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The Environmental Information Regulations 2004

Report of the Freedom of Information sub-group of the pro bono Climate and Environment Project of Cardiff University's School of Law and Politics 2022/2023

1. Introduction.

The Climate and Environment Project is a pro bono extra-curricular project for law students at the School of Law and Politics at Cardiff University.

The Project is not formally part of the assessment for any degree or professional course and the students volunteering on the Project range from second-year undergraduates to postgraduates to those on solicitor and barrister professional courses.

In 2022 into 2023, the Project sub-group on freedom of information, particularly in the environmental field, examined the Environmental Information Regulations 2004, the rights they underpin, from which European and international law and convention they derive, and how are they administered in the UK.

More particularly, the group considered and discussed how the 2004 Regulations could be improved in Wales.

The members of the FOI sub-group in 2022/23 were:

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The group was assisted by Guy Linley-Adams, Lecturer in Law at the School of Law and Politics.

2. Background to the Environmental Information Regulations 2004.

The group examined how the Environmental Information Regulations 2004 provide for a right of access for the public to environmental information held by UK public authorities.

The 2004 Regulations came into force on 1st January 2005, under the authority then provided by the European Communities Act 1972, covering England, Wales and Northern Ireland. Scotland has its own Environmental Information Regulations (Scotland) 2004. The Regulations implemented European Council Directive 2003/4/EC on public access to environmental information. That Directive in turn has its origins in the Aarhus Convention.

The 2004 Regulations provide a right of access for the public to environmental information, upon request, subject to a number of exceptions, as well as requiring public bodies to make environmental information available proactively.

The group strongly supported the role the 2004 Regulations play, as part of the UK's implementation of its obligations as a party to the Aarhus Convention, in encouraging transparency from public authorities as part of a process of enabling the public to be informed about the environment and to participate in environmental decision-making from a position of knowledge.

3. The potential effect of the Retained EU Law Bill on the Environmental Information Regulations 2004.

The group was concerned at the potential effect on the 2004 Regulations of the Retained EU Law (Revocation and Reform) Bill ('the REUL Bill'), making its way through Parliament.

It was (and remains) unclear whether the Bill will be enacted in its current form, but what follows must be re-considered in the light of what is finally enacted.

However, as the REUL Bill stands, clause 1 will trigger the sunset of EU-derived subordinate legislation and retained direct EU legislation, unless otherwise saved, on 31st December 2023.

Clause 1 reads:

(1) The following are revoked at the end of 2023—
(a) EU-derived subordinate legislation;
(b) retained direct EU legislation.
(2) Subsection (1) does not apply to an instrument, or a provision of an instrument, that is specified in regulations made by a relevant national authority.
(3) The revocation of an instrument, or a provision of an instrument, by subsection (1) does not affect an amendment made by the instrument or provision to any other enactment.
(4) In this section "EU-derived subordinate legislation" means any domestic subordinate legislation so far as—
(a) it was made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972, or
(b) it was made, or operated immediately before IP completion day, for a purpose mentioned in section 2(2)(a) of that Act (implementation of EU obligations etc), and as modified by any enactment.

The group expressed its general concern that the practical effect of the REUL Bill on the Environmental Information Regulations 2004 is that, unless the 2004 Regulations are later saved pursuant to the provisions clause 1(2), in the case of Wales, by the Welsh Government, the 2004 Regulations would cease to have effect in Wales at the end of 2023.

The group was clear that, quite apart from the wholly negative effect on the right of access to environmental information, that scenario would put the UK in clear breach of the Aarhus Convention.

The group did not consider that the Welsh Government should countenance the Environmental Information Regulations 2004 being allowed to fall as a consequence of the REUL Bill.

Recommendation 1

In the event that the REUL Bill is enacted in a form which would otherwise lead to 2004 Regulations ceasing to have effect in Wales as part of the planned 'sunset' of retained EU law, the groups recommends that Welsh Government should act swiftly to save the 2004 Regulations.

The group noted that information rights are not a reserved matter – and so are devolved to Wales.

Given the maturity of Welsh devolution, the group considered it appropriate for the Welsh Government to consider if it should, in addition to amending the 2004 Regulations, as they apply in Wales, per the Scottish model, create and appoint a dedicated Welsh Information Commissioner.

If the REUL Bill is to be enacted and lead to the Environmental Information Regulations 2004 ceasing to have effect within England, it would be incongruous for an Information Commissioner based in England to be hearing complaints from Wales, but not from within England.

