

Environmental Information Regulations 2004 (EIR)

Decision Notice

Date: 26 March 2013

Public Authority: Greater London Authority
Address: City Hall
The Queen's Walk
London
SE1 2AA

Decision (including any steps ordered)

1. The complainant has requested correspondence held by the Greater London Authority (the GLA) relating to the Air-Quality Initiative of the Regions (AIR). The GLA provided some information to the complainant, but withheld other information under regulations 12(4)(d), 12(5)(a) and 13 of the EIR.
2. The Commissioner finds that the GLA was entitled to rely on the exceptions claimed in relation to most of the information. However, he does not uphold any of the exceptions claimed in relation to certain information contained within two early drafts of a 'best practices' document. This is because the information within the early drafts is essentially identical to the information contained within the final version which had already been published as at the date of the request.
3. The Commissioner requires the GLA to take the following steps to ensure compliance with the legislation:
 - Disclose page 1 of the draft document entitled "Contribution of the Regions: best practices" attached to the email dated 21 October 2011.
 - Disclose the draft document entitled "Contribution of the Regions: best practices" attached to the email dated 3 November 2011.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Background

5. AIR was founded in 2011 and has 12 members, including the GLA, from 7 European member states¹. Its purpose is to exchange best practice and contribute to the revision process of the EU Air Quality Directive (2008/50/EC).

Request and response

6. On 6 January 2012, the complainant requested the following information from the GLA:

"Please provide me with all correspondence and meeting notes with other parties about The Air-Quality Initiative of the Regions or similar joint working, which have been held since 1 June 2011."

7. On 2 February 2012 the GLA advised the complainant that it needed to extend the time for compliance in order to consider the public interest.
8. On 29 March 2012 the GLA responded to the request. The GLA advised that it was withholding the requested information under the exceptions at regulations 12(4)(d), 12(5)(a) and 13(3) of the EIR.
9. On 17 April 2012 the complainant asked the GLA to conduct an internal review of its decision to refuse the request.
10. The GLA responded to the complainant on 18 June 2012. It confirmed that it had now completed an internal review and that the outcome was to uphold the application of the exceptions cited. However the GLA did offer to meet the complainant to provide a briefing about its engagement activities in Brussels and the work of AIR.

Scope of the case

11. On 20 August 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant generally disagreed with the application of the exceptions cited, and in particular referred to a number of instances
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¹ http://www.london.gov.uk/sites/default/files/memorandum_of_understanding_-_signed_by_the_12_air_regions.pdf

where emails had been disclosed, but attachments had been withheld. In addition the complainant did not accept that the names of public officials were exempt, and said that their redaction made it difficult to identify which region or organisation they represented. Finally, the complainant queried whether the GLA had taken account of the presumption in favour of disclosure set out at regulation 12(2) of the EIR.

12. The Commissioner has inspected the withheld information and has received submissions from the GLA with regard to the exceptions cited. With regard to the complainant's point about email attachments, the Commissioner notes that the GLA has applied exceptions where such attachments have been withheld. The Commissioner has considered all the withheld information in the context of the exceptions applied, and notes that it may be acceptable to disclose an email yet withhold an attachment under an appropriate provision of the EIR.
13. During the course of the Commissioner's investigation the GLA disclosed some of the withheld information to the complainant. Therefore the Commissioner's decision in this case relates only to the remaining withheld information, which the GLA claimed was exempt under regulations 12(4)(d), 12(5)(a) and 13(3) of the EIR.

Reasons for decision

Regulation 12(4)(d)

14. Regulation 12(4)(d) of the EIR is engaged where the request relates to:
"...material which is still in the course of completion, to unfinished documents or to incomplete data".
15. The GLA sought to apply the exception at regulation 12(4)(d) to 12 documents. These include draft versions of the AIR Memorandum of Understanding (MOU), and position paper, as well as emails discussing these drafts. They also include draft versions of a document entitled "Contribution of the Regions: best practices" (the 'best practices' document). The Commissioner understands that the final version of the MOU was signed and published in November 2011, and that the 'best practices' document was also published at this time. However at the time of the request the final version of the position paper had not been completed and agreed.

16. The Commissioner has published guidance on regulation 12(4)(d)² and is satisfied that information relating to draft documents will fall within the scope of the exception. Having inspected the withheld information, the Commissioner is satisfied that the 12 documents identified by the GLA do fall under regulation 12(4)(d). The draft documents are relevant by their nature as drafts, and the correspondence relates to the drafts, so it also falls within the scope of the exception.
17. Regulation 12(4)(d) is a class-based exception, therefore there is no need to consider adverse effect. However, it provides a qualified exception, so the Commissioner has gone on to consider the public interest.

