

The Campaign for Freedom of Information

Freedom of Access to Information on the Environment

Evidence to the House of Lords European Communities Committee, Sub-Committee C

February 22, 1996

The Campaign has over a number years taken an interest in rights of access to environmental information and has promoted a number of backbench bills to extend these. (1) We have also tested existing rights, including those under the Environmental Information Regulations 1992 and the Code of Practice on Access to Government Information (which can also be used to obtain access to environmental information from central government bodies).

Our overriding view of the Regulations is that they are deeply flawed. Their main shortcomings result from (a) the excessively broad exemptions (b) the inadequate definition of the bodies to whom the Regulations apply, and (c) the lack of any effective enforcement mechanism. Although the Code of Practice itself has serious shortcomings, we now advise individuals seeking environmental information from central government to apply for it under *both* the Regulations *and* the Code of Practice. This enables them to challenge any refusal by complaint to the Parliamentary Ombudsman under the Code: no realistic appeal mechanism exists under the Regulations.

Exemptions: harm tests

The exemptions' most obvious defect is that they contain no tests of harm. Thus Regulation 4(2)(a) exempts:

> "information *relating to* matters affecting international relations, national defence or public security" (our emphasis)

There is no requirement that disclosure must be likely to "harm" these interests. This should be contrasted with the corresponding provisions in overseas Freedom of Information Acts which invariably do contain such harm tests, (2) as does the UK's Code of Practice on Access to Government Information. The Code exempts:

> "Information whose disclosure would *harm* national security or defence...[or] *harm* the conduct of international relations or affairs" (3) (our emphasis)

The Regulations would thus permit departments to withhold information which "relates" to international matters, even if disclosure would cause no harm to UK interests. There will be an international dimension in many areas, such as global warming, transborder pollution, issues such as the THORP plant and the NIREX waste repository which have been the subject of discussions between the UK and Irish governments and of course all dealings on environmental issues involving the European Commission, and the Council of Ministers. Similarly, there are many areas where environmental damage may be caused by defence activities, but no prospect that disclosure about them would *harm* Britain's defences.

Another illustration of the weak drafting appears in Regulation 4(1)(e) which exempts:

> "information relating to matters to which any commercial or industrial confidentiality attaches or affecting any intellectual property"

This contrasts unfavourably with the much narrower exemption for commercial confidentiality in section 22(11) of the Environmental Protection Act 1990 which exempts information if its disclosure in a register:

> "would prejudice to an unreasonable degree the commercial interests of... [the] individual or person [to whom it relates]"

This provides *two* tests of harm: that there must be "prejudice" and that the prejudice must be "unreasonable". We wonder what justification there can be for the broader, ill-defined definition adopted in the Regulations.

Most of the other exemptions also lack what we would regard as the necessary tightness of drafting. For example, the wide exemption which protects information which "is or has been the subject matter of, any legal or other proceedings (whether actual or prospective)" (4) protects not merely information which at the time of a request is sub judice, but information which once was, but is no longer. There is no reason to withhold such information from the public. Moreover, information which may be dealt with at a public inquiry, or has in the past been dealt with, could apparently be withheld under this provision, a deeply unhelpful restriction.

Public Interest Override

Under the Environmental Protection Act, even information which is commercially confidential may have to be disclosed "in the public interest" if the Secretary of State so orders *[section 22(7)].*

The Code of Practice provides that exempt information can be disclosed if :

> "any harm or prejudice arising from disclosure is outweighed by the public interest in making information available" (5)

The same principle is also found in relation to many specific exemptions under overseas Freedom of Information laws. For example, Canada's *Access to Information Act 1982* exempts confidential third party information supplied to the Government, but allows such information to be disclosed where there is an overriding public interest. (6)

The absence of any such public interest test from the Environmental Information Regulations means that there is no provision for the disclosure of information which may be the subject of only borderline sensitivity under any of the exemptions, but which reveals the existence of a substantial and imminent environmental hazard.