Recommendation 2

In the event that the REUL Bill is enacted in a form which will lead to the 2004 Regulations ceasing to have effect in England as part of the planned 'sunset' of retained EU law, Wales should consider establishing its own Information Commissioner for Wales.

4. Problems with the Environmental Information Regulations 2004 and possible solutions.

The group considered that, especially if the Welsh Government finds itself required to save the 2004 Regulations shortly, it would be an effective time, almost 20 years since the 2004 Regulations were passed, to consider certain improvements to the 2004 Regulations. This would ensure they work better in practice, to enhance the right of the Welsh public to environmental information held by Welsh public authorities.

Such a progressive approach would be entirely in line with the position Wales has adopted on the environment, not least via the Well-being of Future Generations Act 2015, and the well-being goals for Wales.

Therefore, the group analysed real-world examples of problems that have arisen over the nearly 20 years since the 2004 Regulations came into effect, that the group considers the Welsh Government could now address, in order to make the systems work more effectively as providing timely and wider access to environmental information for the Welsh public.

These are:

- Ensuring public authorities respond (including to refuse) as soon as possible, and do not always default to responding at 20 working days.
- Preventing authorities from ‘resetting the clock’ by asking for clarification, but only at 20 working days
- Reducing time for internal review from 40 working days to 20 working days (as in Scotland)
- Requiring the Commissioner to accept a complaint if there has been no in-time response to an initial request.
- Limiting an applicant’s obligation to requesting an internal review on one occasion only
- Improving proactive publication and public authorities learning from regular requests
- Learning from Commissioner Decisions to avoid using unlawful exceptions for the same type of information.
- Remedying the inability of public to take the lack of proactive publication to the Commissioner.
- Remedying public authorities’ ability to raise different exceptions at refusal, at review, at Commissioner’s investigation or at Tribunal.
- Addressing the use of private emails
- When ‘harm’ should be required and not required, when applying exceptions under Regulation 12

4.1 Ensuring public authorities respond (including to refuse) as soon as possible, and do not always default to responding at 20 working days.

The group considered that the effective right granted to the public by the Aarhus Convention would not be delivered without timely access to environmental information.

Even though the provisions of the 2004 Regulations require that a public authority has to respond as soon as possible to a request for environmental information, and no later than 20 working days after a request, there is no metric against which to measure what 'as soon as possible' means.

The group heard that the practical effect has been that there has been nothing to prevent public authorities from routinely, by default, taking the full 20 days to respond. There is a belief, for example in environmental NGOs, that some public authorities may even do this in what might be termed 'bad faith', particularly where the requested information may be considered to be controversial, or the authority concerned might prefer that the information were not released promptly.

The group considered that this problem - of taking 20 working days by default – could be addressed by requiring public authorities to issue an acknowledgment to any request, perhaps within 5 working days, providing, with reasons, an estimate of the time likely to be taken for a substantive response to be given.

This would enable any person requesting information to understand why up to 20 working days may be required to respond and would enable the matter to be raised in any request for internal review (per Regulation 11), or ultimately to be brought to the Commissioner (per Part 5 of the Regulations).

The group considered that this proposal would effectively balance the interests of the public requesting information and the resource demands for the public authorities involved.

Recommendation 3

The group proposes that public authorities should be required to acknowledge requests within 5 working days and, in that acknowledgement, give an estimate of the time that will be taken to respond substantively to the request. This can be achieved by an amendment to Regulation 5, adding a new Regulation 5(1A):

"5(1A) A public authority shall acknowledge the receipt of any request within 5 working days;"

4.2 Preventing authorities from ‘resetting the clock’ by asking for clarification, but only at 20 working days.

The group heard that under the 2004 Regulations, per Regulation 9, public authorities can effectively extend the period within which they must respond to a request by 20 working days, by asking applicants to clarify their request.

The group considered that while asking for such clarification may be entirely reasonable, this provision does potentially allow the ‘reluctant’ public authority to delay responding substantively to a request, by re-setting the 20 working days clock, by asking for clarification, but only after 20 working days have almost elapsed. Such practices dilute the public’s right to receive information in a timely manner.

The group therefore proposed a provision that would require public authorities to ‘triage’ requests received at an early stage, and if necessary, make a request for clarification within 5 working days. This would fit well with the proposed provision (above) under Regulation 5 on acknowledgment of requests.