Public interest arguments in favour of disclosure

18. Regulation 12(2) of the EIR states that, when considering the public interest, a presumption must be applied in favour of disclosure.
19. The GLA identified the following arguments in favour of disclosing the withheld information:
 - Disclosure of unfinished documents may allow for greater public participation in the debate on air quality. It is in the public interest for the public to be informed as to how the appropriate authorities are addressing the issue of air quality and how they are interacting with the European Commission to shape air quality policy.
 - There is a general public interest in ensuring transparency of discussions and decision making by public authorities.
20. The complainant did not accept that the exception at regulation 12(4)(d) was engaged as the MOU had been agreed and published in November 2011. Therefore he did not put forward any public interest arguments in favour of disclosure.
21. In this particular case the Commissioner considers that there is a public interest in the public being informed as to how AIR developed its MOU, 'best practice' document, and position paper. Disclosure of the withheld information would show how the various members discussed these key

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[http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx)

documents, and how decisions were reached. The Commissioner notes that issues surrounding air quality are of major importance to the public, as air quality has the potential to have a substantial impact on health and wellbeing.

Public interest arguments in favour of maintaining the exception

22. The GLA argued that the public interest favoured maintaining the exception at regulation 12(4)(d) to protect the "safe space" necessary for AIR members to exchange views and agree group decisions. As the final version of the position paper had not been agreed and published at the time of the request the Commissioner is minded to accept that safe space was required to allow AIR to reach agreement on key issues within this paper, without premature public involvement.
23. He does not however accept this argument in relation to the draft MOU and 'best practices' document. This is because, as at the date of the request, the final version of these documents had already been agreed and published and there were therefore no key decisions to make in this respect.
24. The GLA also argued that the draft documents and correspondence largely represented the views and work of junior officials, and as such it would be unfair to the officials concerned to disclose these documents rather than the agreed final versions. The Commissioner considers this argument is relevant to regulation 13(1) but not to regulation 12(4)(d).
25. The Commissioner notes that the complainant made his request on 6 January 2012. At this stage AIR was planning to publish its position paper, and it was published in June 2012. Therefore the Commissioner accepts that disclosure of the draft position paper and related drafting comments would be likely to have competed for attention with the official position paper, thus distracting public attention from the agreed final version. The Commissioner has attached some weight to the public interest in maintaining the exception on this basis.

Balance of the public interest

26. The Commissioner notes that air quality is an important issue to the public, and he recognises that there is a strong public interest in the public being adequately informed as to how member states are addressing this issue.
27. However, having inspected the information withheld under regulation 12(4)(d) the Commissioner notes that to some extent it discusses presentational issues around the MOU and position paper. The Commissioner considers that where this is the case it limits the public interest argument set out above as it does not suggest that disclosure

would enhance the public's understanding of the substantive issues under discussion.

28. The Commissioner has taken into account the context of the case, ie the fact that the information reflects discussions between various members of AIR. The Commissioner considers that there is significant public interest in protecting the ability of the various members, in their capacities as representatives from different regions and cities across the EU, to discuss the content of draft documents freely and frankly and away from external pressures.
29. In balancing the public interest the Commissioner has distinguished between information relating to the MOU and the 'best practices' document and information relating to the position paper. This is because the final versions of the MOU and 'best practices' document had been agreed and published before the complainant made his request³. The Commissioner believes that the public interest in maintaining "safe space" to discuss ideas and reach decisions will fall away significantly, if not disappear, once those decisions are taken and a final version of a document has been published. Therefore the Commissioner finds that the public interest in relation to the MOU material and the drafts of the 'best practices' document lies in favour of disclosure. The Commissioner notes that this information was also withheld under regulation 12(5)(a), so the Commissioner must consider whether that exception can be applied before ordering disclosure of this information.
30. The position paper had not been published at the time the request was made, although it has since been made available to the public⁴. The Commissioner is of the view that the public interest in protecting the ability of AIR members to discuss and agree this document before publication outweighs the public interest in disclosing the withheld information, particularly where it is limited in what it would tell the public. Therefore, in respect of the information relating to the position paper, the Commissioner finds that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(5)(a)

31. Regulation 12(5)(a) of the EIR is engaged where disclosure of the requested information would adversely affect international relations,

³ <http://en.vleva.eu/AIR-page>

⁴ <http://en.vleva.eu/air>

defence, national security or public safety. The Commissioner notes that it is not sufficient to show that the information is related to those interests specified in the exception. Furthermore, it is not sufficient that disclosure would simply have an effect; the effect must be "adverse".

