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

Task Force on Access to Information

Fourth meeting

Geneva, 8 - 10 December 2015

Items 2 - 7 of the provisional agenda

Statement by the United Kingdom

The UK is pleased to report on further progress on a number of the priorities for the Task Force.

Transparency and Open Data

Transparency remains a key part of the UK Government's efficiency and reform agenda, and the Government proactively publishes information on environmental and non-environmental issues on two websites, https://www.gov.uk/ and https://data.gov.uk.

As shown by the Open Data Barometer 2015 Global Report, the UK succeeded in retaining its 2013 global top ranking for overall open data readiness, implementation and impact. By way of example, the Department for Environment, Food and Rural Affairs (Defra) this year set itself an ambitious target of releasing 8000 datasets by June 2016 under the Open Data initiative "to create opportunities for businesses and our rural economy and to improve the quality of our natural environment".

Number of public authorities

As there is a potential for public authorities to come into, and fall out of, scope of the Environmental Information Regulations 2004 (EIRs) as a result of changes in status and function, it is impossible to provide a complete list or accurate number. However, Government statistics show that over 100,000 UK bodies are subject to the FOIA, and this figure will be very similar for the EIRs.

Schedule 1 to the Freedom of Information Act 2000 (FOIA) lists the UK's public authorities; a similar schedule to the Scottish Freedom of Information (Scotland) Act 2002 (FOISA) lists Scotland's public authorities. The lists apply, with minor differences, to the UK and Scottish EIRs. These differences are due to the different

approaches: the FOIA and FOISA designate public authorities, whereas the Aarhus Convention, and consequently the EIRs, define them.

Statistics on requests for information

Encouraging greater public participation in decision making can create its own challenges. There are no official figures for the number of information requests received by all public authorities in the UK, although Scottish public authorities are now asked in the Scottish Ministers' 2014 Code of Practice to collect key statistics. Statistics for the larger authorities are published on the Scottish Information Commissioner's website, which show that Scottish public authorities reported receiving 7,196 EIRs requests in 2014-15 (compared to 59,557 FOI requests).

The number of requests recorded by 41 centrally monitored UK public authorities (largely government departments) has recently levelled off at around 47,000 a year following a number of significant year-on-year increases. The collections of performance statistics can be found on the Gov.uk website.

There is no requirement for statistics to be collated and published for UK local authorities. However, Dr Ben Worthy of the Department of Politics, Birkbeck College (University of London), speaking at a recent Westminster Legal Policy Forum, estimated that local authorities received around 200,000 requests under the FOIA and the EIRs in 2010, accounting for at least 70-80% of total national requests. The majority of requests received by local authorities are reportedly "niche" requests for information on micropolitical issues and those affecting local communities.

Any simple statistics conceal the ever-increasing complexity of requests posted by a sophisticated group of users, including political lobbyists, environmental campaigners, researchers and journalists from all across the spectrum of political and environmental opinion. By way of example, the What Do They Know website, a useful tool assisting requesters to submit requests, reflects the range of probing, detailed questions put to a small number (around 16,000) of UK and Scottish public authorities.

The EIRs therefore continue to make a valuable contribution to environmental democracy, but at what is argued by some to be a considerable burden to the public purse. However, it is not possible to isolate environmental information from the available statistics.

Item 2 - Environmental information: improving public access

(a) Scope of environmental information and its provision by different public authorities

This session will focus on the scope of information to be provided in accordance with the Convention. Participants will be invited to share good practices, recent policy and legislative developments and to identify challenges and gaps with regard to such issues, inter alia, as: (a) types of information to be provided in accordance with the Convention; (b) types of public authorities generating, collecting and providing environmental information; (c) access to information on emissions, substances and wastes; and (d) access to statistical, spatial and hydrometeorological information related to the environment. Participants will be also invited to identify further needs in relation to the subject.

