by delivering data at a 1:1250 scale where the operational decision only merits 1:25000. Therefore the same dataset can be described as both good quality and bad quality.
- Public authorities can only collect and produce data to support their operations: they do not collect data simply to provide them to others. We would therefore suggest that the question of quality should also be one of transparency, i.e. the public should be able to assess whether the information that a public authority uses to support its decision making is appropriate and not erroneous or based on poor modelling etc.
- The UK has done some work on a generic approach to data quality and being able to say how confident we are in using the data, but this is at an early stage. When sharing data the aim should be to be clear that the data are what they are, to be transparent about how we use the data, and to alert people to how to use it (as there is no exception for withholding poor quality information).

(c) Comparability of environmental information

- Environmental information held by a public authority may come from a variety of sources, e.g. its own staff, members of the public, contractors, external

researchers and other public authorities, as a result of correspondence, public participation, consultation, literature surveys, etc.

- Financial and other resource constraints will mean that it is generally not possible for a public authority to check or guarantee the comparability of information that it has not compiled itself, particularly if the public authority does not need to do so for its own business purposes.
- The UK's Cabinet Office has emphasised the need for consistent data that could allow meaningful comparisons between departments and over time and acknowledges a lack of "comparable data across government and data sets that don't change [format] over time". - See more at: <http://www.information-age.com/technology/information-management/2111138/francis-maude%3A-%22id-like-to-make-foi-redundant%22#sthash.3U8irTFZ.dpuf>

Item 3 - The application of certain restrictions on access to environmental information in accordance with the Convention's provisions

(a) Commercial and industrial information

- There is a belief among the business community that disclosure of small pieces of innocent information can lead to enough information being assembled to reveal strategic or valuable commercial information, perhaps when combined with information from other sources and competitors' knowledge of the industry; this was also highlighted by a presentation at the first meeting of the Task Force.
- These issues risk affecting the quantity and quality of information shared by industry with Government on a voluntary basis, particularly where discussions relate to proprietary technology, investments, etc.
- Without a better understanding of the scope of "information on emissions which is relevant for the protection of the environment" (Article 4(4)(d)), the exception could discourage third parties from voluntarily sharing commercial and industrial information with Government because it is not certain that they would get adequate protection for proprietary information shared confidentially.
- The EU's transposition of the Convention disapplies the "confidentiality" exceptions with regard to emissions. While we understand that the Convention is intended as a minimum standard, this leaves us with an uneven playing field across the Parties to the Aarhus Convention, where those countries which are not EU Member States have less of a barrier to overcome:
 - Article 4(4)(d), i.e. "information on emissions which is relevant for the protection of the environment shall be disclosed", and
 - Article 4(4), i.e. "taking into account whether the information requested relates to emissions into the environment".
- With regard to emissions, the opinion of CJEU Advocate General Kokott in the Ville de Lyon case [C-524/09](#) has been helpful in establishing the application of the EU emissions "override". This will restore some confidence in sharing

information about the development of technology aimed at reducing emissions which is not information on actual incidents of emissions.

(c) Intellectual property rights

- We understand this exception to apply to material protected by copyright, database rights, patents, etc., and to be aimed at protecting the interests of the holder of those rights rather than protecting intellectual property rights in principle.
- The exception therefore provides for information otherwise protected by intellectual property rights to be disclosed even if those rights are breached, but protects against its being re-used in a way that damages the interests of the holder of the IPR.
- It is difficult, if not impossible, to provide evidence of the requisite degree of harm to the IPR holder before that harm has taken place, as this would require knowledge of the effect of future actions by competitors and others who might unjustly profit from access to the novel information. It can also be difficult to identify when it has happened, e.g. when proprietary information placed in the public domain is used by a competitor to develop a rival or competing technology
- It is not clear how big a problem this is in practice.
- The only real remedy seems to be to pursue cases through the courts once the holder of the rights has already suffered the damage, at additional cost to the rights holder.
- We recognise that it is vital for research to be shared at some stage in order to ensure that the research is as good as it can be and is exploited to the full. However, both funding and academic careers can be affected by unlawful use of research material. The funding of much university research depends on ownership and publication of research, and the research results are unlikely to be published by peer-reviewed journals if the information is already in the public domain.
- The UK recognised the difficulty of protecting pre-publication research in non-environmental fields by introducing a special exemption in its Freedom of Information Act (section 22A) in 2014, but we cannot do the same to protect environmental information without an amendment to the Aarhus Convention.
- The best way of dealing with IPR is to identify the issues when you acquire the data, not when you want to share it. However, for cases where this has not been done, the UK's Environment Agency has developed an 'Approved for Access' (AFA) process by which they check data for third party rights, confidentiality etc. before publishing it for re-use. This has been viewed as best practice.

