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FREEDOM OF INFORMATION UPDATE

MONICA CARSS-FRISK QC
JANE COLLIER
GEMMA WHITE

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44(0)20-7583 1770 Fax: +44(0)20-7822 7350 Email: clerks@blacksonechambers.com
www.blackstonechambers.com

1. The Freedom of Information Act 2000 came fully into force on 1 January 2005. In this paper we examine the way in which the provisions of the Act (to which we refer as "FOIA") have been applied in practice. We begin by summarising the key provisions of FOIA and include, where appropriate, reference to relevant Decision Notices of the Information Commissioner. Having provided an overview of FOIA in practice we proceed to consider two areas of particular interest to public lawyers, the use of FOIA in public law litigation and the Environmental Information Regulations 2004.

I FOIA IN PRACTICE: AN OVERVIEW

(i) The general principle: a right of access to information

2. FOIA establishes a general right of access to information held by public authorities. Public authorities for the purposes of the Act are defined by sections 3 to 7 and are, broadly, those listed in Schedule 1, those designated by order of the Lord Chancellor under section 5 and publicly owned companies as defined by section 6. Schedule 1 is frequently amended. The Department for Constitutional Affairs ("DCA") therefore publishes an online list of public authorities, updated monthly, at www.foi.gov.uk/coverage.htm.

3. By section 1 FOIA any person making a request for information to a public authority has the right:

   (i) to be informed by the public authority whether it holds information of the description specified in the request[1]; and

   (ii) if the public authority does hold the information, to have that information communicated.[2]

4. A person dissatisfied with a public authority's response to a complaint about the way in which it has handled his or her request for information may apply to the Information Commissioner for a decision whether, in any specified respect, a request for information made by the complainant has been dealt with in accordance with the requirements of part I of FOIA.[3] The Information Commissioner publishes his Decision Notices, which can be found at www.informationcommissioner.gov.uk.

5. Complainants and public authorities have a right of appeal to the Information Tribunal from a Decision Notice. The decisions of the Information Tribunal on appeals are published on its website at www.informationtribunal.gov.uk. A number of appeals are currently pending before the Information Tribunal but at present there are no published Information Tribunal decisions on appeals under FOIA. An appeal, on a point of law, lies against the decision of the Information Tribunal to the High Court of

[1] Section 1(1)(a). The duty of a public authority to state whether it holds the specified information is referred to in the Act as "*the duty to confirm or deny*": section 1(6).
[2] Section 1(1)(b).
[3] Section 50(1).

Justice in England, Court of Session, or High Court of Justice in Northern Ireland, depending upon the address of the public authority concerned.[4] For obvious reasons there is presently no High Court case law dealing with appeals from the Information Tribunal.

(ii) Exemptions: absolute or qualified by the public interest test

6. Part II of FOIA establishes exemptions to the general right of access to information. The exemptions fall into two categories depending upon their effect:[5]

   (i) Where a provision confers an absolute exemption (1) there is no duty to confirm or deny in relation to the particular information falling within it and/or (2) the information falling within it is "*exempt information*" which means that the public authority is under no obligation to communicate it.

   (ii) Where the provision does not confer an absolute exemption, there is no duty to confirm or deny and/or no obligation to disclose only if, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty and/or the exemption outweighs the public interest in disclosing whether the authority holds the information and/or disclosing the information itself. The balancing act public authorities are required to perform in deciding whether to disclose is referred to as "*the public interest test*".

7. Section 2(3) of FOIA contains a list of provisions conferring absolute exemption. They are section 21 (information accessible to the applicant by other means)[6], section 23 (information supplied by, or relating to, bodies dealing with security matters), section 32 (court records),[7] section 34 (parliamentary privilege), section 36 (prejudice to effective conduct of public affairs) so far as relating to information held by the House of Commons or the House of Lords, in section 40(1) (information containing personal data of which the applicant is the data subject) and subsection (2) so far as relating to cases where the first condition referred to in that subsection (personal data which do not fall within subsection (1)) is satisfied by virtue of subsection (3)(a)(i) or (b) of that section (contravention of data protection principles)[8], section 41 (information provided in confidence) and section 44 (prohibitions on disclosure).[9]

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[4] Section 59.

[5] The effect of the exemptions is provided for by section 2.

[6] By Decision Notice FS50063907 dated 25 August 2005 (Hertfordshire County Council) the Information Commissioner upheld the Council's reliance upon section 21 in a case in which it had previously supplied the complainant with the information held by it.

[7] Decision Notice FAC0065282 (Bridgenorth District Council) deals with this exemption. The Information Commissioner held that a transcript of court proceedings obtained by the Council was covered by section 32. The Information Tribunal has heard an appeal from this decision but no judgment has yet been published.

[8] By Decision Notice FS50075379 the Information Commissioner upheld the refusal of the Department of Finance and Personnel Northern Ireland to provide information about the full qualifications and experience of its web design team on the basis that it was personal information and disclosure would breach the provisions of the Data Protection Act 1998. In contrast by Decision Notice FS50062124 (Corby Borough Council) dated 25 August 2005 the Information Commissioner held that section 40(2) did not

8. All other exemptions are qualified by the public interest test. These are section 22 (information intended for future publication), section 24 (national security), section 26 (prejudice to defence), section 27 (prejudice to international relations), section 28 (prejudice to relations within the United Kingdom), section 29 (prejudice to the economy), section 30 (investigations and proceedings conducted by public authorities), section 31 (prejudice to law enforcement), section 33 (prejudice to audit functions), section 35 (formulation of government policy), section 36 (prejudice to effective conduct of public affairs relating to information other than that held by the House of Commons and House of Lords), section 37 (communications with Her Majesty and honours), section 38 (prejudice to health and safety), section 39 (environmental information), section 40 (personal information insofar as is not absolutely exempt), section 42 (legal professional privilege)[10] and section 43 (commercial information)[11].

9. Since January 2005 the Information Commissioner has considered the application of a number of the exemptions. Relevant decisions are cited as footnotes to the particular exemptions listed above. More generally, the Decision Notices dealing with qualified exemptions provide some indication of the way in which the public interest test is applied in practice. While both the DCA and the Information Commissioner have published guidance on this aspect of FOIA, the Decision Notices provide a far better indication of the Information Commissioner's approach and some factors which will be relevant to the test.[12]

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apply to a request for disclosure of the total amount of money paid to the former temporary finance officer employed by the council as the Council was able to satisfy the sixth condition for data processing listed in Schedule 2 DPA as there was a legitimate interest in making the public aware of the amount of money spent on employing senior staff. Decision Notice FSS50064699 dated 1 August 2005 deals with sections 40(1) and 40(2) which were properly applied to a request for information about an investigation into the applicant conducted by the Standards Board for England as a result of a complaint made by a third party.

