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**THE RIGHT TO ACCESS  
ENVIRONMENTAL INFORMATION**

An analysis of UK law in the context of International,  
European and Comparative law

By Jean-Jacques Paradissis

Thesis submitted for the award of the degree of Doctor of  
Philosophy (PhD)

City University, London  
Department of Law

March 2005



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## **ABSTRACT**

The present thesis comprehensively examines the right of any member of the public to access environmental information held by mainly public bodies and the obligation of these bodies to provide it upon request. In doing this, we do not claim to present the reader with a brand new theory. However this thesis is original in the way that it combines in a single piece of work all the aspects of the subject: both legal and non-legal. With respect to the legal aspects of the subject, these are analysed in regard of not only national law, but also international, EC law and also the law of the European Convention on Human Rights. In other words, the present thesis is a synthesis that has never been done before.

In our introductory chapter we set the limits of our examination by stating that we will mainly examine the legal rules that grant a right to individuals to access environmental information upon request. We also examine the historical evolution of the right to access to environmental information.

Then, in Chapter 1, which is the core chapter of the present work, we explain in detail the substantive provisions of the legal instruments granting a right to access environmental information upon request: the Aarhus convention, the 2003/4/EC Environmental Information Directive on public access to Environmental Information and the Environmental Information Regulations 2004, which transpose into UK law this Directive and the information provisions of the Aarhus convention. It should be stressed that we analyse in parallel the equivalent provisions of EC law, international law and UK law, thus avoiding repeating the identical parts of these instruments. This parallel examination of all legal rules that grant a right to access environmental information is also a feature that renders the present work original, since there is no other written work on the subject adopting such an approach.

In chapter 2 we examine other specific UK enactments that grant a right to access specific kinds of environmental information which is recorded on registers. Moreover, we highlight the fact that the statutory provisions on registers serve a different function than the environmental information regulations, as they also create a statutory duty for some public authorities to collect and compile certain types of environmental information and place it on registers.

In chapter 3 we examine the relevant ECHR articles which have been interpreted by the Court of Strasbourg as including a right to access environmental information. Thus, we analyse how in some limited circumstances the right to access environmental information can be of a fundamental nature.

Finally, in chapter 4 we examine how the 90/313/EEC Directive (the precursor of Directive 2003/4/EC) was transposed in French law, in comparison with England. We conclude that the English method of transposition has been more in conformity with the aim of the right to access environmental information: environmental protection. We also conclude that this important finding is also of some relevance today, even after the enactment of the 2003 Directive and the Environmental Information Regulations 2004.

The present work is concluded by showing that: 1) the right of access to environmental information is what could be called a 'multi-layered' right, which stems from various legal instruments of different levels (the EC level, international level and UK national level). This is the reason why the right to environmental information is a right with uncertain boundaries and content, since, although all these instruments go into the same direction of recognising a right to access environmental information to any person, they all contain different limitations and exceptions to the scope of this right; 2) the right to access environmental information is fundamentally different from the general right to access information held by public bodies, since it aims at achieving better environmental protection; 3) as a consequence, the correct approach to any analysis of the right to access environmental information is to understand and acknowledge that, first, this right stems from various European, national and international legal instruments, and second, that although it is a right similar to the general right to access information, it is conceptually different as it aims to protect the environment.

## LIST OF ABBREVIATIONS

**Nota Bene** : the following list of abbreviations does not include the common abbreviations widely used in order to refer to various legal journals.

**"1990 Directive"** : the Council Directive 90/313/EEC of 7 June 1990, on freedom of access to information on the environment

**"2003 Directive"** : Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

**"1992 Regulations"** : the Environmental Information Regulations 1992

**"2004 Regulations"** : the draft Environmental Information Regulations 2004 as laid before Parliament on 22 July 2004. **Any reference in the present work to the "Environmental Information Regulations 2004", should be read as a reference to these draft regulations.**

**"Aarhus Convention"** : 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

**CFI** : Court of First Instance of the European Communities

**ECHR** : European Convention of Human Rights and Fundamental Freedoms

**ECJ** : European Court of Justice

**ECtHR** : European Court of Human Rights

**EPA** : Environmental Protection Act 1990

**FOIA** : Freedom of Information Act 2000

**OJ** : Official Journal of the European Union. Formerly known as Official Journal of the European Communities. Any reference in the present work to the "Official Journal", should be read as a reference to this journal.

**TCPA** : the Town and Country Planning Act 1990

*“The Court recognises for its part that in today’s society the protection of the environment is an increasingly important consideration.”*

ECtHR, *Fredin v. Sweden*, 1990, Application No. 12033/86, (1991) 13 EHRR 784, at par. 48.

*“The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind; and public bodies, both national and international, are taking significant steps towards the establishment of legislation which will promote the protection of the environment”*

Per Lord Goff, *Cambridge Water Co. v. Eastern Counties Leather Plc.* [1994] 2 AC 264, at 305.