(a) Types of information to be provided in accordance with the Convention

European Directive 2003/4 expands on the types of information intended to be covered by the definition of "environmental information" in Article 2(3) of the Convention, and this is the version that appears in the EIRs. The types of information to be collected and disseminated proactively are as defined in Article 5(3) of the Aarhus Convention and developed by Article 7(2) of the Directive. The list is referred to but not copied out in Regulation 4(4) of the EIRs.

UK public authorities use "publication schemes" to act as a directory to the information that they hold and disseminate proactively or can make available on request. While these schemes have their origin in s19 of the FOIA or s23 of the FOISA, and therefore were not designed specifically for environmental information, they can also be used to show where such information sits on the public authority's website. This has the benefit of using the same categories for environmental and non-environmental information. The UK's Information Commissioner's Office (ICO) has produced guidance about the publication of environmental information. The ICO handles complaints about publication schemes.

(b) Types of public authorities generating, collecting and providing environmental information

Public authorities are restricted by their public task in the scope of the information they collect. They will therefore not collect or update information that they do not require for their own business purposes. We have no statistics on the number of the UK's public authorities whose public task involves environmental matters, but the best known will include government departments such as Defra, the Department of Energy & Climate Change, the Forestry Commission, and public bodies whose remit is to deliver the policies, such as the Environment Agency and Natural England. Local authorities have responsibility for issues such as local waste disposal, noise, and planning issues. Bodies whose environmental responsibilities are not obvious from their names are also listed in Schedule 1 to the FOIA. The equivalent bodies in Scotland (such as the Scottish Government, the Scottish Environment Protection Agency, Scottish Natural Heritage, all

Scottish local authorities, etc.) will also generate a lot of environmental information.

The Guidance for Operators Providing Public Services produced by the European Bank for Reconstruction and Development (EBRD), with the support of the Aarhus Convention secretariat and representatives of operators, came out of the blue when it was circulated in September 2015. It states that some services "are generally viewed as public services" and operators of such services may have legal obligations in accordance with the Aarhus Convention.

Although flagged as just guidance, this approach is of some concern, as the sectors identified as potentially needing to comply with the Aarhus Convention will differ in the detail of their organisation, ownership and legal status across the Parties. The complexity of this situation is illustrated by a recent UK case involving privatised water utilities. *Fish Legal and Shirley* (C-279/12) required a referral to the Court of Justice of the European Union (CJEU) to define what was meant by special powers and control and to set out the conditions for examining, in the national courts, whether or not particular bodies had such powers or were subject to such control.

The EBRD guidance states that "Article 2(c)" of the Convention "applies not only to government at all levels", but also to "any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of [a public authority]."

Article 2(2)(c) requires control to be demonstrated. The test set by the CJEU, which the UK is now required to apply under EU law, requires another public authority to "exert decisive influence on their action in the environmental field" such as to remove their autonomy. However, in the UK privatised water utilities were judged to be public authorities only under the domestic equivalent of Article 2(2)(b) relating to "public administrative functions". The CJEU had ruled that national courts would need to examine whether such bodies were "vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law." The Upper Tribunal (UT) examined the powers in some detail and decided that the UK's privatised water utilities met this test.

(c) Access to information on emissions, substances and wastes

Access is provided on request in the same way as for other environmental information. Urgent information and alerts are published proactively by appropriate means during emergencies and other incidents. The following links provide examples of the proactive publication of emissions and waste information by central and local government:

- http://uk-air.defra.gov.uk/ - air quality information
- http://environment.data.gov.uk/bwq/profiles/ - bathing water quality
- http://www.dwi.gov.uk/ - Drinking Water Inspectorate
- http://apps.environment-agency.gov.uk/wiyby/37821.aspx - local pollution incidents
- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/292843/LIT_8547_b70a6b.pdf - pollution incidents report
- https://www.gov.uk/government/organisations/environment-agency - pollution, waste and other incidents
- http://www.bristol.gov.uk/page/community-and-safety/hazardous-chemicals-and-control-major-accident-hazards-comah - warnings on discharges

Where requests for information are concerned, the interpretation of "emissions" has presented challenges. This is partly because Directive 2003/4 reduces the number of exceptions to disclosure available to a public authority when the information concerns emissions (commonly referred to as the "emissions override"). In 2014 the precedent-setting UT, an appellate court, established that information on emissions did not cover "anything beyond information relating to the nature, extent etc of the emissions themselves" (case No. GIA/4279/2012). This judgment is welcome, for example in respect of manufacturers developing proprietary technology for reducing emissions who may share information with public authorities. Prior to the UT judgment, there was a risk that such information might be caught by the override that prevented public authorities from arguing that it was confidential industrial information.

