The Campaign for Freedom of Information

Free Word Centre
60 Farringdon Road
London EC1R 3GA
Tel: 020 7324 2519
Email: admin@cfoi.org.uk
Web: www.cfoi.org.uk

Submission to the Environment, Food and Rural Affairs Committee on Draft Environment (Principles and Governance) Bill

12 April 2019

Summary

We have serious concerns about the prohibition on disclosure contained in clause 28 of the draft Environment (Principles and Governance) Bill[1]. This:

- is likely to override the right of access that would otherwise apply under the Environmental Information Regulations
- would prevent disclosure regardless of whether it would be harmful and regardless of the public interest in the information
- would introduce a greater level of secrecy than applies under existing EC arrangements
- would be incompatible with both the Aarhus Convention and Article 10 of the European Convention on Human Rights
- would be a major reversal of the progress made over more than 25 years in opening up environmental information.

Introduction

Michael Gove, the Environment, Food and Rural Affairs Secretary has stated that the draft bill broadly attempts to replicate the arrangements of EU infraction proceedings.[2] The Explanatory Notes to the draft bill state that *"The OEP will provide a domestic replacement for the scrutiny function of the European Commission and the European Environment Agency"*.[3]

It is highly desirable that the UK's exit from the EU should not lead to a weakening of environmental protection. But there is no reason why, post-Brexit, access to information about the proposed new enforcement arrangements should be more restrictive than those that apply under both UK and EU access laws.

[1] Draft Environment (Principles and Governance) Bill, December 2018, Cm 9751
[2] Environment, Food and Rural Affairs Committee, Oral evidence: Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill, HC 1893, 6 March 2019, Q296 and Q303
[3] Draft Environment (Principles And Governance) Bill Explanatory Notes, Paragraph 32

The draft bill proposals

Under the draft bill the proposed Office for Environmental Protection (OEP) could investigate complaints alleging a serious failure by a public authority to comply with environmental law. It could demand information from the authority by serving an information notice and issue a decision notice setting out the corrective measures they expect to be taken. An authority would not have to comply with a decision notice but would have to explain whether it accepts the findings and agrees to take the specified action. The OEP could bring judicial review proceedings against an authority which had not rectified a breach identified in a decision notice.

The OEP would be required to publicly acknowledge that it has served a notice and explain why, unless it considers that this would not be in the public interest. **It would have to send the authority concerned a report into its investigation which it could, but *would not be required,* to publish.**

Under clause 28:

- **The OEP would be prohibited** from disclosing any information it obtained from an authority in response to a notice or in connection with an investigation[4] **without the authority's consent**[5]

- **The OEP** would be required to copy its correspondence with an authority to the relevant minister[6] but could not disclose any reply **without the minister's consent**[7]

- A **public authority** would be prohibited from disclosing an information notice or decision notice served on it or any associated correspondence without the **OEP's consent**.[8]

This means that, apart from an explanation of why a notice had been served, there would be no public access to any information which the OEP or (depending on the circumstances) the public authority or minister, did not wish to be disclosed.

[4] Clause 28(1)
[5] Clause 28(2)(a)
[6] Clause 24(1)
[7] Clause 28(2)(a)
[8] Clause 28(4)

The contrast with the approach under the UK's existing access to information legislation could not be greater.

The existing UK approach

Access to information about potential breaches of environmental legislation is dealt with under the Environmental Information Regulations 2004 (EIR). The right of access is subject to a number of exceptions, including that in regulation 12(5)(b) which provides that:

> 'a public authority may refuse to disclose information to the extent that its disclosure would adversely affect…*the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature*'

In applying the EIR exceptions:

- It must be shown that disclosure ***'would adversely affect'*** the specified interest. In this context '*would'* means that the adverse effect is more likely than not[9]
- the exception must be interpreted in a **'restrictive way'**[10]
- ***'*a presumption in favour of disclosure'** must be applied,[11] and
- even if an exception applies, the information must be disclosed if on balance the **public interest** favours disclosure.[12]

None of these provisions appear in the draft EPG Bill. Instead there would be a blanket prohibition on disclosure to the public, unless the relevant consent was given by the OEP or (depending on the circumstances) the minister or authority. Disclosures would be permitted for certain specified purposes such as for the purpose of the OEP's functions or any report which it chooses to publish but this would be at the OEP's discretion. **There would be no right of access to this information.**

[9] The Information Commissioner's Office's 'Guide to the Environmental Information Regulations' states "To show that disclosing information would harm one of the interests in 12(5)(a) to (g) you must: • identify a negative consequence (adverse effect) of the disclosure that is significant (more than trivial) and is relevant to the exception claimed; •show a link between the disclosure and the negative consequence, explaining how one thing would cause the other; •show that the harm is more likely than not to happen."