## **INTRODUCTION**

When examining access to environmental information, one has to start from a definition of basic terms such as what is meant by environmental information. It is because the meaning of such terms may seem evident, that they ought to be defined right at the beginning, in order to prevent any misunderstanding and inconsistencies further on.

### **A) Definition of access to environmental information.**

The definition of “access to environmental information” can be analysed by examining the meaning of the two components of this phrase: “environmental information” and “access to environmental information”.

#### **1) What is “environmental information” ?**

We shall examine further on the extremely detailed definition of environmental information given by the various legislative instruments that deal with the subject matter. So, at this point we shall only give a working definition of the term.

Thus, for present purposes, “environmental information” shall be considered to be information concerning the present or past state of the environment and also information concerning activities with an adverse or damaging effect to it.

Although the above definition seems pretty straightforward, its scope is dependent on the meaning given to the term “environment”. It can be argued that this word does not have a very precise meaning, apart from an all-encompassing definition such as that the environment is everything but the human being itself.<sup>1</sup> It is indeed very difficult to restrict an idea that can have such a general, all encompassing, content. In any case, and for present purposes only, we shall acknowledge that the term “environment” is able to have such a general meaning as to encompass everything. We shall see further on, how legislators and regulators have restricted the scope of this term, when legislative access to information regimes are concerned.

---

<sup>1</sup> This definition of course comes from Einstein who said that *‘The environment is everything that isn't me’*. It is clear that the environment therefore covers other human beings and so the state and the health of human beings, which is the primary concern of environmental law. Quoted in the Indian Supreme Court Case of *K.M. Chinnappa, T.N. Godavarman Thirumalpad v Union of India and Ors* (Writ Petition (civil) 202 of 1995, 30/10/2002, available from <http://judis.nic.in/> ) in which Arijit Pasayat J. said " *'Environment' is a difficult word to define. Its normal meaning relates to the surroundings, but obviously that is a concept which is relatable to whatever object it is which is surrounded. Einstein had once observed, 'The environment is everything that isn't me'.*"

## **2) When is there access to environmental information?**

It is also very important to define what is meant by “access to environmental information”.

First of all, it can be said that access to information takes place whenever a person receives some environmental information from any source (like from the government, private corporations, local authorities, the media, or even his neighbours). A distinction can however be drawn, depending on the reason why environmental information is communicated to a certain person.

First, environmental information might be imparted to a person because he has previously requested it. Thus, a private company or a public body might give environmental information because a person or a group of persons have asked for it. Second, environmental information might be communicated to people voluntarily by the bodies holding it, in which case recipients of information have not asked for it before.

In both cases, there is access to environmental information, though not necessarily because a legal instrument (such as a statute or another piece of legislation) compels that.

## **3) Access to environmental information through legal means.**

Although one can access environmental information in many ways, like by reading a newspaper, listening to the weather report broadcast over the radio, such means are not organised through a legal framework laying down legal rules on access to environmental information. Such a framework could either provide for a legally enforceable right of citizens to receive environmental information upon a request to bodies that hold such information, or for an obligation for various bodies to impart information to the general public, without any previous request. We shall examine further on in more detail such legal instruments. In any case, it is important to note that the present work will only cover and analyse the concept of access to environmental information as it is organised through legally binding instruments.

This fundamental conceptual limitation being drawn, it is important to start by examining how access to environmental information has been evolving through time.

## **B) The History of access to environmental information.**

Woolley has observed that<sup>2</sup> “the history of the development of the law and practice of environmental information has, on the whole, been one which shows that polluters, actual or potential, and those who regulate their activities, have moved from positions exhibiting hostility, or at least reluctance, to divulge anything about what they were doing, to acceptance, sometimes

grudging, that the public must be told enough to inform them of the outlines of the risks to which they may be subject". This sentence admirably sums up the overall trend, which has been a gradual liberalisation of the public's right to access environmental information.

The evolution of access to environmental information can be examined in three distinct phases, which start from a practice of total secrecy and end with general freedom of information being the general rule. The first phase covers the period from the late 19<sup>th</sup> century to the late 60s during which total secrecy was the rule. The second intermediate phase took place in the late 60s to the 90s and is characterised by a movement toward greater but not complete openness. The last phase extends from the early 90s till the present time, when freedom of access to information has become the general rule. After having examined these three periods of time, we shall examine the future of environmental information, that consists of international instruments that are in the process of being implemented into British and European Union legal systems.

### **1) The past: secrecy has been the rule.**

This period of time starts in 1863, a year which is a landmark for environmental law in Britain, since it is the year when the Alkali Act 1863 was adopted. This Act, apart from being one of the first statutes dealing with environmental problems, created the Alkali Inspectorate, the first national pollution agency. The Alkali Inspectorate adopted a policy of total secrecy concerning environmental information it came to hold. The only exceptions allowed, were either when disclosure was demanded by a statute or when the owner of the information permitted it<sup>3</sup>. This policy was finally transposed into section 28 of the Health and Safety at Work etc. Act 1974, which concerned measurements and recordings taken by the Alkali Inspectorate and prohibited disclosure of these information except where it was a statutory duty to do so or with the consent of the person who had furnished it.<sup>4</sup>

Furthermore, a statutory requirement for secrecy in general was laid down in the Official Secrets Act of 1911. This Act<sup>5</sup> created the offence of wrongful communication of information. This consisted of the communication of any information which has been obtained by the accused "owing

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<sup>2</sup> David Woolley *et al.*, *Environmental Law*, Oxford University Press, Oxford 2000. See Chapter 5 on Environmental Information, written by Woolley, page 145.