32. It is also necessary to show that disclosure "would" have an adverse effect, not that it could or might have an adverse effect. The Commissioner has interpreted this to mean that, although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.
33. The GLA argued that the exception at regulation 12(5)(a) was engaged in respect of all the withheld information. The Commissioner has already considered some of the withheld information under regulation 12(4)(d) and where he has found that information could be properly withheld under regulation 12(4)(d) he has not considered it again under regulation 12(5)(a).
34. The GLA argued that disclosure of the information withheld under regulation 12(5)(a) would harm relations between the GLA and the other members of AIR. Consequently the GLA was of the view that disclosure would have an adverse effect on relations between the UK and the states from which the members of AIR were drawn. If disclosure of the requested information provoked a negative reaction with the parties concerned, EU states or organisations would become reluctant to share information with the GLA which in turn would be likely to affect the UK's ability to promote its interests abroad.
35. The GLA explained that AIR's membership is made up of a number of cities and regions across the EU, with some member states having more than one member, and some having none. AIR is attended by officials from the EU offices of the relevant cities and regions, and is a relatively informal group with no permanent or dedicated secretariat or budget. In addition the GLA argued that:

"We do not consider that the term 'international relations' can properly be confined to how favourably or otherwise other states view the UK; rather, it covers all aspects of relations between the UK and other states or international organisations."

36. The GLA advised the Commissioner that it had consulted with the other regions, and several regions had objected to disclosure on the basis that it would prejudice future co-operation with the regions themselves as well as other stakeholders. The GLA argued that, if London, or any other UK city or region, could not work effectively with other cities or regions, their overall influence in Europe would be significantly diminished and

they would be at a disadvantage compared with cities or regions in other member states.

37. The complainant argued that the withheld information was about the relationship between a local authority (the GLA) and a lobbying organisation (AIR). The complainant did not agree that this relationship could be considered as "international relations" within the meaning of regulation 12(5)(a).
38. The Commissioner accepts that, while AIR's members are regions of states rather than the states themselves, detriment to relations between the GLA and other regions in this case can be interpreted as detriment to relations between the UK and other states. The GLA does not act in isolation from the rest of the UK; therefore its actions can be understood to have a wider effect which extends beyond the GLA itself.
39. The Commissioner is satisfied that disclosure of the majority of the withheld information would have an adverse effect on international relations in that it would cause prejudice to international co-operation between the GLA (and thus the UK), and other AIR members and their states. For this information the Commissioner accepts that this adverse effect would be more probable than not. Therefore the Commissioner finds that the exception at regulation 12(5)(a) is engaged, and has gone on to consider the public interest.
40. However, for page 1 of the draft of the 'best practices' document attached to the email dated 21 October 2011, and for the whole of the draft of the 'best practices' document attached to the email dated 3 November 2011, the Commissioner has reached a different conclusion. The Commissioner notes that this information is essentially identical to the 'best practices' document that had already been published as at the date of the request. For this information the Commissioner cannot see how its disclosure would be prejudicial to international relations. He therefore does not accept that the exception is engaged for this particular information.

Public interest arguments in favour of disclosure

41. As with regulation 12(4)(d), the GLA acknowledged the public interest in the public being informed as to how the appropriate authorities are addressing the issue of air quality and how they are interacting with the European Commission to shape air quality policy.
42. Conversely, the complainant did not accept that regulation 12(5)(a) applied as the GLA is a local authority rather than a state. Therefore he submitted no public interest arguments in relation to the exception.

Public interest arguments in favour of maintaining the exception

43. The GLA identified the following arguments in favour of maintaining the exception:

- The Mayor of London has responsibility for air quality in London. This requires the GLA to work closely with the Department for Environment, Food and Rural Affairs (Defra) in the development of air quality plans and procedures. If the GLA disclosed information which harmed international relations this could have a detrimental effect on the UK government's relationships with European stakeholders more generally.
- There was a strong public interest in maintaining trust and confidence between the GLA and AIR, allowing for the free and frank exchange of opinions and views with the understanding that those communications will be treated in confidence. In addition to AIR, there was a strong public interest in the GLA maintaining trust with other stakeholders, including other cities and regions, which would be damaged if the GLA was seen to disclose the withheld information.
- Disclosure of correspondence that refers to AIR's contacts within the European Commission or the EU generally could harm AIR's relationship with these contacts and consequently its potential to influence the review process of the Air Quality Directive.