[9] By Decision Notice FS50069386 the Information Commissioner upheld the Independent Police Complaints Commission refusal to provide information on the basis of a statutory prohibition under section 80 of the Police Act 1996. In June 2005 DCA published a report on its review of statutory prohibitions on disclosure which identified, amongst other things, a number of legislative provisions for amendment or repeal.

[10] By Decision Notice FSS50064699 dated 1 August 2005 (Standards Board for England) the Information Commissioner upheld a refusal to disclose information under section 42. The decision is being appealed.

[11] Decision Notice FS50063478, deals with this exemption. The Information Commissioner held that the National Maritime Museum was entitled to rely upon the section 43(2) exemption in refusing to disclose information relating to payments made to Conrad Shawcross for his exhibition "*Continuum*" as they were involved in active negotiations with their next proposed artist. This decision has been appealed and is currently pending before the Information Tribunal.

[12] Chapter 7 of the DCA guidance, "*Introduction to exemptions*", dealing with the public interest test notes that "*[t]he assessment of the public interest is a judgment in which policy and legal interpretations are both involved to some degree: it is an inherently dynamic concept. The law and practice of the public interest test will develop by decisions made within Government and by the Information Commissioner and the courts.*" The Information Commissioner's Freedom of Information Act Awareness Guidance No 3 provides more useful guidance upon the application of this test listing some factors to be, and factors not to be, taken into account.

10. In Decision Notice FS50063478 dated 20 June 2005 (National Maritime Museum) the Information Commissioner considered the application of the exemption under section 43(2) which provides that:

> *"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."*

11. The complainant had requested information, in the form of documents and correspondence, relating to payments to Conrad Shawcross for his exhibition "*Continuum*". The National Maritime Museum ("NMM") refused to provide the information on the basis that the release of the information would prejudice both its commercial interests and those of Conrad Shawcross and that the public interest in maintaining the exemption outweighed the public interest in releasing the information. The Commissioner agreed that the exemption applied because the information sought comprised the details of the financial arrangements between NMM and Conrad Shawcross. He then proceeded to consider the public interest test separately in relation to the interests of the NMM and of Mr Shawcross.

12. As to the prejudice to NMM's commercial interests, the Commissioner took account of the public interest in financial transparency and accountability where public authorities commission new works of art, particularly where that is not their core activity and recognised that disclosure might inform debate about museum funding and the choices made by a publicly subsidised museum to attract greater visitor numbers and generate revenue. Against that, the Commissioner noted that at the time the request was made the NMM was involved in active negotiations with another artist and recognised that the premature release of the financial information sought would be likely to prejudice NMM's bargaining position in respect of these active negotiations for a similar project. The Commissioner found that the public interest in maintaining the exemption outweighed the public interest in releasing it, giving particular weight to the fact that NMM was dealing with public funds and therefore needed to ensure value for money. The Commissioner emphasised that the likelihood of prejudice would diminish with time and with the conclusion of the negotiations to the extent that the public interest in disclosure would outweigh the public interest in maintaining the exemption.

13. In contrast, in relation to the interests of Mr Shawcross the Commissioner held that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.[13] He recognised the potential prejudice to Mr Shawcross' interests and acknowledged the public interest in encouraging new artists and entrepreneurs to flourish. However, the Commissioner was of the view that those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about those activities than previously had been the case prior to FOIA coming into force.

[13] Although, as a result of the Commissioner's decision on the test as applied to the NMM, Mr Shawcross' interests were in fact protected.

14. This decision is being appealed to the Information Tribunal. However, general points to emerge from the decision, which appear to be correct as a matter of law and principle, are that:

(i) Timing is key to application of the public interest test. The older the information becomes, the weaker the public interest in withholding it.

(ii) Protection of public funds will be an important factor to consider. While this factor often weighs on the side of disclosure (transparency reinforcing public scrutiny of public spending) it can conclusively weigh against disclosure because of the need to protect the public authority's bargaining position.

(iii) The protection of the bargaining position of private individuals who have dealt with public authorities is a factor to be taken into account but is far less likely to outweigh the public interest in openness.

(iv) It is clear (although not expressly stated in the Decision Notice) that the public interest test is applied on the basis that disclosure is to the public at large rather than the individual applicant.

15. In a number of Decision Notices the Information Commissioner has considered requests for information relating to the position and activity of, and funds raised by, speed cameras.[14] The relevant public authorities presented evidence to the effect that some of the speed cameras positioned by them were dummies and that the effectiveness of their system relied upon the public perception that all cameras were active. Disclosure of the information sought would have revealed which cameras were not active. In each case the relevant public authorities relied upon sections 31 (law enforcement) and 38 (likely to endanger health and safety), refusing to disclose the information. In applying the public interest test to these cases the Information Commissioner acknowledged the value of improving public awareness and the opportunity disclosure would bring to the debate on the effectiveness and the purpose of speed cameras. However, he considered that there was a stronger public interest in avoiding both an increase in non-compliance with road traffic laws and the likely increased risk to the health and safety of the public. In addition he was persuaded that if the perception of the risk of being caught by speed cameras was reduced this might persuade the public authority to install and operate more active cameras thereby incurring additional public expenditure.

16. It will be some time before a significant body of domestic case law has evolved on the public interest test. Until that time case law from other common law jurisdictions with FOI legislation provides a useful guide as to how the public interest test should be approached. The Information Commissioner's Freedom of Information Act Awareness Guidance No 3 cross refers to a booklet published by The Constitution Unit entitled *Balancing the Public Interest: Applying the public interest test to exemptions in the UK*

[14] Decision Notice FS50068601 (Essex Constabulary) dated 3 August 2005, Decision Notice FS50067279 (Hampshire Constabulary) dated 2 August 2005, Decision Notice FS50068019 (Hampshire Constabulary) dated 2 August 2005.

Freedom of Information Act 2000 which summarises many of the recent cases. In addition any decisions made by the Parliamentary Ombudsman under the Open Government Code should be considered: www.ombudsman.org.uk.

(iii) Dealing with requests for information

17. Since January 2005 the Information Commissioner has considered a number of aspects of the practical ways in which public authorities are obliged to deal with requests for information. These are considered below.

18. **Time Limits.**

Under FOIA a public authority is obliged to comply with its section 1 duty promptly and in any event within 20 working days of the date of receipt of a request for information.[15] Where the public authority gives the applicant a fees notice, the working days beginning with the day on which the fees notice was given to the applicant and ending with the day on which the fee was received by the public authority are disregarded for the purposes of calculating the 20 day time limit.

19. In practice it appears that many public authorities are not complying with this time limit. The majority of Decision Notices issued by the Information Commissioner record a breach of the Act because a response was received outside the 20 day time limit.