Recommendation 4

The group proposes that public authorities should be required to seek any clarification that may be required from applicants on the requests made within 5 working days of receipt of a request. This can be achieved by an amendment to Regulation 9(2)(a), so that it reads:

“9(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall - (a) ask the applicant no later than 5 working days after the date of receipt of the request to provide more particulars in relation to the request; and”

4.3 Reducing time for internal review from 40 working days to 20 working days (as in Scotland).

In examining the regimes in England and Wales, and in Scotland, the group noted that there is a mismatch between the time allowed for internal review for public authorities in different parts of the UK.

In Scotland, an internal review should only take 20 working days. In England and Wales, the law allows for 40 working days. The relevant UK and Scottish provisions are shown below:

"Representations and reconsideration

11.—(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and ***no later than 40 working days*** *after the date of receipt of the representations".*

"Review by Scottish public authority

16.—(1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

(4) The Scottish public authority shall as soon as possible and ***no later than 20 working days*** *after the date of receipt of the representations notify the applicant of its decision".*

The group considered that there can be no justification for a longer period to be allowed for in England and Wales, as opposed to Scotland. Welsh public authorities should be no less able to deliver a review in 20 days than their Scottish counterparts.

Recommendation 5

The group proposes a simple amendment to Regulation 11 of the 2004 Regulations (applying to Wales) to allow for a 20 working days maximum period for an internal review.

4.4 Requiring the Commissioner to accept a complaint if there has been no in-time response to an initial request.

The group considered the scenario, under the 2004 Regulations, of a public authority failing to respond at all to a request for information and note that there exists no mechanism to address in a timely manner the situation in which the public authority, to whom a request for information has been made, simply does not respond.

In line with the Regulations, if there is no response, the person requesting information has to request an internal review, before the matter can be taken to the Commissioner.

That is the practical effect of section 50(2)(a) of the Freedom of Information Act 2000, which, per Regulation 18, provides for the enforcement mechanism for the 2004 Regulations, and requires that a complainant to the Commissioner must have "exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45…".

In short, a complainant must have asked for an internal review by the public authority of its failure to respond, before the matter can be taken to the Commissioner.

The group noted that what this means in practice is that the 'reluctant' public authority can safely sit back and wait for a request for information to run past its 20 working days for the initial response, at which point the person requesting will need to make a request for internal review, which then gives the authority a further 40 working days to address the matter.

In effect, any public authority can therefore safely ignore a request unless an applicant 'asks twice', with those requests 20 working days apart.

If a public authority does not wish to provide information (for example, if the requested information is somehow embarrassing, or might be used to 'fuel' a legal challenge), it has a total of 60 working days minimum to respond substantively to any request, without fear of any sanction or referral to the Commissioner.

The group considered that such length of delay could be highly detrimental to the value of the requested information to an applicant. Moreover, that such an approach is possible at law undermined the purpose of initial 20 working day time limit for answering requests.

Recommendation 6

The group proposes that an amendment is required to allow an applicant to go directly to the Information Commissioner for a decision to prevent such abuse and uphold the right of access to environmental information in a timely manner, by inserting paragraph 18(1A) into Regulation 18:

18(1A) The enforcement and appeals provisions of the Act shall be read for the purposes of these Regulations such that section 50(2)(a) of the Act does not apply if a public authority fails to respond to a request within the time limits specified in Regulation 5.

4.5 Limiting an applicant's obligation to requesting an internal review on one occasion only.

The group examined a particular matter in relation to the requirement on applicants that they have gone through a public authority's internal review procedure before a matter can then be raised with the Commissioner.

In the case of the Friends of the Earth v DEFRA, Decision Notice IC-102916-C8Q5, 13th June 2022, the Commissioner sought to require Friends of the Earth to request an internal review from DEFRA on a second occasion, having initially complained about a lack of a timely response in a first internal review request. In that matter, Friends of the Earth in fact refused to go to a second internal review and, albeit reluctantly, the Commissioner agreed to deal with the matter by way of a Decision, despite advising Friends of the Earth to go for a second internal review on the substance of the matter.

The group considered that no applicant for information should be required by law or by the Commissioner to go to a second internal review because that would enable the 'reluctant' public authority to add further delay to a process of disclosure of information, undermining the right granted by the Aarhus Convention of timely access to information.