(d) Access to statistical, spatial and hydrometeorological information related to the environment

The Natural Environment Research Council's Centre for Ecology & Hydrology (CEH) is the UK's Centre of Excellence for integrated research in terrestrial and freshwater ecosystems and their interaction with the atmosphere. It offers expertise in hydrometeorological monitoring and information systems to support capacity development. As the Centre of Excellence for freshwater science, the CEH acts as the focal point for hydrometric data in the UK. CEH has experience in developing and operating highly efficient, long-term observation, data management and decision support systems. It possesses unique, long-term and large-scale datasets that describe the state of the environment.

The CEH has significant plans to make more data available and exploitable by 2019: http://www.ceh.ac.uk/our-science/science-areas/environmental-informatics

(b) Quality of environmental information

This session will continue the discussion on measures, tools and techniques that can be used by various stakeholders to assure and monitor quality of environmental information derived from various sources. Participants will be invited to share good practices, outcomes of relevant projects, recent policy and legislative developments and to identify challenges and gaps with regard to this issue. Participants will be also invited to identify further needs in relation to the subject.

This item picks up on a topic discussed as Item 2(b) at the third meeting of the task force in December 2014, where a number of contributors argued forcefully that the quality of the information they held depended on the purpose for which it was created or obtained. The UK statement prepared for that meeting shared that view, and we also refer under Item 2(a) above to the concept of the "public task".

As regards information that public authorities generate, it is good practice to keep it up to date as long as it is required for business or legal purposes, but not beyond that. Information with a long-term or historic interest is usually transferred to the UK National Archives or a local place of deposit.

Additionally, public authorities should not be held responsible for the quality of information they receive from third parties. If such information is the subject of a request, it can be disclosed with a warning and background information, as appropriate. Public authorities need to be cautious about altering original information, as it is an offence in the UK to alter a record with the intention of preventing disclosure of the original.

(c) Associated costs

This session aims to share good practices, recent policy and legislative developments and to identify challenges and gaps with regard to the costs associated with public access to environmental information. Participants will be also invited to identify further needs in relation to the subject.

Burden on public authorities

Researchers over the years have attempted to come up with average figures for the cost of requests to the public purse. A survey conducted by Ipsos MORI on behalf of the Ministry of Justice in 2011 revealed that the average cost of handling a request for environmental information was £308, and the average request took nearly ten hours to complete.

Local authorities, as recipients of 70-80% of information requests, bear a significant cost burden in terms of supplying environmental information, although by no means all requests will be for environmental information. A number of panel members at a recent Westminster Legal Policy Forum pointed out that the majority of requests received by local authorities reflected private or niche interests, and that the taxpayer is funding the handling of requests for relatively trivial information. Such requests arguably have no true "public interest" beyond the generic argument of transparency and present no true opportunity for public participation or benefit for future generations since no significant environmental decisions are being taken.

The *East Sussex* case - C-71/14

The judgment of the CJEU in a referral from the UK's First-tier Tribunal (FTT) will be helpful in establishing the cost elements that public authorities can reasonably recoup when supplying environmental information. The judgment clarifying the activities that may be taken into account when setting charges was received in October 2015. The case will now be heard by the referring tribunal in January 2016 with the benefit of the CJEU's interpretation of the charging provisions.

The small amounts charged for searches (approximately €1 - €6) by East Sussex County Council were calculated on a cost-neutral basis, but are nevertheless significantly lower than the wide range of costs suggested by the research referred to above. This may be because East Sussex had efficient systems to facilitate searches for information, but we do not know the basis for the calculations by the survey respondents.