20. If a request is to be refused the public authority is required, within 20 days, to send the applicant a notice stating which exemption is relevant and stating why the exemption applies.[16] Where the public authority has decided that the public interest test is satisfied in relation to a qualified exemption it must give reasons for this conclusion.[17] However, a public authority which is considering whether the public interest favours relying on an applicable exemption need not comply with its obligations under section 1 "*until such time as is reasonable in the circumstances*".[18] In its notice to the applicant, which must nevertheless be sent within 20 days, a public authority which has not reached a decision on the balance of public interest must indicate that this decision has not been reached and give an estimate of the date by which it expects a decision to be reached.

21. The Information Commissioner's Decision Notice FS50063907, dated 25 August 2005 (Hertfordshire County Council), provides an indication of his approach to extensions of time under this provision. In that case the Council had responded to the request stating that "*a number of the exemptions in Part II of the Act may apply to your application and the Council has to consider whether the duty to confirm or deny outweighs the public interest in disclosing whether the public authority hold the information*". Having received a complaint, the Information Commissioner wrote to the Council asking whether it had

[15] Section 10(1). The Freedom of Information (Time for Compliance with Requests) Regulations 2004 allow specific public authorities a longer, 60 day maximum period, in certain circumstances.
[16] Section 17.
[17] Section 17(3).
[18] Sections 10(3) and 17(3).

made a decision as to disclosure. If it had not, it was asked to provide a target date. The Commissioner asked for an account of why the extension was required in a case which had already received extensive consideration by the Council and the public interest considerations were therefore presumably well known. The Council replied to the letter 3 months later when it wrote enclosing a copy of its letter to the complainant refusing to provide information under section 21 (an absolute exemption). In the circumstances of the case the Information Commissioner was not satisfied that an extension to the 20 day period had been required.

22. **Fees**

Section 9 of FOIA provides that public authorities may charge a fee for responding to requests for information (determined in accordance with regulations made by the Lord Chancellor) for so doing. The relevant regulations are the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (referred to as the "*Fees Regulations*").[19] The charges a public authority is permitted to impose differ according to whether the public authority is obliged to respond to a request or whether it offers to do so notwithstanding that the cost of doing so would exceed the "appropriate limit" under section 12 (see below). Regulation 6 sets out the manner in which the public authority may determine the maximum fee to be charged under section 9. The maximum fee is equivalent to a sum the public authority reasonably expects to incur in complying with a request, and may include the costs of complying with any obligation under section 11 as to the means or form of communicating the information, reproducing any document and postage or other forms of transmission. But the public authority may not take into account costs which are attributable to the time which the person communicating the information spends.

23. **Costly requests**

Section 12(1) of FOIA provides that a public authority is not obliged to comply with section 1(1) "*if the authority estimates that the cost of complying with the request would exceed the appropriate limit*". But this does not exempt the public authority from complying with paragraph (a) of section 1(1) (the duty to confirm or deny) unless the cost of complying with that paragraph alone would exceed the appropriate limit.[20] The "*appropriate limit*" is defined by the Fees Regulations and is £600 for a Schedule 1 public authority and £450 for any other.[21] The Regulations provide for the costs which a public authority may, and may not, take into account for the purpose of determining whether the "*appropriate limit*" is exceeded.[22]

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[19] DCA has published very useful guidance on all areas of application of the Fees Regulations which can be found at http://www.foi.gov.uk/feesguide.htm.
[20] Section 12(2).
[21] Regulation 3.
[22] Regulation 4.

24. Paragraph 14 of the Code of Practice on the Discharge of Public Authority's Functions under Part I of FOIA[23] provides that where an authority is not obliged to comply with a request for information because the cost of complying would exceed the "appropriate limit" and where the public authority is not prepared to comply on a discretionary basis the authority should consider providing an indication of what information could be provided within the cost ceiling or consider advising the applicant that by revising or refocusing their request information may be able to be provided for a lower fee (see further below).

25. **The provision of advice and assistance**

The Information Commissioner has, on a number of occasions, had to consider whether public authorities have complied with their duties under section 16 of FOIA to provide advice and assistance to persons who propose to make, or have made, a request. The Code of Practice provides detailed guidance as to what is expected of public authorities. Broadly, public authorities are expected to establish a channel of communication with an applicant in order to enable him or her to define the information in such a way that the authority can locate it and to provide details of the types of information which could be provided.

26. Decision Notice FS50075378 (Ferryhill Town Council) records a decision on a case in which the Council had correctly estimated the cost of complying with the request for information in accordance with the Fees Regulations and therefore there was no duty to supply it as the costs exceeded the "*appropriate limit*" (see above). However, the Council had acted in breach of section 16 as it had failed to give the complainant the opportunity to refine its request or to offer to supply information which could have been provided within the appropriate limit.

27. In Decision Notice FS50063475 dated 5 July 2005 the Information Commissioner found that Nottingham City Council had complied with its duties under section 16 by redirecting the applicant to the public authority which might have held the information specified in the applicant's request. Similarly a public authority had complied with section 16 when it endeavoured to provide the applicant with some information concerning a particular car boot sale site despite the fact that it did not hold the documents requested: Decision Notice FAC0068022 dated 3 August 2005.

28. By his Decision Notice FS50064062 dated 5 September 2005 (Luton Borough Council) the Information Commissioner found that the Council had failed to comply with section 1. The request was for information relating to land with a complicated management history which made it difficult for the applicant to identify the information he wanted. Although the Council believed it had provided the information requested, the Information Commissioner held that it was reasonable to interpret the request in a different way and directed it to provide a copy of information contained in records of correspondence. Although section 16 is not cited in the decision, this is a

[23] The Code is issued under section 45 of FOIA to provide guidance as to the practice which it would, in the opinion of the Secretary of State for Constitutional Affairs, be desirable for public authorities to follow.

case in which had the Council sought properly to clarify the applicant's request it might have been in a position to identify and provide the relevant information.

II USING FOIA IN LITIGATION

(i) Disclosure outside FOIA

The common law principle of openness in public law litigation

29. What use can be made of FOIA for the purposes of litigation? The requirement of openness in public law litigation is already well-established. See eg. the observation of Sir John Donaldson MR in **R v Lancashire County Council, ex p Huddleston** [1986] 2 All ER 941 that judicial review "*is a process which falls to be conducted with all the cards face upwards on the table and [where] the vast majority of the cards will start in the [public] authority's hands.*" (p 945g). More recently, see **R(Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs** [2002] EWCA Civ 1409 per Laws LJ: "*there is…a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide.*" (paragraph 50).

30. These are important principles, but because the test is one of what is relevant to the issues in the litigation, there is clearly significant scope for debate as to what a public authority is required to disclose.