Relevant persons

In December 1993 the Campaign published the results of a survey in which we attempted to use the Regulations to obtain information from a range of public bodies about the British Nuclear Fuels THORP plant. (7) A copy is attached.

Its most striking finding was that a number of bodies stated that they considered that they did not fall within the Regulations' definition of a "relevant person". For reasons that the report describes in some detail, we considered that in each of these cases (the Radioactive Waste Management Advisory Committee; the Health and Safety Executive, in relation to its nuclear responsibilities; and British Nuclear Fuels Ltd) the body concerned fell within the relevant definition and was in particular "under the control of" ministers and therefore within the scope of Regulation 2(3)(b). We accordingly wrote to the Ministers concerned asking each to instruct the body concerned to comply. The Ministers were not prepared to do so. We also made a formal complaint to the European Commission that the British Government had failed to meet its obligations under the Directive in that it had allowed bodies under ministerial control to evade their responsibilities under the Regulations. This complaint is still being considered by the Commission.

(As a side issue, we have asked the Government if we could see the submissions it has sent to the Commission in response to our complaint, citing this Select Committee's 1992 recommendations that the process of investigating complaints under European environmental legislation should be open to scrutiny. (8) This has been refused - although we have supplied the Department of the Environment with

copies of all of our submissions to the Commission. (It seems strange that what are essentially equivalent to pleadings in court should be taken in secret and not be available to other parties for possible rebuttal.)

One of the issues that arose in correspondence between ourselves and Ministers was the view of the Health and Safety Commission/Executive that it was subject to the Regulations only where it had an explicit, statutory environmental responsibility and not in relation to other functions (such as those relating to the nuclear industry). This was at odds with the view expressed in the Department of the Environment's Guidance on the Regulations, that a person subject to the Regulations was subject to them in respect of *any* environmental information held by it. Since the DOE was the lead department we had assumed that it spoke on behalf of the whole Government. We were astonished to be told by the Employment Secretary that the lawyers of both the HSE and the DE did not accept the the DOE's view. He added:

> "I note that the Department of the Environment guidance suggests a different interpretation but it is only guidance. Ultimately only the courts can give a definitive interpretation of the law but, in the absence of that, I believe that HSE is right in following its legal advice". (9)

We find it a bizarre reflection on collective responsibility that ministers were unable or unwilling to resolve their differences and in effect were content to leave the matter unresolved unless a third party brought the the matter before a court.

The cost of bringing such an action deterred us from doing so, although we believe it would have been well-founded legally. The cost would also generally prevent any ordinary citizen and most environmental organisations from enforcing their rights.

The matter was however one that could, at least in our view, be regarded as constituting a breach by the UK government of its obligations under the Directive. Our complaint to the European Commission, though still unresolved after more than two years, has had one positive outcome. The Government appears to have concluded that the Health and Safety Commission's arguments, that it was subject to the Regulations only in respect of some but not all of the environmental information held by it, could not be sustained. The Commission has now revised its policy on access to environmental information, making clear that it now accepts that it is subject to the Regulations in respect of all its functions. (10) (Copies of the Campaign's report and of the subsequent correspondence with Ministers and the Commission are attached.) However, the Government's position in relation to RWMAC and BNFL remains unchanged and reflects a wider problem, that bodies, including those over which ministers self-evidently exercise a degree of control, have been allowed to decide for themselves whether they consider that they are subject to the Regulations.

The report raises a number of other points, which may be relevant to the Committee's inquiry. The meaning of *"public responsibilities for the environment"* in Regulation 2(3)(b) is unclear. BNFL appeared to have interpreted the Regulation to refer to bodies with regulatory responsibilities for the environment (11) though we believe

that it is unreasonable to interpret it in this narrow sense. (12) RWMAC also argued that it had no such "public responsibilities", a comment we found even more difficult to understand. (13) Some of the information sought was refused on the grounds that it was not "*information which....relates to the environment"* within the meaning of Regulation 2(1)(a), though we consider that Regulation 2(2)(c) supports a much broader interpretation. (14)