<sup>3</sup> As the Alkali Inspectorate put it in its first report: "Of course, all information regarding any work must be considered private unless publication is demanded by the act, or permitted by the owner.", cited by S. Bell and D. McGillivray in *Ball and Bell on Environmental Law*, Blackstone Press, 5<sup>th</sup> edition 2000, page 219.

<sup>4</sup> This section is still in force, but the Health and Safety Commission has published in March 2004 proposals to amend section 28 of the Health and Safety at Work Act 1974, to allow the release of some safety information whose disclosure is currently prohibited, on the understanding that information to which section 28 applies can be adequately safeguarded, where it needs to be, using the exemptions in the Freedom of Information Act 2000. See

[http://www.hse-consultations.co.uk/consult/HSWA\\_section28\\_amendment/consultationHome](http://www.hse-consultations.co.uk/consult/HSWA_section28_amendment/consultationHome)

<sup>5</sup> For a more detailed explanation of the implications of this Act in general, see Ewing, K. D. and Keith David, *The struggle for civil liberties : political freedom and the rule of law in Britain, 1914-1945*, Oxford University Press, 1999

to his position as a person who holds or has held office under His Majesty, or as a person who holds or has held a contract made on behalf of His Majesty, or as a person who is or has been employed under a person who hold or has held such an office or contract”<sup>6</sup>. This provision was very general and encompassed virtually any information (including environmental information) possessed by government officials and agencies. This prohibition was in force until it was repealed in 1989 by the Official Secrets Act 1989 that limited its scope to “sensitive” information, concerning state secrets, defence, intelligence, international relations, interception of communications and information which might be useful to criminals.

At the same time as specific environmental statutes were enacted, many of them have contained clauses prohibiting the disclosure of environmental information, most of the time relating to releases into the environment. Thus in the case of water pollution, section 12 of the Rivers (Prevention of Pollution) Act 1961<sup>7</sup>, provides that disclosure of information is permitted only in cases where the provider of that information consents, or if there are other statutory requirements to disclose.

Apart from the existence of various statutes prohibiting disclosure, the courts also showed a trend in protecting governmental secrecy. Under the law of Crown privilege, the government could refuse to produce documents in court when they belonged to a class of documents, which the public interest required to be withheld from production like national defence and security matters, even if they were necessary for one of the parties to prove his allegations. Before 1942 it seemed that this executive power was not absolute, though the House of Lords in a 1942 decision,<sup>8</sup> ruled that a ministerial claim of privilege was unquestionable in law. However, in 1968 the House of Lords<sup>9</sup> relaxed its position by deciding that although the principle was still applicable, the courts had the power to weight the public interest of justice being done against the public interest invoked by government and it would be for the court, after inspecting the documents shown to the court but

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<sup>6</sup> Section 2(1) of the Officials Secrets Act 1911 (as amended in 1920).

<sup>7</sup> Section 12 of this Act which is still in force provides:

s 12 Restriction of disclosure of information.

(1) If any person discloses any information--

(a) which has been furnished to or obtained by him in connection with an application for consent, or the imposition of conditions, under this Act or the principal Act (including the variation of conditions, and references and applications to the Minister); or (b) which is derived from a sample of effluent taken for the purposes of this Act or the principal Act, he shall be guilty of an offence, unless the disclosure is made--

(i) with the consent of the person by whom the information was furnished or from whom it was obtained or, in the case of information derived from a sample of effluent, of the person making the discharge in question; or

(ii) in connection with the execution of this Act or the principal Act; or (iii) for the purposes of any proceedings arising out of this Act or the principal Act (including references and applications to the Minister) or of any criminal proceedings whether so arising or not, or for the purpose of any report of any such proceedings.

(2) A person guilty of an offence under the foregoing subsection shall be liable on summary conviction to a fine not exceeding [level 3 on the standard scale] or to imprisonment for a term not exceeding three months or to both.

(3) Nothing in this section shall prevent the disclosure of information derived from a sample of the waters into which an effluent is discharged.

<sup>8</sup> *Duncan v Cammell Laird & Co* [1942] AC 624.

<sup>9</sup> *Conway v Rimmer* [1968] AC 910.



not the parties, to decide whether the documents should be covered by Crown privilege or be disclosed.