The CPR

31. By contrast with the general common law principle of openness, the CPR do not envisage disclosure in judicial review proceedings. CPR 54 does not specifically deal with the topic, but 54PD.12 expressly provides: "*Disclosure is not required unless the court orders otherwise.*" This reflects the traditional reluctance on the part of the Courts, notwithstanding (or, in a sense, because of) the strong expectation of openness referred to above, to compel public authorities to make disclosure. See **R v Secretary of State for the Home Department, ex p Fayed** [1998] 1 WLR 763, where Lord Woolf MR observed that: "*On an application for judicial review there is usually no [disclosure] because [disclosure] should be unnecessary because it is the obligation of the [defendant] public body in its evidence to make frank disclosure to the court of the decision making process.*" (p 775C).

Pre-claim disclosure

32. A further limitation on the common law principle of openness on the part of public authorities is that it (probably) only comes into play once a claim for judicial review has been launched[24].

[24] The '*model*' letter before claim contained in Annex A to the Judicial Review Pre-Action Protocol envisages that a request for information will be contained in the letter, eg. a request for a fuller explanation of the reasons for the decision that is being challenged. But the Pre-Action Protocol

33. CPR 31.16 provides for disclosure before proceedings start, but only in limited circumstances. This power is based on the provision for pre-action disclosure in section 33 of the Supreme Court Act 1981, which until 1999 was limited to personal injury claims. A number of conditions must be satisfied before an order for pre-claim disclosure can be made: (a) the respondent to the application must be likely to be a party to subsequent proceedings; (b) the applicant for disclosure must be likely to be a party to those proceedings; (c) if proceedings had started, the respondent's duty of disclosure by way of standard disclosure under CPR 31.6 would extend to the documents sought; (d) disclosure at that stage is desirable in order to (i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs (CPR 31.16(3)). This is a formidable list of hurdles, although it has been held that there is no requirement to establish that the initiation of proceedings is itself likely. See **Black v Sumitomo Corpn** [2002] 1 WLR 1562, at paragraphs 71-72.

(ii) FOIA

The broad sweep of FOIA

34. There are several obvious reasons why a request for disclosure under FOIA may be a very useful tool in public law litigation: (1) the request can be made at any time, whether pre- or post- commencement of legal proceedings; (2) there is no test of relevance to any issue in proceedings; and (3) there is no limitation based on 'need' for disclosure to dispose fairly of the proceedings. In addition, the general prohibition on subsequent use of disclosed documents contained in CPR 31.22 does not apply.

Procedure for request

35. The procedure for requesting disclosure under FOIA is extremely simple. The only formal requirements are in section 8(1) of FOIA, where it is provided that a '*request for information*' is a reference to a request which (a) is in writing, (b) states the name of the applicant and an address for correspondence, and (c) describes the information requested. There is no need even to state that the request is made under FOIA, although it seems clearly sensible to do so. As the guide to FOIA published by The Campaign for Freedom of Information notes, any request for information under FOIA will be valid regardless of whether the legislation is mentioned, but doing so will remind officials to deal with it correctly.

36. It is also fundamental to FOIA that there is no need to give any reason why the information is requested.

Timing of request

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expressly states that "*This protocol does not impose a greater obligation on a public body to disclose documents or give reasons for its decision than that already provided for in statute and common law.*" (paragraph 6)

37. At what stage should a FOIA request be made if the purpose of the request is to use the information in litigation? Because the processing of FOIA requests often takes a considerable period of time[25], and could involve at least an internal appeal within the relevant public authority, if not a further appeal to the Information Commissioner[26], it is important to make the request as soon as possible.

38. If the applicant is lucky enough to obtain the information speedily, s/he may be able to use it at the stage of formulating a pre-claim letter for a potential judicial review. But it would be inadvisable for a potential claimant to take the risk of being out of time for pursuing a claim because s/he has waited for disclosure under FOIA before commencing proceedings. The requirement in CPR 54.5(1) that a claim form for judicial review must be filed promptly and in any event not later than three months after the grounds for making the claim first arose is applied strictly. Where there is delay because the claimant has lacked essential knowledge for the purpose of pursuing a judicial review[27], or because the claimant has been in communication with the defendant with a view to resolving the claim by other means[28], the Court may be prepared to extend time. But seeking information from the potential defendant under FOIA can hardly be regarded as a form of alternative dispute resolution. And if the claimant considers that s/he may have a claim for judicial review but lacks the necessary information, it is likely that the sensible course will be to send a letter before claim which combines a '*common law*' request for information with a request under FOIA, and (if necessary) to go ahead and issue proceedings within the time limit, even if the request has not at that stage been complied with.

Affected third parties

39. In relation to the timing of a request for FOIA disclosure, it is also important to consider the possible delay caused by affected third parties. This might arise, for example, in relation to a potential challenge to a licensing decision, where commercially sensitive information of third parties could be discloseable.

40. Section 45(2)(c) of FOIA provides that a Code of Practice issued by the Lord Chancellor must include provision relating to consultation with persons to whom the information requested relates or persons whose interests are likely to be affected by the disclosure

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[25] According to DCA statistics about the operation of FOIA January –March 2005, a considerable proportion of requests were not being dealt with within the Act's time limits. For example, more than a third of all requests to government departments (36%) took longer than the 20-working day deadline to answer.

[26] And possibly to the Information Tribunal.

[27] See eg. **R v Licensing Authority, ex p Novartis Pharmaceuticals Ltd** [2000] COD 232, where the Court held that there was good reason to extend time where a claimant lacked essential information needed for the purpose of knowing whether it had a claim.

[28] See eg. **R v Hammersmith and Fulham London Borough Council, ex p Burkett** [2001] Env LR 39 (CA) at paragraph 14: "*Judicial review is in principle a remedy of last resort. It follows, as it always does when a potential [claimant] for judicial review expeditiously seeks a reasonable way of resolving the issue without litigation, that the court will lean against penalising him for the passage of time and will where appropriate enlarge time if the alternative expedient fails.*"

of information. Such provision is contained in paragraphs 25-30 of the Code of Practice issued under section 45 in November 2004.

41. If an authority were to refuse to consult an affected third party, or to listen to any representations made by such a third party, in circumstances where under the Code such consultation should take place, it would be open to the third party to challenge that decision on an application for judicial review. The question for the Court would then be whether the authority had a proper basis, in public law terms[29], for deciding to depart from the requirements of the Code in that respect.