Recommendation 7

The group recommends amending Regulation 18 so as to require the Commissioner to issue a Decision if a complainant has made at least one request for internal review by a public authority.

Insert a new Regulation 18(11):

"For the purposes of these Regulations, section 50 of the Act shall be read as requiring the Commissioner to make a decision as to whether a public authority has dealt with a request in accordance with the requirements of these Regulations where a complainant to the Commissioner has made any representation to a public authority pursuant to Regulation 11. An applicant shall not be required to make more than one representation to a public authority under regulation 11".

4.6 Improving proactive publication and public authorities learning from regular requests.

Access to environmental information is recognised as a right under the Aarhus Convention, but the Convention also requires proactive publication of environmental information, obviating the need for specific requests to be made by the public.

Effective public participation in decision-making processes requires more proactive publication of environmental information. The more information in the public domain, the greater the public engagement, which can also lead to insights and ideas of great value to public authorities. Proactive publication would mean a greater level of access to information and as such would also support open-source research.

The group was generally very supportive of proactive publication.

Proactive publication also reduces pressure on public authorities having to process requests for information.

However, the group considered that experience suggests public authorities do not always learn from previous requests and start proactively publishing information that is regularly requested, or which they have been ordered by the Commissioner to publish.

The group suggested that information of any type or character that has been requested and provided on more than, say, three occasions by the public authority should be considered as a matter of law for future proactively publication.

Recommendation 8

In order to encourage more proactive publication, the group recommends an amendment adding a new subsection to Regulation 4(4)(c) requiring public authorities to 'learn' from repeat requests, such that Regulation 4 then reads:

Dissemination of environmental information

4.—(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds—
(a)progressively make the information available to the public by electronic means which are easily accessible;
…
(4) The information under paragraph (1) shall include at least—
…
(c) information of any type or character that has been requested and provided on more than three occasions by a public authority or following decisions issued the Commissioner

4.7 Remedying the inability of public to take the lack of proactive publication to the Commissioner.

The group examined how, under the 2004 Regulations, and the enforcement and appeal provisions provided for under the Freedom of Information Act 2000, an applicant for environmental information cannot take the matter of a lack of proactive publication to the Commissioner.

The enforcement and appeal provisions of the 2004 Regulations are in effect, borrowed from the 2000 Act, by virtue of Regulation 18:

18.—(1) The enforcement and appeals provisions of the Act shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in this regulation.

Section 50 of the 2004 Act, subsection 1, provides that a person can take a matter to the commissioner when “a request for information” has not been dealt with in accordance with, in this case, the 2004 Regulations.

However, when a person is taking issue with a lack of proactive publication, that would not be considered “a request for information” under section 50 of the Act.

The group considered that a person should be able to complain to the Commissioner and secure a Decision from the Commissioner if there is breach of the duty under the 2004 Regulations on proactive publication.

Recommendation 9

The group recommends an amendment with the effect that a person can complain if there is a breach of duty under the 2004 Regulations on proactive publication, by inserting a new Regulation 18(1)(A):

18(1A) The enforcement and appeals provisions of the Act shall be read for the purposes of these Regulations, such that a request for information as defined in section 50(1) of the Act, shall be taken to include circumstances in which a public authority has, in the opinion of the applicant or complainant, failed to comply with the duty under Regulation 4.

4.8 Learning from Commissioner Decisions to avoid using unlawful exceptions for the same type of information.

The group heard examples of how public authorities do not always appear to learn from previous Decisions from the Commissioner, or from Tribunal or higher Courts as to when, and to what information, they can and cannot apply exceptions provided for by Regulation 12.

These can be decisions made by the Commissioner either against the authority itself, or against other public authorities, in relation to when it is appropriate to apply particular exceptions under regulation 12 and when it is not.

This adds considerably to the time and trouble faced by applicants for information.

It is not resource-efficient for public authorities repeatedly to put applicants to the trouble of complaining to the Commissioner on points that the Commissioner has already addressed in previous Decisions. By repeating the same incorrect application of exceptions to requests, internal review and Commissioner investigations are triggered on points that have been addressed previously.

That can take many months.

Most importantly, the group considered that, in practical effect, reliance on exceptions to withhold information, where public authorities should already understand that such reliance is unlawful, undermines the right of the public to have access to environmental information in a timely manner.