The approach of both public authorities and businesses during this period was vividly described by the second report of the Royal Commission on Environmental Pollution which stated: *“In our discussions with representatives of industry, river authorities and local authorities, we have been struck by the insistence upon confidentiality over the nature and quantities of industrial wastes released into the air or into rivers and estuaries or dumped on land or at sea”*.<sup>10</sup>

## 2) The move toward greater openness.

It has been argued<sup>11</sup> that the political reason for imposing limitations on public access to information, was the belief that such secrecy will prevent the public from being involved actively in public life and it will make it accept more easily decisions made by authorities in the public interest. We will discuss further this idea in the following part, where we will be talking about whether there should be openness to environmental information or not.

However, secrecy in environmental matters started to be criticised in the early 70s by the Royal Commission on Environmental Pollution.

In its second report<sup>12</sup> in 1972, the Royal Commission on Environmental Pollution concluded that there was a need for more public openness concerning environmental matters. The Commission has maintained this position through its subsequent reports, and in its tenth report<sup>13</sup> in 1984 it recommended that *“...a guiding principle behind all legislative and administrative control relating to environmental pollution should be a presumption in favour of unrestricted access for the public to information...”*<sup>14</sup>

Meanwhile, at **International level**, disclosure of environmental information was becoming an important issue. In June 1972, there was held in Stockholm the United Nations Conference on “The Human Environment”, which led to the creation of the United Nations Environment Programme (UNEP). The United Nations Environment Programme has since then been working to encourage sustainable development through sound environmental practices. To achieve its goals, the UNEP started promoting the collection and dissemination of environmental data at a very early

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<sup>10</sup> Royal Commission on Environmental Pollution, *Second Report: Three Issues in Industrial Pollution*, London 1972, HMSO Cmnd. 4894, page 1.

<sup>11</sup> See John McCormick, *The Global Environmental Movement – Reclaiming Paradise*, Belhaven Press, London 1989, page 128.

<sup>12</sup> See above no. 10

<sup>13</sup> Royal Commission on Environmental Pollution, *Tenth Report: Tackling Pollution – Experience and Prospects*, London 1984, HMSO Cmnd. 9149. A good summary of this 10<sup>th</sup> report can be found in David Woolley et al., *Environmental Law*, Oxford university Press, 2000, pages 146-150.

<sup>14</sup> *Ibid*, paragraph 2.77, page 38.

stage in its history, by creating the “Earthwatch” programme<sup>15</sup>, which aims to collect and disseminate information about the current status of the earth’s environment.

In the same time, in **Europe**, after a meeting of European Community heads of state and governments in Paris in October 1972, it was agreed that economic development had resulted in inequalities in living conditions in the community and that economic expansion was not an end by itself. The European Community therefore moved, for the first time, beyond strictly economic issues and started developing a European Environmental Policy. This led to the First Action Programme<sup>16</sup>, that ran from 1973 to 1977, and contained some provisions about dissemination of environmental information and an examination of the application of environmental laws across European Community states. The Second Environmental Action Programme<sup>17</sup>, that ran from 1977 to 1981, gave a central place to collection and research of data and information and emphasised the need to monitor the compliance of member states with European Community’s environmental regulations. The third Environmental Action Programme, that ran from 1982 to 1986, included proposals for environmental coordination and recommendations on European Community foreign environmental policy and noted the importance of environmental protection as an integral part of development policy.

It is important to mention that all these Environmental Programmes, are not binding on member states, and are just political declarations of intent to implement the objectives set forth in the programmes. However, it was in accordance with the third environmental programme, that the directive 85/337 on Environmental Impact Assessments was implemented. This Directive provided that information concerning activities that can have adverse effects on the environment should be passed to those who might be affected.

This movement at international and European level, alongside calls from the Royal Commission on Environmental pollution towards greater openness concerning environmental information, led to the adoption in **Britain** of certain **statutory provisions that allowed access to specific environmental information**. All these provisions will be further discussed in the following chapters.

Firstly, the Directive on Environmental Impact Assessment was implemented in British law through The Town and Country Planning (Assessment of Environmental Effects) Regulations<sup>18</sup> which were originally passed under the European Communities Act 1972. In 1994 their scope (the classes of project subject to an impact assessment) was extended beyond the Directive’s minimal

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<sup>15</sup> Detailed information about the UNEP and the “Earthwatch” programme, can be found on the UNEP’s internet website at the internet location: <http://www.unep.org> .

<sup>16</sup> First Environmental Action Programme: Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ, No. C 112, 20/12/1973, page 1-2.

<sup>17</sup> Second Environmental Action Programme: Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment, OJ, No. C 139, 13/06/77, page 1.

requirements, under s. 71A of the Town and Country Planning Act 1990. Through this system, the public is given access to an environmental statement prepared by the developer itself that contains information about possible impacts to the environment of some major projects planned to be built.<sup>19</sup>

Secondly, two years after the Royal Commission on Environmental Pollution produced its Second Report, the Control of Pollution Act 1974 was passed containing provisions on air and also water pollution. As far as air pollution is concerned, this Act gave local authorities discretionary powers to collect data about air pollution (information could be obtained by various methods, even by issuing notices to polluters) and publish some of it. This information was available to the general public through the Register of Information on Air Pollution, which was to be maintained by local authorities, but only if they chose to establish one. As far as water pollution is concerned, the Act went further by requiring water authorities (namely the National Rivers Authority) to publish records of effluent discharges into rivers. However, it was not until 1989 that registers of discharges to rivers were established, since the Secretary of State for the Environment was required to make regulations to prescribe in detail how these registers would function; these regulations<sup>20</sup> were not adopted until 1989. They were made under the Water Act 1989, which restructured the water industry.