42. Where a public authority decides that it should comply with a request for disclosure after it has consulted with any affected third party, there is no specific remedy for the third party under FOIA. There is, in particular, no right to apply to the Information Commissioner for a decision that the public authority has wrongly failed to apply an exemption. The right to apply to the Information Commissioner conferred by section 50 of the 2000 Act only applies to "*the complainant*", who is the person who made the request for information (see section 50(1)). The right is not extended to those affected by disclosure[30]. In those circumstances, the third party's remedy would, again, be to make a claim for judicial review of the authority's decision, probably including a claim for an injunction or a stay to prevent disclosure pending the outcome of the judicial review.

43. It should also be possible in principle for an affected third party to make a claim for judicial review of a decision by the Information Commissioner that information affecting it should be disclosed. So far as concerns appeals against a decision by the Commissioner to the Information Tribunal, FOIA amended the Data Protection Act 1998 to provide for the inclusion in rules governing the procedure of the Tribunal of the possibility of joinder of any person to an appeal to the Tribunal (see Data Protection Act 1998, Sch 6, para 7(2)(aa)). This has been done through Rule 7 of the Information Tribunal (Enforcement Appeals) Rules 2005 (SI 2005/14) (as amended), which provides that any person may be made a party to an appeal, if the Tribunal considers that it is desirable. This appears clearly to be intended to enable affected third parties to be made a party to an appeal (although such third parties have no right to lodge an appeal). Once a person is made a party to an appeal to the Tribunal in this way, s/he or it may appeal the decision of the Tribunal to the High Court (see section 59 of FOIA).

44. The potential claimant in public law litigation who wants to use FOIA for advance disclosure needs to consider, therefore, whether any third parties would be affected by the disclosure, and bear in mind the potential for further delay where this applies. As mentioned above, where an issue of this kind arises, it would in most cases be unwise to delay the '*prompt*' issuing of judicial review proceedings on the basis that a FOIA request for disclosure is pending.

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[29] Eg. taking into account all and only relevant considerations.

[30] This view is shared by the authors of Macdonald & Jones: The Law of Freedom of Information (2003), paragraph 17.74. See also Supperstone & Pitt-Payne: The Freedom of Information Act 2000, paragraph 5.15.

Some relevant exemptions

45. The exemptions in FOIA will of course apply to any request for disclosure for the purposes of litigation. Some exemptions have the effect of enabling the public authority to refuse disclosure of information where disclosure would be required under the CPR, if the information were relevant to an issue in litigation. In particular, confidential information which is subject to the (absolute) exemption in section 41, and/or to the (qualified) exemption in section 43 for information whose disclosure would be likely to prejudice commercial interests, would generally not be privileged from disclosure under the CPR.

46. On the other hand, legal professional privilege ("LPP") provides an absolute exemption from any duty of disclosure at common law or under the CPR, but that is not the case under FOIA. Section 42(1) of FOIA provides that "Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information." On the face of it this exemption appears to be absolute, but it is clear from section 2(3) of
47. FOIA that it is not. In other words, the section 42 exemption is subject to the public interest test[31].

48. That information which is subject to LPP is not absolutely exempt is perhaps surprising in the light of the very strong statements in the case law about the importance of the privilege at common law. In *R (Morgan Grenfell Ltd) v Special Comr* [2002] 2 WLR 1299, for example, Lord Hoffmann observed that "LPP is a fundamental human right long established in the common law." (paragraph 7). And as Lord Hobhouse noted in that case, citing Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, ex p B* [1996] AC 487, at 508: "If a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits."

49. How then is one to approach the exemption for LPP in section 42(1)? What is the nature of the 'new' balancing act that is now to be carried out? It would be tempting to think, as a claimant in public law litigation, that one can now potentially gain an immediate advantage over one's opponent by seeking disclosure under FOIA of the public authority's legal advice concerning the merits of its case. And it would be possible to construct an argument that public authorities should conduct litigation with a greater degree of openness than ordinary litigants, involving, perhaps, an obligation to disclose the advice it has received about its prospects of success. But that is certainly not the way the DCA sees the matter. Their guidance on section 42 of FOIA stresses that there is an important public interest in the proper administration of justice (paragraph 4.2), and that "*The need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to others*." (paragraph 4.4). The DCA concludes that "Disadvantaging

[31] I.e. whether "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*" (section 2(2)(b)).

the Government in the conduct of its litigation would not be in the public interest." (paragraph 4.17). This view appears to be shared by the Information Commissioner, who has commented in relation to the disclosure of material which is subject to LPP that "*…where litigation is ongoing and where its disclosure would undermine the prospects of success by the authority, there will be very strong arguments against disclosure*" (Freedom of Information Act Awareness Guidance No. 4).

50. So will the public interest in disclosure ever '*trump*' the public interest in maintaining the privilege? The DCA takes the view that this will be the case in those circumstances where the government would decide to waive the privilege if litigation were afoot (DCA Guidance, paragraph 4.12). This might be the case in relation to legal advice which is in the nature of a historical record. But it is likely to be very difficult to use FOIA to obtain information about current legal advice to public authorities.

51. This is exemplified by Decision Notice FSS50064699 dated 1 August 2005 (Standards Board for England) in which the Information Commissioner upheld a refusal to disclose information under section 42 (legal professional privilege). He held that there is always a strong public interest in maintaining this exemption. The public interest in the public knowing on what basis a decision had been taken did not outweigh the public interest in the authority being able to seek and obtain legal advice which may be relevant in the event of litigation. The decision is currently under appeal.

III ENVIRONMENTAL INFORMATION REGULATIONS 2004

(i) Background

52. Environmental information is subject to a separate regime. Before FOIA came into force, the Environmental Information Regulations 1992 ("*the EIR 1992*") had already provided a regime for disclosure of information '*relating to the environment*'. On 1 January 2005 the Environmental Information Regulations 2004 ("*the EIR 2004*") came into force, replacing the EIR 1992.

53. FOIA section 39 provides that information is exempt information if the public authority holding it (a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations; or (b) would be so obliged but for any exemption contained in the regulations.[32] '*Environmental information regulations*' mean regulations made under section 74 of FOIA; or regulations made under section 2 (2) of the European Communities Act 1972 for the

[32] The exemption in section 39 is a qualified exemption. Thus, even if the information is exempt pursuant to section 39, a public authority under FOIA must nevertheless consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. But in practice it seems unlikely that if the public authority has determined that the exception should be applied under the EIR, it would then go on to determine under FOIA that the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information.

purpose of implementing any Community obligation relating to public access to, and the dissemination of, information on the environment.