Enforcement

Where a 'relevant person' fails to comply with the Regulations, the remedy appears to be either judicial review or action under Regulation 3(6) for breach of statutory duty. The judicial review test may be appropriate (for those not deterred by cost) for determining whether a particular body is a "relevant person" and subject to the Regulations. However, where the complaint is that a relevant person has wrongly claimed that information is exempt, the judicial review test is inappropriate, since it does not permit review of the decision on its merits. An authority's decision could be overturned only if it was "unreasonable" to the point of being irrational. This test would apply only to a decision which is:

> "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". (15)

This is clearly not an adequate basis on which to challenge claims relating to exemption. So long as a body could show some conceivable reason for thinking that the exemption might apply, the court would not substitute its own decision as to whether the information was exempt. We are not clear whether this would also be the test applied in an action for breach of statutory duty, though the suitability of that remedy in relation to the Regulations has been questioned. (16)

An alternative remedy might exist in relation to government departments and certain central government bodies by way of complaint to the Parliamentary Ombudsman. However, where a legal remedy is available to the applicant - as is the case under the Regulations - the Ombudsman is precluded from investigating the complaint, unless he is satisfied that in the circumstances it was not reasonable to expect the applicant to use that remedy. (17) The Ombudsman can, however, investigate a complaint if the environmental information has been sought under the Code of Practice on Access to Government Information and the Campaign has been advising those seeking environmental information from a body subject to the Ombudsman's jurisdiction, to ensure that their requests invoke both the Regulations and the Code, so that either remedy may later be available to them. The Ombudsman has recently ruled in favour of the applicant and against the Department of the Environment in one such case where environmental information was sought under the Code. Anticipating that the applicant might make further related requests the Ombudsman noted:

"Were the request to be made on the basis that the inquirer had legal rights to the information sought under the Environmental Information Regulations 1992 the request would need to be considered against the provisions of those Regulations. Then it would be for the courts (if anyone) to determine the legal issues involved in cases of continuing dispute. Conversely, if the request were to be made relying on the provisions of the Code the request would need to be considered against both DOE's obligations under the Code and the exemptions set out in Part II of the Code." (18)

The Code of Practice

This is not to suggest that the Code is in all respects superior to the Regulations. Its advantages are that some of its exemptions (though not all) are more narrowly drafted, that it includes a public interest override, and that the Ombudsman provides an inexpensive and relatively informal complaint mechanism.

Its disadvantages are:

1. as an administrative measure it cannot override the numerous statutory restrictions on disclosure. For example, under the Code safety information relating to the BNFL THORP plant has been refused by the Health and Safety Executive on the grounds that disclosure is prohibited by section 28 of the Health and Safety at Work Act. (19) This difficulty is overcome under the Environmental Information Regulations by Regulation 3(7).

2. the Code's commitment is to provide "information" not "documents". (20) The Government apparently envisages that requesters will normally be provided with a letter setting out information summarised from documents, not with copies of documents themselves, though the Ombudsman has questioned this approach. (21)

3. Because the Ombudsman's recommendations are not legally binding a department could refuse to follow them if it was anticipated that a disclosure would expose the Government to substantial criticism or embarrassment (although no such refusal has occurred to date).

4. The Ombudsman's jurisdiction is relatively limited in relation to public bodies other than Government departments.

5. Although some Code of Practice exemptions are more narrowly drafted that those in the Regulations, others are equally unsatisfactory and provide unjustifiably wide and undifferentiated protection for information.

The Government has of course promised to introduce new legislation to create a public right to health and safety information, and suggested that any tribunal set up to enforce this new law might also be made responsible for the Environmental Information Regulations. We have welcome this proposal, but remain concerned at

the delay in bringing forward the legislation. Three Queen's Speeches have passed since the commitment was made, without any sign of progress. We have raised this matter with the Chancellor of the Duchy of Lancaster, and the correspondence is attached.

Should the necessary legislation be introduced, there will still be striking anomalies between the various regimes under which information may be sought:

- The proposed health and safety law, for example, will not apply retrospectively - though both the Environmental Information Regulations and the Code of Practice do.