Thirdly, the Environment and Safety Information Act 1988<sup>21</sup> established public registers containing certain enforcement notices concerning breaches of health safety and environmental protection rules.

Fourthly, the Environmental Protection Act 1990 also set up a series of registers of information to be held by public authorities.

Alongside all these specific statutory provisions allowing the public access to a certain specific type of environmental information, existed a set of general rules that allowed access to information held by local authorities. The Local Government (Access to Information) Act 1985, by amendments to the Local Government Act 1972, not only allowed individuals to access local authorities meetings but also to inspect, copy and be furnished with documents. Of course, some exceptions remained concerning sensitive information about individuals and government information that was under restricted access.

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<sup>18</sup> The Town and Country Planning (Assessment of Environmental Effects) Regulations, SI 1988, No. 1199.

<sup>19</sup> See Stephen Tromans and Karl Fuller, *Environmental Impact Assessment - Law and Practice*, Butterworths, 2003.

<sup>20</sup> The Control of Pollution (Registers) Regulations, 1989 (SI 1989 No. 1160).

<sup>21</sup> The Bill of the Environment and Safety Information Act 1988 had been drafted by a pressure group, the Campaign for Freedom of Information; and it forms part of three Bills drafted by this group that received the Royal Assent in 1987 and 1988. The other two were the Access to Medical Reports Act 1988 creating the right for people to access reports produced by their doctor for employers or insurance companies and the Access to Personal Files Act 1987 creating the right for people to access manually held social work and housing reports about themselves. Around this date was also enacted the Access to Health records Act 1990, a private member's bill creating the right for people to access information put on their medical records after November 1991. There was also the Data Protection Act 1984 which was aimed to protect the personal data of individuals from electronic procession, later replaced by the Data Protection Act 1998.

However, all these particular provisions did not create a general right of access to information, or even to environmental information. They just allowed, in most cases by creating public registers, the general public to have access to a certain type of information.<sup>22</sup>

In general, such was the tendency of statutes to prohibit the disclosure of information, that the 1993 White Paper on 'Open Government'<sup>23</sup> lists 189 provisions of primary legislation and 62 pieces of secondary legislation prohibiting disclosure of official information.

### **3) The present: freedom of information is the general rule.**

**In the United Kingdom**, general freedom of information legislation had long been overdue. Wilson had summarised the situation in the UK in the mid-80s as "... of all democratic countries in the world today [...] Britain is probably the most secretive".<sup>24</sup> Even though, some have been asking since the 70s for a freedom of information Act, the central government was opposed to it<sup>25</sup>. Consequently, the first attempt to create a universal freedom of access to information in Britain was made under pressure from the European Economic Community (as it was called then). It was Directive 90/313 on freedom of access to environmental information, which was transposed into British law by the Environmental Information Regulations 1992<sup>26</sup>, which provided that everyone was entitled to have access to information relating to the environment, subject to certain exceptions. This community directive was adopted during the fourth environment action Programme<sup>27</sup> (1987-1992), that included provisions concerning the "need for, and desirability of, a Community Freedom of Environmental Information Act".

The closest that the UK came to recognising general freedom of information held by public bodies before the enactment of the Freedom of Information Act 2000, was the government's *Code of Practice on Access to Government Information* which came into force on 4 April 1994 and was

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<sup>22</sup> For an analysis of the state of Freedom of Information laws in the UK in the late 80s - early 90s, see Trevor Barnes, *Open up!, Britain and Freedom of Information in the 1980s*, London: Fabian Society, 1980; David Northmore, *Freedom of Information Handbook*, London: Bloomsbury, 1991; Patrick Birkinshaw, *Open Government, Freedom of Information and Local Government – a study conducted for the Local Government Legal Society Trust and the society of Town Clerk's Education and Research Trust*, 1985; *Informing Education – report of the Committee of Inquiry into Freedom of Information, appointed by the London Education Authority*, London: Inner London Education Authority, 1987; Des Wilson, *The Secrets file, the case for freedom of Information in Britain today*, London: Heinemann Educational, 1984.

<sup>23</sup> See *The Open Government White Paper*, Open Government, Annex B, part 1, pages 80-86, (Cm. 2290), HMSO July 1993.

<sup>24</sup> See Des Wilson, above n. 22, at p. 1.

<sup>25</sup> See Patrick Birkinshaw, *Reforming the Secret State*, Series: Studies in law and politics, edited by Norman Lewis, Cosmo Graham and Deryck Beylveled, Milton Keynes Open University Press, 1990.

<sup>26</sup> Environmental Information Regulations 1992, SI 1992, 3240.