54. The EIR 2004 were made by the Secretary of State under section 2 (2) of the EC Act in relation to freedom of access to, and dissemination of, information on the environment held by or for public authorities or other bodies. They are intended to transpose Council Directive on public access to environmental information 2003/4/EC ("*the 2003 Directive*"), as well as to enable the UK to ratify the Aarhus Convention.[33] [34] The 2003 Directive repeals the earlier Directive 90/313/EEC on the freedom of access to information on the environment. Its objectives are (a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and (b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information (Article 1). To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted. As the preamble to the 2003 Directive sets out at (1):

> *'Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.'*

55. Again, it will be some time before a significant body of case law has evolved on the Regulations, but the EIR 1992 and the earlier Directive have been considered in a number of cases, which will still be relevant in any consideration of the EIR 2004.

56. Regulation 16 of the EIR 2004 provides that the Secretary of State may issue a code of practice providing guidance to public authorities on the discharge of their functions under the EIR. DEFRA has issued a code of practice (dated February 2005); again, the

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[33] The UNECE Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters.

[34] See Lord Whitty, Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs on 21 December 2004, Hansard, column 1694 " *So why have we required these new regulations? In 1998 we signed the Aarhus Convention, which aims to strengthen the role of members of the public and environmental organisations in protecting and improving the environment for the benefit of future generations. By recognising citizens' environmental rights to information and to participation in justice it aims to promote greater accountability and transparency. The Convention aims to allow members of the public greater access to the information held by public authorities, including active dissemination of information to the public. The EC has also signed the Aarhus Convention and has adopted several instruments to apply the convention across the Community, one of which is the EU Directive on public access to environmental information, which the UK is required to transpose by February 2005. The new regulations transpose that directive into UK law, as well as ensuring that we can ratify the Aarhus Convention."*

code does not have statutory force, but paragraph 11 of the code states that authorities are expected to abide by it unless there are good reasons, capable of being justified to the Information Commissioner, why it would be inappropriate to do so. DEFRA has also issued '*Guidance to the Environmental Information Regulations 2004*' dated March 2005 (parts of which have subsequently been updated), and the Information Commissioner's website also includes guidance on various issues.

(ii) <u>The EIR 2004</u>

57. The key provisions granting rights to environmental information are set out at regulations 4 and 5 of the EIR 2004. Regulation 4 provides that, with certain exceptions, a public authority shall in respect of environmental information that it holds[35]:

(i) progressively make the information available to the public by electronic means which are easily accessible; and

(ii) take reasonable steps to organise the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.

58. Regulation 5 of the EIR 2004 provides for the duty to make available environmental information on request, subject to certain provisos. Regulation 5 (2) provides that information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request; regulation 7 (1) provides that the period may be extended to 40 working days if the public authority reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so. This is significantly different from FOIA (see above) in that there is no further extension available where the authority is conducting the public interest balancing exercise. Regulation 5 (3) provides that to the extent that the information requested includes personal data of which the applicant is the data subject, the paragraph 5 (1) duty does not apply to those personal data. Regulation 5 (6) provides that any enactment or rule of law that would prevent disclosure of information in accordance with the EIR does not apply.

59. Regulation 6 of the EIR 2004 provides that where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available unless it is reasonable for it to make the information available in another form or format; or the information is already publicly available and easily

[35] Regulation 3 (2) provides that information held by a public authority includes information held by another person behalf of the authority.

accessible to the applicant in another form or format. Regulation 8 sets out the charging provisions. (These provisions have been the subject of a number of Decision Notices by the Information Commissioner, which provide guidance on the kind of charges that would be considered reasonable.)

60. Regulation 9 (1) of the EIR 2004 provides that a public authority shall provide advice and assistance so far as it would be reasonable to expect it to do so to applicants and prospective applicants. In particular, where a public authority decides that an applicant has formulated a request too generally, it shall ask the applicant as soon as possible (and in any event no later than 20 working days after the date of receipt of the request) to provide more particulars; *and* it shall assist the applicant in providing those particulars. Regulation 9 (3) of the EIR 2004 provides that to the extent that a public authority conforms to the code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the regulation 9 (1) duty to provide advice and assistance. The code issued by DEFRA sets out types of assistance that might be appropriate including providing an outline of different kinds of information that might meet the terms of the request; access to detailed catalogues and indices; providing a general response setting out options for further information that could be provided on request; and advising the person that another person or agency such as a Citizens' Advice Bureau may be able to assist them with the application or make it on their behalf (code, para 10). The code states that public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

61. Regulation 10 provides that where a public authority does not hold the information requested but believes that another public authority does hold it, it shall either transfer the request to the other public authority or supply the applicant with the name and address of that authority.

(iii) <u>The definition of environmental information</u>

62. Whether making or considering a request, it will be critical to the applicant or the public authority to determine whether the information in question is environmental information within the EIR 2004, and therefore subject to the EIR regime, or not - and therefore subject solely to FOIA.

63. '*Environmental information*' is defined at regulation 2 (1) of the EIR 2004 as having the same meaning as in Article 2 (1) of the Directive. Broadly summarised, it is: any information in written, visual, aural, electronic or any other material form on (a) the state of the elements of the environment, such as air and atmosphere, water…, biological diversity and its components, including genetically modified organisms, and the interaction amongst those elements; (b) factors, such as substances, energy… radioactive waste, emissions… affecting or likely to affect the elements of the environment; (c) measures such as policies, legislation, plans … and activities affecting

or likely to affect the elements and factors referred to above, as well as measures or activities designed to protect them; (d) reports on the implementation of environmental legislation; (e) cost benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to above; and (f) the state of human health and safety including the contamination of the food chain… conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or.. by any of the matters referred to in (b) and (c).

64. The definition of '*environmental information*' under the earlier Directive, and under the EIR 1992 (which contain a different definition of environmental information from the current definition), has been considered in a number of English and EC cases. In **Mecklenburg v Kreis Pinneberg der Lanrat** [1998] EC I-3809, a case concerning the earlier Directive, the ECJ made clear that the definition of '*environmental information*' was intended to be broad.[36] It held in that case that a statement of views submitted by a countryside protection authority in development consent proceedings constituted environmental information. Nevertheless there are limits to the definition – see **Glawischnig v Bundsminister fur soziale Sicherheit und Generationen** 90/313/EC, case C-316/01, 12 June 2003, also concerning the earlier Directive, in which the ECJ found that information relating to measures of controls on labelling of foodstuffs which might contain genetically modified organisms, did *not* fall within the category of information relating to the environment for the purpose of the directive (paras 29 - 35).