The charge levied by East Sussex did, however, include a small element for maintaining the database that held the information. The CJEU ruled that the cost of establishing and maintaining a database used for answering requests was not part of the "supply" of information. However, even with the database element included, the charge was not unreasonable, particularly in the context of the value of the transactions concerned.

The wider issue of property search requests

The UK would be interested in hearing the views of others on the distinction between a request under the Aarhus Convention (and thereby the ensuing Directive and EIRs) which results in information being placed in the public domain for all to see and use, and essentially commercial transactions between a public authority and a person who intends to use the information as part of a service for which a commercial fee is charged.

The UK's *Leeds* case (EA/2012/0020-21) is a typical example, as local authorities frequently receive requests for information that buyers need for the purchase of

properties. Most buyers use professional services to obtain this information (e.g. solicitors or property search companies). The FTT ruled that, where the solicitor or company does not examine the information *in situ* and the local authority instead carries out an "official search" and compiles a report, this involves the value-added provision of information and should be handled outside of the information rights regime.

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

(a) Proceedings of public authorities, international relations, national defence, public security and the course of justice

This session will focus on the practice of application of these restrictions in accordance with article 4, paragraphs 4 (a), (b) and (c), of the Convention. Participants will be invited to share good practices, recent policy and legislative developments, identify challenges and suggest measures to improve the application of the Convention with regard to these issues. Participants will be also invited to identify further needs in relation to the subject.

Proceedings of public authorities – Article 4(4)(a)

The UK believes it has an informal but workable definition of what constitutes proceedings of a public authority. The ICO's published guidance clarifies that the term includes formal proceedings such as:

- legal proceedings;
- formal meetings to consider matters that are within the authority's jurisdiction, and
- situations where a public authority exercises its statutory decision making powers.

We have had greater clarity since the CJEU handed down its judgment in *Flachglas Torgau* (C-204/09) in 2012. Paragraph 63 clarifies that the proceedings have to come within the final stages of each policy-making process.

The precise scope of "proceedings" will now be settled by the case-law of the national courts on the basis of *Flachglas Torgau*, but in the meantime an FTT decision (EA/2015/0026 & 0059) has helpfully clarified (paragraph 25), in line with the ICO's view, that "proceedings" include a process of consideration involving the exercise of choice as to how an authority discharges its regulatory functions.

International relations, national defence and public security – Article 4(4)(b)

The UK implementing legislation has changed the wording of this exception to read "international relations, defence, national security or public safety", which more closely reflects the national terminology used in the FOIA. The scope will be the same.

Very few cases involving this exception have been appealed to the ICO (36 as at October 2015), and our knowledge of any particular challenges is therefore limited. Cases appealed to the ICO and generally decided in the public authority's favour have included matters such as:

- Potential terrorist targets, including ones identified by the compilation of information from various sources, and vulnerable sites
- Relationships with international bodies, including bodies conducting climate research, and interference with European infraction cases
- Derelict structures (abandoned buildings, tunnels) and public safety
- International negotiations
- Emergency preparedness

It is, of course, not guaranteed that a subsequent appeal to the FTT would produce the same outcome.

Both UK and Scottish public authorities have had greater difficulty with this exception when it comes to protecting those involved in the legal but emotionally charged area of culling wildlife. By way of example, the Scottish Government has tried to use the exception to withhold the names of sites shooting seals, as protesters harass salmon farm staff and their families. The Scottish Information Commissioner typically looks for evidence that public safety will be substantially prejudiced – merely demonstrating that there is an increased risk to public safety is not enough.

Course of justice – Article 4(4)(c)

The UK's Information Tribunal helpfully interpreted the concept of the course of justice as the "smooth running of the wheels of justice" (*Verderers*, EA/2008/0020). This exception is often used in tandem with the exception for "proceedings" in order to protect legally privileged information. The UT more recently issued a reminder that disclosure would actually have to adversely affect the course of justice rather than merely waive legal privilege (2014 UKUT 130 AAC).