Recommendation 10

The group recommends an amendment adding add a new subsection to Regulation 12 requiring public authorities to 'learn' from Decisions, Tribunal or higher Court rulings, by inserting a new Regulation 12(1A):

"A public authority may not refuse to disclose environmental information by applying any exception to disclosure under paragraphs (4) or (5) if the public authority should reasonably be aware from decisions of the Commissioner or judgments of the Tribunal or any higher Court that an exception does not apply to the environmental information requested".

4.9 Remedying public authorities' ability to raise different exceptions at refusal, at review, at Commissioner's investigation or at Tribunal.

The group examined the effect of the case of *Birkett v DEFRA* [2011] EWCA Civ 1606 which ruled that a public authority could rely upon a different exception or exceptions in proceedings before the Commissioner and/or the Tribunal for refusing to disclose environmental information.

The group considered whether there should be a regulatory or statutory limit on the number of attempts that a public authority can make to involve the correct exception under Regulation 12.

The group noted, as the Tribunal stated in Department for *Business, Enterprise and Regulatory Reform v ICO and Friends of the Earth* (EA/2007/0072, 29 April 2008, that "it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations. This is a public policy issue which goes to the underlying purpose of FOIA".

The group noted that *Birkett* in effect means that different exceptions be applied (at refusal, at review, at the stage of investigation by the Commissioner and at Tribunal) giving a public authority four attempts to 'get it right'.

This is patently unfair to applicants.

The group proposed an amendment preventing the Commissioner from making a Decision applying exceptions not already raised by the public authority at the initial refusal or internal review stages. Two attempts at 'getting it right5' was considered more reasonable for both the applicant and the public authority to ensure a balance between timely access to information, while ensuring the public authority still has an opportunity to revise its reasons for refusing to disclose information.

Recommendation 11

The group proposes an amendment to Regulation 18:

"18(1A) The enforcement and appeals provisions of the Act shall be read for the purposes of these Regulations such that the Commissioner may not make a Decision applying any exceptions under Regulation 12 that have not been raised reasonably by the public authority as part of its reconsideration under Regulation 11".

4.10 Addressing the use of private emails.

The group noted that use of private emails or other private ‘channels’ of communications has been an issue on a number of occasions recently and there has been increasing use of private email accounts by people working in public authorities for their work-related communications.

There is an increasing concern of the use of private emails by public bodies/authorities to avoid disclosure under freedom of information for work-related purposes.

However, information from private emails would be difficult to locate, which in turn, makes it practically very difficult to disclose.

The group noted the cases of Hillary Clinton, Suella Braverman and Matt Hancock and considered whether adding a new provision to the 2004 Regulations, expressly to include the use of private emails to hold or communicate information relating to the functions of a public authority within the definition of information susceptible to request under the regulations, might work.

Screening private communications may be considered in some circumstances to be too invasive.

However, the group considered that an amendment to the 2004 Regulations could provide that information to be disclosed should include any information that is received, held, stored or communicated through private communications channels, if it related to the functions of a public authority.

Recommendation 12

The group proposes an amendment to Regulation 12(4)(a), so that it reads:

“12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(a) it does not hold that information when an applicant’s request is received and, where there is reason to consider that private communications may contain that information, such search of private communications as can be made lawfully has been made”

4.11 When ‘harm’ should be required and not required, when applying exceptions under Regulation 12.

The group examined and noted that under regulation 12, which deals with the exceptions to the duty to disclose environmental information, the exceptions are divided into two groups per regulation 12(4) and regulation 12(5).

The exceptions provided for in 12(4) are what is known as absolute exceptions, whereas those in 12(5) apply only where the disclosure of the information requested would adversely affect the subject matter of the exception. If there is no harm, the exception cannot be applied.

In other words, Regulation 12(4) exceptions do not require harm to be shown by a public authority seeking to rely on them, whereas Regulation 12(5) exceptions do require harm.

The group considered that there is no logical reason why the exceptions provided for at Regulation 12(4)(d) and (e) should not also require there to be harm before the exception applies. There was nothing that logically means that information that is still in the course of completion (per Regulation 12(4)(d)) or information that is internal communications (Regulation 12(4)(e)) should not be disclosed if the disclosure of that information causes no **harm.**

Recommendation 13

The group therefore recommends that Regulation 12(4) and (5) are amended such that the current regulation 12(4)(d) and (e) appear as regulation 12(5)(h) and (i) respectively.