Balance of the public interest

44. The Commissioner is of the view that the GLA has made a number of strong arguments with respect to the public interest. As with regulation 12(4)(d) the Commissioner acknowledges that there is significant public interest in the public being adequately informed as to how member states are looking at air quality.
45. The Commissioner accepts that there is a strong public interest in avoiding prejudice to relations between the GLA, the UK and other member states, particularly when these parties are involved in discussing issues such as air quality which can affect individuals across the EU.
46. The Commissioner concludes that it would not be in the public interest to disclose correspondence where this would make it more difficult for the GLA, and the UK more generally, to enjoy the trust and confidence necessary to engage fully with other parties. In reaching this conclusion the Commissioner has taken into account the other members' requests that information not be disclosed.

47. In light of the above, the Commissioner finds that the public interest in maintaining the exception at regulation 12(5)(a) outweighs the public interest in disclosing the information withheld under this exception.

Regulation 13: personal information of third parties

48. Regulation 13 of the EIR states that a public authority is not obliged to disclose information if to do so would:

- constitute a disclosure of personal data, and
- this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA).

Would disclosure of the requested information constitute a disclosure of personal data?

49. The GLA withheld the names and job titles of junior officials from the GLA and the regions contained within correspondence. This information was redacted from emails which were provided to the complainant, as well as documents which were withheld in full. The Commissioner is satisfied that the withheld information is personal data, as the individuals in question can be identified by their names, job titles and contact details.

Would disclosure of the requested information breach any of the data protection principles?

50. The GLA argued that disclosure of the requested information would breach the first data protection principle because it would be unfair to the individuals concerned. In considering whether disclosure would be fair or unfair the Commissioner has taken the following factors into account:

- the individuals' reasonable expectations of what would happen to their personal data;
- whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned (i.e. the consequences of disclosure); and
- are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the individuals as data subjects?

51. The GLA argued that none of the individuals would expect their personal information to be disclosed as they were not senior staff. The Commissioner considers it important to distinguish between junior and senior staff, and accepts that junior staff may have a reasonable

expectation that their information would not be disclosed into the public domain.

52. The Commissioner also notes that the individuals had all refused consent to disclose their names and contact details. The GLA argued that the disclosure of information relating to individuals could lead to them being perceived as personally accountable, when in fact they were merely communicating the views of the organisation and had no such personal responsibility.
53. The Commissioner acknowledges that there is a legitimate public interest in accountability and transparency, and the public is entitled to be informed about the GLA's involvement in groups such as AIR. Nevertheless, the Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects in considering how the factors balance.
54. The Commissioner accepts that disclosure of the personal information is not required in order to inform the public as to AIR's decision making process. Again, the Commissioner is inclined to agree that there is less likely to be a legitimate interest in disclosing the personal information of junior staff, although this would not be the case with senior staff, or those in public facing roles.
55. In light of the above the Commissioner finds that the personal information of junior staff was correctly withheld as it would be unfair to disclose this information and would thus breach the first data protection principle. Therefore the Commissioner finds that this information was correctly withheld under regulation 13.

Procedural requirements

Regulation 7: extension of the time for compliance

56. Regulation 7(1) provides that the authority may extend the time for compliance with a request for environmental information from 20 working days to 40 working days in certain circumstances:

"...if it 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."

57. In this case the GLA received the request on 6 January 2012. The GLA advised the Commissioner that it extended the deadline for compliance until 5 March 2012 because the initial search for information returned over 300 emails, approximately 80MB in size. In addition the GLA was of

the view that the subject matter and international dimension of the withheld information made the request more complex.

58. The Commissioner accepts the GLA's argument that the requested information was both voluminous and complex. However the GLA did not respond to the complainant until 29 March 2012, thus exceeding the extended time for compliance. Therefore the Commissioner finds that, although the GLA was entitled to rely on regulation 7(1), it failed to comply with regulations 5(1) and 14(2) in respect of the information provided and refusal notice issued outside of the time for compliance.

Right of appeal

59. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

60. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

61. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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