65. In the English courts, under the EIR 1992 it has been held that the source of information in relation to munitions dumping was environmental information because it directly affected the quality of that information (**R v British Coal Corporation ex parte Ibstock Building Products** 1995 JPL 836)[37]; as was a concession agreement relating to the construction of a bypass (**R v Secretary of State for the Environment, Transport and the Regions, ex parte Alliance against Birmingham Northern Relief Road** [1999] JPL 231).[38] Again, the Court was prepared to adopt a relatively broad construction of the term '*environmental information*' - and it is to be expected that under the EIR 2004 it will continue to do so. DEFRA's own Guidance states that experience

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[36] "*It must be noted in the first place that Article 2 (a) of the directive includes under 'information relating to the environment' any information on the state of the various aspects of the environment mentioned therein as well as on activities or measures which may adversely affect or protect those aspects, 'including administrative measures and environmental management programmes.' The wording of the provision makes it clear that the Community legislature intended to make that concept a broad one, embracing both information and activities relating to the state of those aspects.*" (para 19)

[37] "*The purpose of the legislation, it seems to me, is to provide for freedom of access to information on the environment. It would be strange if the legislature had intended that only the bare information itself should be disclosed, without it being possible to ascertain whether it was right, wrong or indifferent.*" per Harrison J.

[38] "*The definition of information relating to the environment in Article 2 of the Directive is very broad, in my view deliberately so, and this broad definition has been carried through into the Regulations. It would have been possible to define more narrowly the obligation to disclose environmental information, but that was not the intention of either the Council of the European Communities, or Parliament*" per Sullivan J.

from the implementation of the environmental information regime has established that '*environmental information*' is interpreted very broadly (para3.3).

66. In one of the few Information Commissioner decisions to date on the EIR 2004, Decision Notice FS50062329 re Bridgnorth District Council, the Information Commissioner considered that a record of an investigation into whether an enforcement notice should be served under section 215 of the Town and Country Planning Act was environmental information (section 215 applying to situations where the condition of a piece of land is having an adverse effect on the amenity of an area) in that it related to measures or activities designed to protect land.

(iv) FOIA and the EIR 2004

67. There are a number of notable differences between the FOIA provisions and the provisions under the EIR 2004 which mean that in many cases, accessibility to information should be greater under the EIR 2004 than under FOIA. The DEFRA Guidance itself states that '*Access to environmental information is particularly important as environmental issues affect the whole population*' (para 7.105).

68. First, the definition of a '*public authority*' is wider than that in FOIA. Regulation 2 (2) provides that 'public authority' means (a) government departments; (b) any other public authority as defined in section 3 (1) of FOIA, with certain modifications; and also, significantly, (c) any other body or other person, that carries out functions of public administration; or (d) any other body or other person, that is under the control of a person falling within (a) – (c) and having public responsibilities relating to the environment; exercising functions of a public nature relating to the environment; or providing public services relating to the environment. DEFRA's Guidance states that any private company that is sufficiently associated with the activities of the government that they owe similar obligations with regard to the environment have responsibilities under the EIR (para 2.4) and refers expressly to private companies or Public Private Partnerships with obvious environmental functions such as waste disposal, water, energy, transport companies (such as the CAA and port authorities) and environmental consultants.

69. Second, there is an express duty on a public authority to apply a presumption in favour of disclosure (regulation 12 (2)). While it is often said that FOIA also establishes a presumption in favour of disclosure where exemptions are qualified (in that it is only if the public interest in maintaining the exemption outweighs the public interest in disclosing the information that disclosure can be refused), the EIR 2004 make this presumption explicit. In doing so, they reflect the 2003 Directive, which provides at Article 4 (2) (and in the preamble) that grounds for refusal shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure.

70. DEFRA Guidance reinforces this, stating that '*if it is credibly arguable that a certain type of information or a particular piece of information does not fall within the scope of an exception then it is likely that it is not covered*' (para 7.2).

71. Third, a request for environmental information need not be in writing; and fourth, as set out above, the time limits are shorter (20 days, with an extension to 40 days, including consideration of the public interest) (regulation 7, EIR 2004). Unlike under FOIA, the time limit is not extendable in cases where the public interest balancing exercise has to be carried out. Where a public authority has asked the applicant to provide more particulars of a request because the request is formulated in too general a manner, however, the 20 day period begins on the date on which those further particulars are received (regulation 9 (4), EIR 2004).

72. Fifth, the exception in FOIA in relation to requests that will involve costs in excess of the appropriate limit does not apply in the same way. Under the EIR 2004, the public authority may charge the applicant a reasonable amount for making the information available (except where it allows an applicant access to a public register or list of environmental information, or to examine the information at the place which the public authority makes available for that examination) (regulation 8, EIR 2004).

73. Sixth, very significantly, the exceptions under the EIR are fewer than the exemptions under FOIA; and those that there are, are drafted differently, largely reflecting the wording in the 2003 Directive.

(v) <u>Exceptions to the duty to disclose</u>

74. Regulation 12 (1) provides that a public authority may refuse to disclose environmental information requested if (a) an exception to disclose 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.

75. Regulation 12 (3) provides that 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.

76. Regulation 12 (4) provides that 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 is manifestly unreasonable; (c) the request is formulated in too general a manner and the public authority has complied with regulation 9 (advice and assistance); (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 (which include communications between government departments).

77. As for Regulation 12 (4) (a), DEFRA Guidance (para 7.9) suggests that a request might be manifestly unreasonable if the amount of information sought is considerable; or if extensive scans of historic files or significant searches of large databases of information are necessary; or if extensive redaction is required. One of the factors to be taken into consideration is whether the work would require an unreasonable diversion of resources from the provision of the public services for which the public authority is mandated. Payment of a charge may not always meet the difficulty, for example if it would mean diverting a specialist from other work. Moreover if broadly similar information is already publicly available, the Guidance considers that that also may be relevant to the question of manifest unreasonableness (para 7.10). In similar vein, the Information Commissioner's guidance states that a request for large amounts of information, and where response would seriously disrupt the everyday work of the public authority, may be fairly considered as being manifestly unreasonable if the cost of response far outweighs the public interest in the disclosure of the information.

78. As for material still in the course of completion, Regulation 14 (4) provides that if that exception is relied on, the authority must also specify, if it knows, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed. DEFRA Guidance states that an applicant cannot be expected to wait indefinitely for a document to be completed; if a document is for all practical purposes completed it should be made available, if necessary with an explanation that there may be further revision; or a reasonable date for its publication should be set (para 7.16).

79. Regulation 12 (5) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect a number of matters. This contrasts with the requirement in FOIA under a number of exemptions that disclosure would or would be likely to prejudice the relevant matters. Again, this reflects the wording of the 2003 Directive, which provides at Article 4 (2) that Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect the matters set out.