[10] This requirement is found both in Article 4(2) of the EU Environmental Information Directive and Article 4 of the Aarhus Convention.

[11] EIR Regulation 12(2)

[12] EIR regulation 12(1)(b)

At present, the EIR right of access overrides any statutory prohibition on disclosure, reflecting the principle that EU legislation takes precedence over domestic legislation. This is given effect by regulation 5(6) of the EIR which states:

> 'Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.'

If that remained the case after Brexit, the clause 28 prohibition would be pointless. Any request for environmental information, whether in writing or orally,[13] would automatically trump it. **The only conclusion must be that after Brexit the government intends to amend or repeal regulation 5(6) so that the new prohibition (or perhaps <u>all</u> prohibitions) on disclosure override the EIR right of access.**

The EIR provides a balanced approach taking account both of the potential harm and potential benefit of disclosure. The Information Commissioner (IC) and the First-tier Tribunal (FTT) which deals with appeals against the IC's decisions give substantial weight to the need to avoid disclosures that might undermine an on-going investigation or potential prosecution.

- When an firm of loss adjusters sought information from the local authority following a fatal explosion at a Macclesfield site in 2015, the information was refused under regulation 12(5)(b). Both the IC and the tribunal upheld the refusal, the latter concluding that disclosure was 'highly likely' to adversely affect the continuing investigations and any subsequent prosecution. It also concluded that 'the public interest in withholding the information substantially outweighs the interest in disclosure'.[14]

However, the mere fact that an investigation is underway or a formal notice has been served may not, in itself, be sufficient to prevent disclosure:

- When a councillor, who was being prosecuted by her own council for allegedly breaching a tree preservation order, requested information about the handling of similar complaints against the previous owner of the land, the FTT ordered disclosure. It took into account that the councillor had assisted the previous landowner in dealing with the council and been told that no further action would be taken against him. The council had also been notified of and approved the steps she had proposed to take clear vegetation on the land. The tribunal could not see how

[13] The Information Commissioner's Office's 'Guide to the Environmental Information Regulations' states 'Requests can be made verbally or in writing, so a request could be made by telephone, letter or email, or using social media sites such as Facebook or Twitter.'

[14] Appeal No EA/2016/0149, Crawford and Company Adjusters (UK) Ltd & Information Commissioner & Cheshire East Council, 17 July 2017.

> disclosure of information about a decision relating to the former landowner would adversely affect proceedings against the new owner. If the regulation 12(5)(b) exception had been engaged, it would have found that, in light of the circumstances, the public interest in understanding how a council had come to prosecute one of its own councillors justified disclosure. The councillor was later acquitted after a four day trial.[15]

The EIR allow disclosure decisions to be taken based on the harm and benefit likely to flow from disclosure. Clause 28 would replace this balancing process by an absolute bar on the disclosure of information without (depending the circumstances) the OEP's, public authority's or minister's consent. The nature or likelihood of any harm resulting from disclosure would be irrelevant as would the public interest in disclosure. This would be a throwback to a position which has not existed since the original Environmental Information Regulations were brought into force at the end of 1992. They would reintroduce a principle rejected by the Royal Commission on Environmental Pollution as long ago as 1984, when it recommended:

> 'that a guiding principle behind all legislative and administrative controls relating to environmental pollution should be a **presumption in favour of unrestricted access for the public to information which the pollution control authorities obtain or receive by virtue of their statutory powers, with provision for secrecy only in those circumstances where a genuine case for it can be substantiated**.'[16]

EC Infraction proceedings

The Clause 28 regime would be eve more restrictive than that which applies to information about EU infraction proceedings.

A public right of access to information held by the European Commission exists under EC Regulation 1049/2001.[17] One of the exceptions to this right is found in the third indent of Article 4(2) which states:

> 'The institutions shall refuse access to a document where disclosure would undermine the protection of…the purpose of inspections, investigations and audits…unless there is an overriding public interest in disclosure.'

