

# The Campaign for Freedom of Information

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## ENVIRONMENT BILL

**Briefing for Commons 2nd Reading on 26 February 2020**

**About the Campaign for Freedom of Information**

The Campaign for Freedom of Information was set up in 1984 and played a key part in persuading the government to introduce the Freedom of Information Act 2000 and improving the measure during its Parliamentary passage. Since the Act and Environmental Information Regulations came into force in 2005 the Campaign has provided assistance to requesters and training for both requesters and public authorities. It monitors and seeks to improve the the operation of the legislation and promotes good practice in its operation.

**The Environment Bill: summary**

**We are concerned at the restrictions on disclosure of information in the Environment Bill:**

- **The bill establishes the Office for Environmental Protection (OEP) but contains broad prohibitions on the disclosure of information about some of the OEP's functions. The Explanatory Notes say these prohibitions do not affect the public's right to information under the Environmental Information Regulations (EIR) except in one specified way. However, nothing in the bill itself establishes that the prohibitions do *not* override the EIR right to information. The bill should be amended to ensure that the EIR right of access is not undermined.**
- **The bill would prohibit disclosure of information about OEP investigations into suspected failures by public authorities to comply with environmental law. The prohibition would only be lifted once the OEP decides to take no further action. However, the status of the information in question would be changed to allow a particular EIR exception that might not otherwise apply to be invoked. This would make it more likely that the information could be withheld under the EIR. That should not be necessary. Existing EIR exceptions protect information whose disclosure is shown to be harmful and not in the public interest.**
- **A prohibition would also apply to information which public bodies supply to the OEP to assist it with its functions. The information could only be disclosed with the consent of the body supplying it. If the prohibition on disclosure trumps the EIR right of access, this information could be withheld indefinitely, preventing public access to information about matters such as progress toward meeting environmental targets.**

### **The prohibition on disclosure and the EIR (clause 40)**

The bill establishes the Office for Environmental Protection (OEP) with a range of environmental functions including the investigation of complaints of serious failure by public authorities to comply with environmental law.

Clause 40 of the bill prohibits the disclosure of specified information relating to these functions. We question whether these prohibitions are necessary. We are particularly concerned at the possibility that the prohibitions might be intended to override the right of access to environmental information under the Environmental Information Regulations (EIR).

**The Explanatory Notes to the bill state that these prohibitions do *not* affect the operation of the EIR, except in one specified way.<sup>1</sup> However, the bill itself does not provide for this. It contains a substantial list of exceptions to the prohibitions,<sup>2</sup> none of which states that the prohibitions do not affect the operation of the EIR.**

**In the absence of such a provision, the bill could be seen as purporting to override the EIR right of access. The fact that the EU directive, which the EIR implements, will cease to apply when the Brexit transition period expires may support such an interpretation.<sup>3</sup> The bill should be amended to provide an explicit statement that the EIR right of access is not affected by the prohibition, except in the one specified way.**

We also question whether the specified change to the way the EIR applies, which would bring a particular EIR exception (for the confidentiality of a public authority's proceedings) into play is necessary.

**Under the bill, the OEP would be prohibited from disclosing:**

- **information supplied to the OEP by a body with public functions to assist it with any of its statutory functions, unless that body consents to disclosure.<sup>4</sup>** In the absence of consent, this prohibition would apparently continue indefinitely.
- **an information notice or a decision notice.<sup>5</sup>** An information notice would require a public authority suspected of failing to comply with environmental law to supply

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<sup>1</sup> Paragraph 347 of the Explanatory Notes states: *'The only way in which the provisions affect the application of the EIR is in the manner set out in subsection (7): that is, that information mentioned in subsections (1) and (3) is capable of attracting the exception relating to the confidentiality of proceedings of a public authority where such confidentiality is provided for by law.'*

<sup>2</sup> Clauses 40(2) and 40(4)

<sup>3</sup> This is Directive 2003/4/EC on public access to environmental information. However, the UK will remain bound by the Aarhus Convention, to which it is a signatory, after the transition period. The Convention requires subscribing states to provide an right of access to environmental information.