- Neither the EIR nor the proposed health and safety information law include a public interest override, though such a provision appears in both the Environmental Protection Act and the Code of Practice.

- Separate provisions apply to local authorities which are subject to the Regulations, but not to the Code of Practice A conceptually distinctive set of requirements apply under the Local Government (Access to Information) Act 1985, which provides access to information only in relation to matters which have been, or are about to go, before a meeting of the authority or its committees but not to information on matters which are not directly related to a past or imminent meeting.

- The 1985 Act and the Regulations provide access to documents, whereas the Code, on its face, does not.

- Information which is subject to a separate statutory restriction on disclosure cannot be obtained under the Code or under the 1985 Act (22) but can be obtained under the Regulations.

It is not difficult to envisage circumstances in which someone seeking information on a particular topic is forced to make a series of separate applications, under separate sets of provisions, involving inconsistencies in exemptions, time scales for responses, charging schemes, provisions on retrospection, access to documentary materials and enforcement procedures. Our own requests for information about THORP encountered such problems. (23) On the grounds of consistency alone - but also in the interests of ensuring that the highest standards of disclosure are implemented most widely - we believe that a single regime, in the form of a Freedom of Information Act applying across the entire public sector, has compelling attractions.

Footnotes

1. These include the Environmental Pollution Information Bill introduced by Nigel Forman MP in 1985; the Environment and Safety Information Bill introduced by Chris Smith in 1988, which subsequently reached the statute book; and the Corporate Safety and Environmental Information Bill 1991, introduced by Jeff Rooker MP.

2. For example, section 33(1)(a) of Australia's Freedom of Information Act 1982 exempts documents whose disclosure *"could reasonably be expected* ***to cause damage to*** *(i) the security of the Commonwealth; (ii) the defence of the Commonwealth; (iii) the international relations of the Commonwealth"*. (our emphasis)

3. Exemption 1

4. Regulation 4(2)(b)

5. *Code of Practice on Access to Government Information, Part II, 'Reasons for Confidentiality'*

6. "The head of a government institute may disclose any record requested under this Act...that contains *[exempt third party information]*...if such disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if such public interest in in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contract or other negotiations of a third party". *Access to Information Act 1982, section 212(6).*

7. *'The Environmental Information Regulations and THORP',* M.Frankel & A.Ecclestone.

8. Select Committee on the European Communities, Session 1991-92, 9th Report *'Implementation and Enforcement of Environmental Legislation'* HL 53-I

9. Letter from David Hunt, 31.3.94

10. Health & Safety Commission, *'Policy Statement on Open Government'*, November 1994

11. Report, page 24

12. Report, pages 26-36

13. Report, pages 36-43

14. Report, pages 56-66

15. Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service [1985], AC 374*

16. G. Bakkenist, *'Environmental Information, Law Policy & Experience', Cameron May, 1994, 118*

17. Section 5(2), Parliamentary Commissioner Act 1967

18. *Parliamentary Commissioner for Administration, First Report 1995-96, Selected Cases 1995. Volume 6, Access to Official Information, HC 86, page 12*

19. This is currently the subject of a complaint by the Campaign for Freedom of Information to the Parliamentary Ombudsman

20. "There is no commitment that pre-existing documents, as distinct from information, will be made available in response to requests". *Code of Practice on Access to Government Information, para 4.*

21. He has indicated that he will treat a request for a document as a request for all the information contained in it. *Access to Official Information - The First Eight Months, Second Report, 1994-95, HC 91, page 4*

22. Section 1(1) of the 1985 Act and Section 100A(3)(b) of the Local Government Act 1972.

23. Some of the requested information was refused on the grounds that it did not "relate to the environment"and was therefore not subject to the Regulations, although it related either to safety concerns or to the economic justification for the plant. We later sought some of this "non-environmental" information under the Code of Practice and were told that it was subject to a statutory restriction on disclosure, which the Code - unlike the Regulations - cannot override.