[15] Appeal No EA/2017/0064, Susan White & Information Commissioner, 7 September 2017
[16] Royal Commission on Environmental Pollution, 10th Report, Tackling Pollution - Experience and Prospects, Cm 9149, February 1984, paragraph 2.77
[17] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

This envisages that excepted information might be disclosable on public interest grounds. No such provision would apply under the government's proposals. **Rather than merely introduce openness provisions corresponding to the EC's, the government is proposing a *more* secretive regime.**

The EC system is hardly a model of openness as it is. The General Court of the Court of Justice of the European Union (CJEU) has held that in relation to infraction proceedings, there is a general presumption of confidentiality which does not require each document to be assessed individually.

However, according to the Court of First Instance, for information to be withheld under this provision it is not enough merely to show that a document relates to an investigation. The exception only applies where it is foreseeable that disclosure is actually likely to undermine the purpose of the Commission's investigations, which is:

'to induce the Member State concerned to comply with Community law'[18]

The exemption therefore operates by reference to the need to ensure that Member States comply with their international treaty obligations as EU members. Infraction proceedings may involve legal action against a Member State brought either by the European Commission or by another Member State, and other Member States may intervene on behalf of either side. Ultimately, this may lead to the European Court of Justice imposing financial penalties on the offending state.[19] This bears absolutely no relation to the context which would arise under the Draft Bill. There is no reason for the secrecy that accompanies these international proceedings to be imported into purely domestic post-Brexit UK arrangements, let alone for the UK to make them even more secretive.

[18] '(110) As has been acknowledged by settled case-law, in view of the need to interpret and apply any exception to the right of access strictly, the fact that a document concerns an investigation within the meaning of Article 4(2), third indent, of Regulation No 1049/2001 cannot in itself justify application of that exception, since the latter applies only if disclosure of the documents concerned is actually likely to undermine the protection of the purpose of the Commission's investigations concerning the infringements in question (see, to that effect, Franchet and Byk, cited in paragraph 101 above, paragraphs 105 and 109, and API v Commission, cited in paragraph 101 above, paragraph 127). Indeed, that risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical (Sweden and Turco v Council, paragraphs 43 and 63). Moreover, as is clear from its wording, the aim of that exception is not to protect the investigations as such, but rather their purpose, which, in the context of an infringement procedure, is to induce the Member State concerned to comply with Community law (see, to that effect, API v Commission, cited in paragraph 101 above, paragraphs 127 and 133 and the case-law cited; see also, to that effect, Opinion of Advocate GeneralKokott in Commission v Technische Glaswerke Ilmenau, cited in paragraph 44 above, points 109 to 115).' Case T-36/04 (Association de la presse internationale ASBL (API) v Commission of the European Communities).

[19] Article 260 of the Treaty on the Functioning of the European Union.

The Aarhus Convention

After Brexit, the EU Directive on access to environmental information will no longer apply but the UK will remain a party to the Aarhus Convention. The right of access to environmental information under the Convention is subject to an exception which appears in identical terms in EIR regulation 12(5)(b).[20] Article 4(4) of the Convention requires that the grounds for refusal:

> 'shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment'

The absolute nature of Clause 28 prohibition is clearly not compatible with this requirement.

European Convention on Human Rights (ECHR)

In a 2016 decision the Grand Chamber of the European Court of Human Rights held that Article 10 of the ECHR, which guarantees freedom of expression, also creates a right of access to government held information.[21]

Any restriction on the exercise of Article 10 must be prescribed by law and necessary in a democratic society.[22] The court's case law has consistently interpreted this requiring proportionality.

The proportionality requirement would also apply to any restriction imposed on an existing statutory right of access, such as the EIR. It is highly unlikely that a blanket, and indeed, potentially indefinite, restriction such as is proposed by clause 28 of the Draft Bill, would be regarded as proportionate, since it would apply where there was no identifiable harm from a disclosure and even where there was a overwhelming public interest in the matter.

---

[20] Article 4(4)(c) of the Aarhus Convention states: 'A request for environmental information may be refused if the disclosure would adversely affect…The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature'.

[21] For the right to apply (a) disclosure of the information must facilitate public participation in matters of public interest (b) it should be sought by a requester acting in a 'public watchdog' role, including the press, NGOs, academic researchers, authors, bloggers and social media users and (c) it must be readily available. Case of Magyar Helsinki Bizottság v. Hungary, decision of 8 November 2016

[22] These are requirements of Article 10(2) of the ECHR