<sup>27</sup> Fourth environment action Programme, Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992), OJ C 328, 07/12/1987 p.1 – 44.

revised in 1997.<sup>28</sup> This Code of Practice did not create any legal right of access to information, since it was a non-binding instrument, but merely laid down a policy of openness. According to this policy, the government and other bodies caught by the code, ended the policy of secrecy and started responding to reasonable requests for official information. The approach to release of information was based on the assumption that information should be released except where disclosure would not be in the public interest, as covered under a specific exemption to disclosure specified in Part II of the Code. There is a long list of wide-ranging exemptions to disclosure but the presumption is that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available. The exemptions are grouped in Part II of the Code under 15 different headings and concern matters such as defence, security, international relations, internal discussions and advice, communications with the Royal Household, law enforcement and legal proceedings, immigration and nationality issues, effective management of the economy and collection of tax, effective management and operations of the public service, public employment and public appointments and honours, voluminous or vexatious requests, information intended for future publication, information held for preparing statistics or carrying out research, privacy of an individual, third party's commercial confidences, information given in confidence, and information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement or covered by Parliamentary Privilege.

Under the Code each public body is to make its own arrangements for charging. Information is to be provided as soon as practicable. The target for response to simple requests is 20 working days from the date of receipt of the request, subject to an extension for more complicated requests.

The scope of the Code extends to almost all central government departments and their agencies, as well as many other public bodies which come within the jurisdiction of the Ombudsman (as listed in Schedule 2 to the Parliamentary Commissioner Act 1967). It should be noted that since 1999 the Scottish Executive and the National Assembly for Wales have introduced their own Codes.<sup>29</sup>

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<sup>28</sup> The text of the Code can be found on the Department of Constitutional affairs website at <http://www.dca.gov.uk/foi/ogcode981.htm> . It should be noted that the NHS is covered under a different Code, the 1995 *Code of Practice on openness in the National Health Service*.

<sup>29</sup> The *Code of Practice on Access to Scottish Executive Information* can be accessed at <http://www.scotland.gov.uk/government/foi/> . The *Welsh Code of Practice on Public Access to Information* can be accessed at [http://www.wales.gov.uk/keypubcodespractice/content/codeofpracticecover\\_e.htm](http://www.wales.gov.uk/keypubcodespractice/content/codeofpracticecover_e.htm) . The Welsh code is interesting, since it shows that the National Assembly for Wales has tried to be more open than the UK government, by first providing that the target for responding to a request for information will be 15 working days (instead of the 20 found in the UK Code or the FOIA 2000) and second, that in applying the public interest test the National Assembly will use the test of "substantial harm" (unlike the FOIA 2000 or the UK Code which just operate a simple balance test of competing interests weighted equally). Such a practice is possible under the FOIA 2000, and thus will be able to continue even after January 2005 when the Act will come into full force and this code will not be relevant, since section 78 of the Act provides that nothing in the FOIA is to be taken as limiting the powers of public authorities to disclose information held by them, presumably on a voluntary basis.

The Code is not very important as far as environmental information is concerned, since first it will cease to have effect in January 2005 when the Freedom of Information Act 2000 will have come in full force and second, because the Code, due to its voluntary nature, cannot affect any legal rights of access stemming under any legal provisions such as the pre-existing Environmental Information Regulations 1992 and any other relevant statutes (examined in detail further on).

In any case, the Labour Government that won the 1997 elections had promised in its manifesto to legislate on the issue and in 1997 a governmental White paper was produced on general freedom of information.<sup>30</sup> Then in 1999 a Freedom of Information Bill was passed through Parliament, and on the 30<sup>th</sup> November 2000, the new Freedom of Information Act 2000 received the Royal Assent. This Act has created a general right for anyone to consult and receive copies of almost any information held by public bodies, although some exemptions apply.<sup>31</sup> This Act does not repeal the Environmental Information regulations or any other special provisions providing access to specific environmental information (like public registers). In fact, section 39 of the Act provides that environmental information is not included under the scope of this statute. Further rights to environmental information are to be made available under regulations made by the Secretary of State in order to implement 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. This is the Aarhus Convention, which the UK signed at Aarhus in Denmark in 1998 (see below). These Regulations also implement the new EC directive 2003/4/EC on access to environmental information and are the Environmental Information Regulations 2004, examined in detail further on.

Moreover, at **international level**, over this period the importance of access to environmental information has been emphasised.

Firstly, principle 11 of the Rio Declaration on Environment and Development (agreed at the 1992 earth summit at Rio) states that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities and the opportunity to participate in decision-making processes and that States shall facilitate and encourage public awareness and participation by making information widely available. Similarly, in Agenda 21, a document also agreed at the 1992 earth summit at Rio, it was agreed that all stakeholders in the environment should have access to information concerning products or activities with a possible adverse effect on the environment. This commitment in access to environmental information led to various international conventions concerning exchange of specific environmental information. It also led to the UNECE Aarhus convention on Access to Information, Public Participation and Decision

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<sup>30</sup> See Debra L. Silverman, "Freedom of Information: Will Blair be Able to Break the Walls of Secrecy in Britain?" [1997] 13 *American University International Law Review* 471.