80. The regulation 12 (5) exceptions are to '*information to the extent that its disclosure would adversely affect the following*':

(i) International relations, defence, national security or public safety (12 (5) (a)):

Regulation 15 provides for certification by a Minister of the Crown that disclosure would adversely affect national security and would not be in the public interest under 12 (1) (b);

(ii) 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[39] (12 (5) (b));

(iii) Intellectual property rights (12 (5) (c):

There is no definition of intellectual property rights in the EIR 2004. The term reflects the term used in the 2003 Directive (Article 4 (2) (e)), which also does not define it. The Information Commissioner's Guidance states that he considers that in broad terms it will protect information that '*forms the basis of registered rights such as patents, trademarks and designs, unregistered rights such as copyright and unregistered design right*'. But the Commissioner considers that if the information would enjoy protection even after disclosure eg under the Copyright Designs and Patents Act, the case against disclosure would be considerably weaker;

(iv) The confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law (12 (5) (d)):

This again directly reflects the 2003 Directive, which refers at Article 4 (2) (a) to '*the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law*'. DEFRA's Guidance states that 'proceedings' of a public authority will include its formal proceedings such as formal board and council meetings (para 7.47). The Information Commissioner's Guidance meanwhile states that the meaning of the term '*proceedings'* is not entirely clear but that it will include '*a range of investigative, regulatory and other activities carried out according to a statutory scheme*';

(v) The confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest (12 (5) (e):

It is worth noting that DEFRA's guidance emphasises that protection of information under this exception should be limited to the minimum time necessary to safeguard the commercial or industrial interest (para 7.62). Information that is confidential at one point may cease to be so later on.

[39] In the Bridgnorth District Council decision, FS 50062329, the Information Commissioner rejected the Council's argument that disclosing the information would adversely affect an inquiry of a criminal nature; while failure to comply with an enforcement notice was a criminal offence, the issuing of such a notice was a civil action. Thus the initial inquiry to determine whether the issuing of an enforcement notice was appropriate could not be construed as an inquiry of a criminal nature.

(vi) 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 (12 (5) (f)):

> In his Decision Notice FS50062329 (Bridgenorth District Council), the Commissioner was satisfied that disclosure of the third party's identity would have an undesirable impact on their relationship with the complainant and that that was sufficient to amount to an adverse effect. The Commissioner was also satisfied that people would be deterred from volunteering information to the planning authority if they were concerned that their identity could be disclosed and that this would hinder the ability of the local planning authority to deal with such planning issues; the public interest in maintaining the exception in relation to the identity of the third party therefore outweighed the public interest in disclosing that information;

(vii) the protection of the environment to which the information relates (12 (5) (g)).

81. Regulations 12 (5) (d) – (g) do not apply at all, however, to the extent that environmental information relates to information on emissions. Emissions are not defined in the Regulations, or in the Directive, but as the Information Commissioner points out, a commonly cited definition is found within the European Directive on Integrated Pollution Prevention and Control. The DEFRA Guidance also considers this issue, and states that emissions should be taken to include the direct or indirect release of substances, gases, vibrations, light or noise from individual or diffuse sources into or onto air, water or land; trade effluent information or information on emissions from aerials; and residues from any veterinary medicines released into the environment (para 7.32).

82. The differences between the EIR 2004 exceptions and FOIA are significant. For example, while information whose disclosure would adversely effect national security is excepted under 12 (5) (a), there is no overall exception for security bodies as under FOIA (section 24). There is also no express exception for legally professionally privileged information (although privileged documents may of course fall within one of the other exceptions). Furthermore, all the exceptions in Regulation 12 (5) of the EIR 2004 are '*qualified*' exceptions in that the public interest balancing exercise must be carried out where the exception applies; none of these are '*absolute exceptions*'. Thus whereas information provided in confidence is subject to an absolute exemption under FOIA (section 41), the EIR 2004 exceptions at regulations 12 (5) (e) and (f), which provide for exceptions where disclosure would adversely affect confidentiality of commercial or industrial information; or the interests of the person who provided the information; are only qualified exceptions.

83. Moreover, the regulation 12 (6) right not to confirm or deny provides that a public authority may respond by neither confirming nor denying the existence of information if that would adversely affect the interests at regulation 12 (5) (a) – ie international relations, defence, national security or public safety – and would not be in the public interest under 12 (1) (b). That right not to confirm or deny does not apply if the other regulation 12 (5) interests are engaged.

84. On the other hand there are additional exceptions under the EIR which are not expressly provided for under FOIA - such as disclosure which would adversely affect intellectual property rights; or the protection of the environment (although both these instances might be covered by other FOIA exemptions).

85. It is important to note also that regulation 12 (11) of the EIR 2004 provides that nothing in the EIR shall authorise a refusal to make available any environmental information contained in or otherwise held with other information unless it is not reasonably capable of being separated from the other information for the purpose of making it available. Thus if a document contains information which is reasonably capable of being separated from the other information, the public authority is obliged to carry out that exercise for the purpose of making information available.

86. Regulation 13 provides that to the extent that information requested includes personal data of which the applicant is not the data subject a public authority shall not disclose the personal data if either of two conditions is satisfied:

(i) The first condition is, (a) where the information is 'data' under section 1 (1) (a) – (d) of the Data Protection Act 1998, disclosure otherwise than under the EIR would contravene (i) any of the data protection principles; or (ii) section 10 of the 1998 Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case the public interest in not disclosing the information outweighs the public interest in disclosing it; and (b) disclosure otherwise than under the EIR would contravene any of the data protection principles if the exemptions in section 33A (1) of the 1998 Act relating to manual data were disregarded;

(ii) The second condition is, the information is exempt from section 7 (1) of the Data Protection 1998 Act (ie the right of access to personal data) by virtue of Part IV of the 1998 Act, and the public interest in not disclosing the information outweighs the public interest in disclosing it.

(vi) <u>Remedies</u>

87. Regulation 14 of the EIR 2004 provides that a refusal to disclose information must specify the reason not to disclose the information, including any exception relied on under regulations 12 (4) (5) or 13; the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12 (1) (b) or 13 (2) (a) (ii) or 13 (3); and, if the exception in regulation 12 (4) (d) is specified (material still in the course of completion, unfinished documents or incomplete data) the name (if known) of any public authority preparing the information and the estimated time in which the information will be finished or completed. The refusal must also inform the applicant that he may make representations to the public authority under regulation 11; and of the enforcement and appeal provisions of FOIA under regulation 18.

88. Regulation 11 provides that an applicant may make representations to a public authority in relation to the request for environmental information if it appears to him that the authority has failed to comply with a requirement of the EIR in relation to the request; no later than 40 working days after the date on which the applicant believes that the authority has failed to comply. The authority is obliged to consider the representations and any supporting evidence produced by the applicant; and decide if it has complied, as soon as possible and no later than 40 working days after the date of receipt of the representations. If it decides that it has failed to comply, the notification must include a statement of failure to comply, the action the authority has decided to take to comply, and the period within which that action is to be taken. Regulation 18 provides that the enforcement and appeals provisions of the Act shall apply for the purposes of the EIR 2004, with certain modifications.