(b) Material in the course of completion or internal communication

This session will focus on the practice of application of these restrictions in accordance with article 4, paragraph 3 (c), of the Convention. Participants will be invited to share good practices, recent policy and legislative developments, identify challenges and suggest measures to improve the application of the Convention with regard to these issues. Participants will be also invited to identify further needs in relation to the subject.

Material in the course of completion / internal communications – Article 4(3)(c)

The EIRs follow the European Directive in splitting these.

Material in the course of completion

The EU Directive expands on the Aarhus text "material in the course of completion" to ensure that the phrase encompasses three scenarios: material still in the course of completion, unfinished documents, and incomplete data. The UK Information Tribunal has established that the exception therefore covers drafts of finished documents. This is because a draft's status does not change simply because a final version exists. The unfinished documents that have been put aside will forever remain unfinished. However, the Scottish Information Commissioner does not accept that draft documents engage this exception in cases where completed documents existed at the time of the original request.

Internal communications

The UK highlighted in its 2014 statement the many changes in the way that governments develop policy in the years since the Aarhus Convention was negotiated.

There is an added layer of complexity where policy making and policy delivery have been split between, for example, a government department and a delivery body that is not part of the same legal entity, but where successful outcomes depend equally on both bodies.

The government structures of the Parties to the Convention will show a broad spread of organisational and administrative models. The sorts of cases referred to above are, perhaps, more likely to arise in larger countries with a more complex array of interrelated public bodies. Where "internal communications" are concerned it would, therefore, be preferable for decisions on the scope of the exception to rely on local practice and government organisation. This would establish a level playing field as regards access to information and ensure that one country is not penalised with regard to access to sensitive information compared with more centralised forms of government prevalent in other Parties.

In many cases statutory arrangements and documentary evidence on forms of collaboration will be helpful in establishing the true nature of the link between the bodies and the need for a safe space for communications.

(c) Commercial and industrial information, intellectual property rights and interests of a third party

This session will continue discussing the practice of application of these restrictions in accordance with article 4, paragraphs 4 (d), (e) and (g), of the Convention. Participants will be invited to share good practices, recent policy and legislative developments, identify challenges and suggest measures to improve the application of the Convention with regard to these issues. Participants will be also invited to identify further needs in relation to the subject.

Commercial and industrial information - Article 4(4)(d)

The Task Force has already heard evidence on the risks attached to the drip-feed of commercial information that may ultimately reveal sensitive details, particularly when read together with other industry information. It is important not to lose sight of this issue.

Although the UK's EIRs and FOIA have been in force for over ten years, appeals to the ICO reveal that there is still considerable nervousness among contractors, manufacturers, etc. surrounding the dissemination of information that they share with public authorities. However, the UK's ICO and Tribunals send out the clear message that private undertakings should by now be aware of both the need for transparency and the risk of disclosure, when doing business with public authorities.

Information relating to tenders and contracts may often be disclosed if it will not have an effect on future tender exercises. There is a need to ensure that disclosure of information is not anti-competitive (i.e. through giving a competitor an unfair advantage) and does not drive up costs to the public authority.

A balance needs to be struck between confidentiality and the need for accountability, so that public money is not wasted through unnecessary disruption. Derailing a major project involving investment of public funds may not be in the public interest, and in many cases there are also significant stages in a project during which the public may make an active contribution through participation in a consultation process.

Intellectual property rights – Article 4(4)(e)

The complexity of, and disparities between, international agreements on IP were discussed at some length at the third meeting of the Task Force. This is an area that requires specialist knowledge and presents considerable difficulties for the layman.

Interests of a third party – Article 4(4)(g)

This is generally interpreted as providing a level of protection for volunteered information, e.g.

- responses to consultations where respondents request confidentiality for valid reasons
- correspondence from ordinary members of the public in situations where the Data Protection Act applies, and
- correspondence from whistleblowers who may fear the personal consequences if their identity is revealed.

It may not apply where a person is required to give certain information as part of an application process where that application is itself optional, but the Data Protection Act may provide confidentiality in such a case.

There is also often a public interest in disclosing correspondence from lobbyists who are attempting to influence government policy.