<sup>31</sup> On the Freedom of Information Act 2000, see *inter alia* John Macdonald and Clive H Jones, *The Law of Freedom of Information*, Oxford: Oxford University Press, 2003; Philip Coppel, *Information Rights*, London:

Making and access to Justice in Environmental Matters, mentioned above. However, at the 2003 Johannesburg World Summit on Sustainable Development, no consensus could be reached on developing global guidelines on access to information, public participation and access to justice and thus the World Summit just encouraged governments to implement access to information and participation at the national level so as to further principle 10 of the Rio Declaration.<sup>32</sup>

Secondly, the European Human Rights Court in Strasbourg, has interpreted article 8 (the right to privacy, home and family life), in a way that creates a right of information for residents close to hazardous areas<sup>33</sup>.

As far as **European Union** is concerned, the same year that it enacted the Directive on access to Information on the environment, it also established the European Environment Agency;<sup>34</sup> one of the reasons it was created was to ensure that the public has been properly informed about the state of the environment. Its mission is to collect national data on the environment and to provide it to European Institutions in order to help them draft European legislation and assess its effectiveness. The Agency also draws up reports on environmental issues. These reports are available to the general public. However, the Agency has never played a major role in the recognition and the exercise of a right to receive environmental information, such as the one introduced by Directive 90/313, although this has been advocated by Gorny.<sup>35</sup>

#### **4) The future: a move toward even greater openness.**

It can be seen from the above that in Britain, the first step was to enact specific statutes concerning access to certain type of environmental information (usually through public registers). Then came directive 90/313 creating a right of access to any kind of environmental information, and finally the Freedom of Information Act 2000, that extended this general right to every sort of information, not just environmental. However, as it has already been mentioned, this general right of access, curiously, does not extend to environmental information (although it would have been simpler and more coherent to unify these regimes). This is because the European and international

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Sweet & Maxwell, 2004; the commentary of that FOIA 2000 by Paul Stanley, *Current Law Statutes*, Vol. 2, 2000, London : Sweet & Maxwell, 2000.

<sup>32</sup> See on this point Marc Pallemerts, *International Law and Sustainable Development: Any Progress in Johannesburg?*, 12 [2003] 1 R.E.C.I.E.L. 1, at 9.

<sup>33</sup> In the case of *Guerra v. Italy*, 1998. See below the relevant chapter on Human Rights and environmental information, for an in-depth analysis of how access to environmental information can be based on the ECHR.

<sup>34</sup> The EEA has been established by Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network (OJ L 120, 11. 5. 1990, p. 1.), as amended. According to article 1(2) of this Regulation, one of the tasks of the Agency is 'to ensure that the public is properly informed about the state of the environment'. In conformity with this general statement, the Agency is in charge of ensuring 'the broad dissemination of reliable environmental information', according to article 2, point (vi) of this regulation.

<sup>35</sup> Dietrich Gorny, "The European Environment Agency and the Freedom of Environmental Information Directive: Potential Cornerstones of EC Environmental Law" [1991] 14 *Boston College International and Comparative Law Review* 279.

rules of general access to environmental information are more liberal than the FOIA 2000 and the UK government did not want to go as far.

Today, in the European Union, access to environmental information has recently been modified through the new Directive 2003/4 that has replaced Directive 90/313 on Freedom of access to Environmental Information and implements the provisions of the Aarhus Convention concerning access to environmental information<sup>36</sup>.

### **C) Arguments *pro* and *contra* openness of environmental information.**

'The Government believes that the public should have a right of access to information held by pollution control authorities'. This unambiguous statement was made in the Governmental White Paper 'This Common Inheritance' in 1990. It is clear that access to Environmental Information is seen as a right, but one can wonder why such a right should be recognised and whether there could not exist arguments against it.

#### **1) Arguments favouring the recognition of a legal right to access environmental information.**

The underlying or main reason for a growing emphasis concerning environmental information is that it can perform a useful function in protecting the environment and thus in the achievement of the goal of sustainable development. All authors<sup>37</sup> seem to agree that increased access to environmental information can contribute towards the following goals.

##### **a) Better implementation and effectiveness of environmental legislation**

Increased information allows the monitoring of the effectiveness of environmental legislation, since it is possible not only for the regulatory authorities and the ones regulated, but

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<sup>36</sup> Other aspects of the Aarhus Convention will be implemented either individually by member states, or by other specific EC legislation. For instance, the access to justice part of the convention will be implemented through a separate Directive; see *Commission lays legislative plans on access to justice*, ENDS Report, issue 307, August 2000, page 39.