<sup>4</sup> Clauses 24(1), 40(1)(a) and clause 40(2)(a)

information about the alleged failure to the OEP.<sup>6</sup> A decision notice would specify the steps that the OEP considers the authority should take to address the failure.<sup>7</sup>

- **information supplied to the OEP by a public authority in response to an information notice<sup>8</sup>**
- **correspondence with a public authority about an information or decision notice<sup>9</sup>**

**An information notice or decision notice or related correspondence could be disclosed once the OEP has decided to take no further action.**<sup>10</sup> Correspondence about a notice could be disclosed with the consent of the party sending it.<sup>11</sup>

**A public authority would be prohibited from disclosing:**

- **an information or decision notice**
- **any correspondence between itself (or any other public authority) and the OEP relating to such a notice<sup>12</sup>**

**These prohibitions also lapse once the OEP decides to take no further action.** The prohibition on disclosing correspondence does not apply if the OEP consents to its side of the correspondence being disclosed.<sup>13</sup> However, the OEP could not authorise an authority to disclose an information or decision notice until no further action was to be taken.

One interpretation of the prohibitions would be that they only apply to disclosures *other than* those in response to EIR requests. In this case, both the OEP and public authorities would be prevented from *voluntarily* disclosing ‘prohibited’ information but not from disclosing it in response to an EIR request. This approach might be consistent with the UK’s obligations under the Aarhus Convention, to which the UK is a signatory,<sup>14</sup> and with regulation 5(6) of the EIR.<sup>15</sup>

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<sup>5</sup> Clause 40(1)(b)(ii)

<sup>6</sup> Clause 32

<sup>7</sup> Clause 33

<sup>8</sup> Clause 40(1)(a) with clause 32(3)(b).

<sup>9</sup> Clause 40(1)(b)

<sup>10</sup> Clause 40(2)(h)

<sup>11</sup> Clause 40(2)(a)

<sup>12</sup> Clause 40(3)

<sup>13</sup> Clauses 40(6) and 40(4)(a)

<sup>14</sup> The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998

<sup>15</sup> This states: ‘Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.’

However, the bill itself does not state that this is the case. The Explanatory Notes do, but their grasp of the relationship between the bill and the EIR is uncertain.<sup>16</sup>

**An alternative interpretation might be that the prohibitions *are* intended to override the EIR right of access, at least until the OEP decides to take no further action. At that point, disclosure under the EIR might be possible. Allowing environmental information to be withheld regardless of whether disclosure would be harmful or in the public would be a highly regrettable interference with existing EIR rights.**

**The ambiguity should be clarified by an express statement in the bill to the effect that nothing in clause 40 affects the operation of the EIR (with the possible exception of the specific change referred to in clause 40(7) - but see the comments below on this.)**

### **The EIR exceptions**

**If disclosure of requested information would be harmful, it can be withheld under an appropriate EIR exception. This raises the question of why the proposed prohibitions are thought necessary.**

The EIR contain an exception for information whose disclosure would '*adversely affect...the course of justice*'.<sup>17</sup> The Information Commissioner's guidance highlights the '*very wide*' scope of this provision which it says applies to information about law enforcement action *including 'civil and criminal investigations and proceedings'*.<sup>18</sup> Information relating to OEP investigations could be withheld under this provision *if disclosure would be harmful and not in the public interest*. Reliance on EIR exceptions is how other public bodies including DEFRA, the Environment Agency, Natural England, local authorities and indeed the police and Crown Prosecution Service protect sensitive information. It is not clear why this would not be adequate for the OEP.

**Reliance on a prohibition against disclosure, rather than an EIR exception, would absolve the OEP of the need to show that disclosure would harmful and not in the public interest – important safeguards against unjustified secrecy.**

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<sup>16</sup> For example, paragraph 352 of the Explanatory Notes wrongly states that "*Subsection (7) [of clause 40] provides that information referred to in subsection (1) and held by the OEP, or subsection (3) and held by a public authority, is to be regarded as "environmental information" in accordance with the EIR" (emphasis added)*". In fact, nothing in the bill has this effect. The question of whether any particular information is 'environmental' depends solely on whether the information falls within the definition of 'environmental information' in regulation 2(1) of the EIR.

<sup>17</sup> EIR regulation 12(5)(b) applies to information whose 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*'.

<sup>18</sup> Information Commissioner's Office, The course of justice and inquiries exception (regulation 12(5)(b)). 20140211, Version: 1.1

Assuming that the prohibitions would, as the Explanatory Notes suggest, *not* interfere with the operation of the EIR, it is not clear what their purpose could be. In theory they might prevent a public authority *voluntarily* disclosing information in the absence of an EIR request. However, an authority that wanted to circumvent the prohibition would merely have to invite someone to make an EIR request for the information - and then release it to the requester. EIR exceptions are discretionary – an authority is not obliged to withhold excepted information.