(d) Personal data

- In the UK data protection issues are governed by the [Data Protection Act \(DPA\)](#), which transposes the relevant EU legislation. The DPA is a protection regime rather than an access regime.
- The principles of the DPA are applied in the EIRs, often alongside the equivalent of the Aarhus Convention's Article 4(f)(g), to protect both members of the public and officials.
- The generally accepted approach to disclosure of officials' names is that senior staff are expected to take responsibility for their decisions and will be named; staff with public-facing roles are generally named if the information is about their area of work, although this is assessed on a case-by-case basis; junior staff are likely to have their names redacted. Staff in particularly sensitive roles are likely to need protection whatever their seniority. However, names are not necessarily in scope of all requests for information and may be irrelevant.
- There are various ways of redacting names that still allow the requester to see which body or public authority made which comments (e.g. in minutes, correspondence, notes of meetings, etc.) while protecting the individual who spoke on behalf of the body he or she represented.
- Public authorities receive many requests for information on staff structures, and the response is to increase publication of staff organograms. This can help ensure that correspondence is addressed to the correct people in the organisation, but conversely can encourage some members of the public to bombard staff with correspondence.

Item 4 - Access to environmental information on products: implementation Outlook

- In the 2014 National Implementation Report, the UK Government reported that changes to the way we produce, use and dispose of products and provide services can result in big reductions in the major environmental impacts. The Government's aim is to develop more integrated approaches to tackling product impacts right across their life cycle. This involves identifying product sectors with the most significant impacts and finding the best combination of market measures to bring about improvements. These measures include encouraging businesses to manage their impacts on the environment, raising public awareness and developing tools to improve green claims and other labelling. Information is available at <https://www.gov.uk/government/policies/encouraging-businesses-to-manage-their-impact-on-the-environment>
- WRAP (funded by Defra, the Welsh Government and the Scottish Government) have set up the Product Sustainability Forum to encourage organisations to work collaboratively on product environmental information. The Forum is a

collaboration of over 80 organisations including grocery and home improvement retailers and suppliers, academics, NGOs and UK Government representatives. It provides a platform to work together to measure, reduce and communicate the environmental performance of the grocery and home improvement products (<http://www.wrap.org.uk/content/product-sustainability-forum>). Data and information will be published and freely available on the internet. The Product Sustainability Forum is working with UNEP to develop collaborative actions with similar initiatives around the world.

Item 5 - Increasing interoperability and facilitating data sharing at the national level through electronic information tools

The discussions around this item used to be on services such as the UK Environment Agency's '[What's in your backyard?](#)' website mapping service. The real move forward in the last few years has been the change of emphasis away from such end-user service towards providing access to the underlying data itself. Others can use these data in their own services. Of relevance to the provision of data is the Government portal www.data.gov.uk and the Environment Agency's own service www.geostore.com/environment-agency, which links to it and provides the data for several hundred Defra datasets. Where the Environment Agency does choose to also provide the end-user service, such as [ePublic Registers](#) (up to 10,000 searches a day), the agency is moving towards making the data available via its service underneath www.data.gov.uk and then re-directing its own service to use the data that are commonly available to all.

Item 6 - Activities under other international forums

No comment from the UK.

Item 7 - Other business

No comment from the UK.