(d) The environment to which information relates

This session aims at discussing the practice of application of this restriction in accordance with article 4, paragraph 4 (h), of the Convention. Participants will be invited to share good practices, recent policy and legislative developments and to identify challenges and propose measures to improve the application of the Convention with regard to this issue. Participants will be also invited to identify further needs in relation to the subject.

This exception appears to be rarely used in the UK, as there have been just six complaints to the ICO that resulted in a decision notice being issued. In each case the ICO's decision was that the exception had been incorrectly applied.

We understand it to protect information on, for example, breeding sites of endangered species and rare habitats and landscapes, with the intention of preventing wildlife crime through egg collection, destruction of habitats, removal of rare species to enable development that would not otherwise get permission, etc.

(e) Ensuring the legitimate application of the restrictions

This session will continue the discussion on measures that are taken at the national level to ensure the legitimate application of the restrictions under the Convention and on the process of removing the confidentiality protection. Participants will be also invited to identify further needs in relation to the subject.

The reasons for refusal in Article 4(3) of the Aarhus Convention are reflected in regulation 12(4) and (5) of the EIRs. The wording reflects that of the EU Directive, which imposes a stricter disapplication of the exceptions than the Convention where the information relates to emissions into the environment (Article 4).

The EIRs that cover UK public authorities are enforced by the Information Commissioner, and the Scottish EIRs are enforced by the Scottish Information Commissioner in respect of Scottish public authorities. Both are independent regulators. The relevant Commissioner produces guidance, investigates appeals from dissatisfied requesters, and generally produces decision notices setting out their findings and any action to be taken.

In respect of decisions taken by UK public authorities, a full-merits appeal can be heard by the FTT (an oral hearing or just on the papers). Subsequently there may be an appeal on a point of law to the UT, whose decisions set precedent (case-law). Tribunal judges of the FTT or UT may refer questions to the CJEU for a preliminary ruling if they feel that they do not have sufficient information. Further stages of appeal on points of law in the UK are to the Court of Appeal and the Supreme Court. For cases under the Scottish EIRs, a Scottish Information Commissioner decision can be appealed to the Court of Session, but only on a point of law.

The process of removing the confidentiality protection

In order to be confidential, the information must have the necessary quality of confidence, which requires the information

- not to be trivial, and
- not to be in the public domain

The information must also have been disclosed under conditions of confidentiality.

The confidentiality protection exists for a good reason, which is to protect a vital principal. However, the presence of the presumption in favour of disclosure and the application of the public interest test recognise that in some cases even confidential information will need to be disclosed. Cases where no adverse effect will follow disclosure of confidential information are ones that do not engage the exception. Any confidentiality markings on official information will need to be reconsidered when such information falls within scope of a request. Protection should only be removed after due consideration and, where appropriate, consultation of third parties affected by its disclosure.

Item 4 - Effective dissemination of environmental information

This session will focus, inter alia, on innovative application of electronic information tools in support of the Convention and the monitoring of the implementation of the recommendations

in decision II/3. The participants will be expected to share good practices in improving dissemination of environmental information through shared environmental information system, e-government and Open Government Data initiatives, recent technological developments and establishing partnerships. The session will also discuss the role of the Aarhus Clearinghouse for Environmental Democracy and national nodes in promoting access to environmental information.

Please see the comments in our introduction about continuing efforts by the UK government and other public authorities to place environmental information proactively in the public domain.

As an example of the use of electronic tools, the UK Environment Agency (EA) is working on a request logging and tracking system that provides them with a picture of what is being asked for and which will provide them with the management information to identify common requests and common customer needs. This will allow the EA to target the data to be published.

Item 5 - Priority areas for action on emerging and systemic issues

The participants will be invited to highlight any other emerging issues or issues of a systemic nature regarding public access to environmental information that are not covered by previous agenda items, including measures, tools and projects, to address these issues.

No comment from the UK.

Item 6 - Activities under other international forums

No comment from the UK.

Item 7 - Other business

No comment from the UK.