### **The source of the prohibition**

The only explanation provided for the prohibition is that it is modelled on restrictions in the European Commission’s infraction proceedings. The notes on an earlier draft of the bill stated:

‘...public authorities in receipt of information and decision notices may not disclose the details of them, or any related correspondence from the OEP. The consequence of these provisions is to provide that all information connected with enforcement functions is confidential, regardless of where it originates. *This is currently the case, in practice, with EU infraction proceedings.*’<sup>19</sup> (emphasis added)

Under the current bill, when the OEP issues an information notice or decision notice it would be obliged to publicise the fact and describe the alleged failure.<sup>20</sup> This too is expressly intended to reflect European Commission practice:

‘The provisions of this clause are intended to provide an appropriate degree of transparency as regards the enforcement action that the OEP is taking and against whom. *The European Commission also publishes press statements at key stages of the infraction process.* The clause only requires the OEP to make a statement that it has issued an information or a decision notice, describing the failure or alleged failure and other appropriate information rather than requiring publication of the actual notices.’<sup>21</sup> (emphasis added)

**The adoption of restrictions in order to replicate European Commission practice, is particularly unpersuasive in a Brexit related measure.** Even in the European context, the Court of First Instance has explained that the purpose of confidentiality is:

‘to induce the Member State concerned to comply with Community law’<sup>22</sup>

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<sup>19</sup> Draft Environment (Principles and Governance) Bill, December 2018, Cm 9751, paragraph 196.

<sup>20</sup> Clause 38

<sup>21</sup> Explanatory Notes, paragraph 340

<sup>22</sup> Case T-36/04 (Association de la presse internationale ASBL (API) v Commission of the European Communities.

**A provision which operates by reference to the need to ensure that Member States comply with their international EU treaty obligations should not be the model for a purely domestic UK arrangement where no international relations considerations apply.**

### **Confidentiality of proceedings**

The bill would not only prohibit the disclosure of large volumes of information. It would also bring that information within the scope of an EIR exception for the confidentiality of proceedings, if and when the prohibition ceased to apply.

Clause 40(7) states that any environmental information covered by the prohibitions would be treated as held '*in connection with confidential proceedings*'. This would bring it within the scope of an EIR exception in regulation 12(5)(d) for disclosures that would:

'adversely affect...the confidentiality of the proceedings of that or any other public authority *where such confidentiality is provided by law*'<sup>23</sup> (emphasis added)

The clause would establish (a) that the information was held for the purpose of 'confidential proceedings' and (b) that this confidentiality was 'provided by law'.

It would still have to be shown that disclosure would 'adversely affect' confidentiality. Information could still be disclosed on public interest grounds.<sup>24</sup>

The OEP should not need this exception, given that information about its investigations could potentially fall within the exception for disclosures that would adversely affect '*the course of justice*'. However, harm to the confidentiality of proceedings would be easier to demonstrate, than harm to the course of justice, since a disclosure relating to confidential proceedings is extremely likely to likely to adversely effect the confidentiality of the proceedings.

Remarkably, this exception would apply not only to information relating to OEP investigations into possible breaches of environmental law but also to information supplied to the OEP for the purpose of its *general* functions.<sup>25</sup> These include:

- monitoring progress towards improving the environment
- monitoring progress towards meeting environmental targets, particularly in relation to air quality, airborne particulates, water, biodiversity, resource efficiency, waste reduction, and people's enjoyment of the environment

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<sup>23</sup> EIR regulation 12(5)(d)

<sup>24</sup> EIR regulation 12(1)(b)

<sup>25</sup> This is the effect of clauses 40(1)(a) which refers to information obtained under clause 24(1)

- producing annual progress reports on the above
- monitoring the implementation of environmental law
- advising ministers on proposed changes to environmental law and other matters<sup>26</sup>

**The case for artificially extending the scope of an EIR exception to information of this kind requires justification of a kind not so far provided.**

### **The definition of environmental law**

The definition of environmental law in clause 43 expressly excludes legislation relating to *'disclosure of or access to information'*.<sup>27</sup> The Explanatory Notes state this is to avoid overlap between the OEP and the Information Commissioner, who is responsible for ensuring compliance with the Environmental Information Regulations.<sup>28</sup>

However, there are statutory requirements to provide access to environmental information for which the Information Commissioner has no responsibility. For example, a range of laws require public authorities to maintain public registers of pollution or other environmental information. The Information Commissioner has no responsibility to ensure compliance with these laws. As the bill stands, the OEP would not be able to investigate complaints that authorities were failing to comply with such laws. The bill should be amended to bring such matters within the OEP's remit.

This provision should be amended to only exclude those matters for which the Information Commissioner is responsible.

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<sup>26</sup> Clauses 25- 27

<sup>27</sup> Clause 43(2)(a)

<sup>28</sup> Explanatory Notes paragraph 368.