<sup>37</sup> See on these points Maurice Frankel "How Secrecy Protects the polluter", in Des Wilson (ed.), *The Secrets file, the case for freedom of information in Britain today*, London: Heinemann Educational, 1984, Ch. 3 pp. 22-58; Cliona Kimber, *Understanding Access to Environmental Information: the European Experience*, in Tim Jewell and Jenny Steele (ed.) *Law in environmental decision-making: national, European, and international perspectives*, Oxford University Press, 1998, at pp. 141-144; Patrick Birkinshaw, *Freedom of Information – The Law, the Practice and the Ideal*, 2nd edition 1996, Butterworths, at Ch. 1; Jeremy Rowan-Robinson, Andrea Ross, William Walton, Julie Rothnie, *Public access to Information: a means to what end?* [1996] 8(1) JEL 19-42.; Gerd Winter, "Freedom of environmental Information", Ch. 7 in Lomas Owen (ed.),



also for the greater public to measure whether the particular aims of an environmental rule are being achieved. This is especially important in the field of environmental regulation of hazardous activities and substances, since as indicated by Robbins, data that shows weakness in the efficiency of governmental action, would effectively be an admission of government failure to protect its citizens and thus this can explain why a government which is not strong on enforcement will not promote freedom of information.<sup>38</sup>

Also, increased information can assist in the private enforcement of environmental regulations, because it allows the possibility of private prosecution to be effectively exercised. Moreover, private individuals or other groups such as Non-Governmental Organisations could also initiate civil lawsuits or judicial review actions, or just engage in active lobbying towards public bodies as the Environment Agency, responsible of enforcing environmental legislation.<sup>39</sup>

This trend of private actors to enforce environmental regulation themselves, without relying only on state actions, forms part of the principle of shared responsibility and environmental stewardship. Since public participation in respect of the environment presupposes access to information, this means that these two principles also need effective circulation of information so as to operate correctly.

#### **b) Increased participation in decision-making and better decision-making quality**

Reliable, complete and timely information is a *sine qua non* of effective public participation. This is also demonstrated by the Aarhus Convention, which combines access to information with public participation and access to justice, thus indicating that public participation is a corollary of environmental information. Increasing public participation in turn leads to improved regulatory mechanisms and decisions being adopted, since increased information leads to increased accountability for the decision-maker and also makes the whole process of regulation seem more legitimate. Thus, information leads to improved decision-making quality. It also helps avoiding arbitrariness in the enforcement of the law and also helps preventing excessive industry-bias in decision making. Furthermore, disclosure may help control authorities to detect and deal with pollution incidents and also to realistically assess the success of the various pollution-control strategies and mechanisms.

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*Frontiers of Environmental Law*, London: Chancery Law Publishing, 1992, at pp. 102-114. Each author emphasises different points.

<sup>38</sup> See Deirde H. Robbins, *Doing Business in the Sunshine: Public Access to Environmental Information in the United States* [1994] 3(1) *Review of European Community & International Environmental Law* 26, at p. 32.

<sup>39</sup> See for example the recent case of *R v Anglian Water Services* [2003] EWCA Crim 2243, where a private prosecution was brought against a polluter by a member of the public who felt that the Environment Agency lacked determination in discharging its responsibilities.

### **c) Assisting individuals and companies in changing their actions**

Better information on the real state of the natural environment can assist in attaining the goal of sustainable development, by creating an awareness of the state of the environment and thus influencing the behaviour of individuals and companies. This is the educational element of freedom of information. As Bell and McGillivray have put it, *'In order to understand the consequences of our current actions in term of the legacy which is being passed to future generations there is a need to ensure greater access to information on those consequences.'*<sup>40</sup> Of course, it cannot be overlooked, that an environmentally-friendly attitude cannot suffice in itself if there aren't available practical and legal channels through which to direct these good intentions.

Also, as far as businesses are concerned, access to information would help raise standards by allowing the comparison of competing firms, as a firm with good environmental records may increase its business where environmental protection is seen to be important amongst consumers. Moreover, information would allow companies to police their competitors, so as to prevent them from benefiting unfairly in a relaxation in environmental protection standards. The best evidence that industry may benefit from greater disclosure, is the fact that under the U.S. Freedom of Information Act, 71% of requests come from industry.<sup>41</sup>

### **d) Access to environmental information as a regulatory instrument in its own right**

Access to information can and has been used as another regulatory instrument in order to achieve protection of the environment. This is demonstrated by the eco-labelling schemes, that provide consumers with information relating to the environmental impact of various products.<sup>42</sup> Environmental information labelling can be defined as the use of labels in conjunction with manufactured products or services, in order to provide some amount of information about the harm or lack of harm that the existence and further use of this product or service causes to the environment.

Environmental information labelling aims to use the market force of consumers as a means to push manufacturers to produce more environmentally friendly products. It is believed that if consumers are informed about the environmental friendliness or harmfulness of the different products or services on the market, they will tend to buy the ones that are less harmful towards the

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<sup>40</sup> Bell and McGillivray, *Environmental Law*, 5th ed. 2000, Blackstone Press, at page 218.

<sup>41</sup> See Frankel above, at p. 56. The fact that the U.S. FOIA has been mostly used to obtain government data concerning competitors and private institutions and that an entire industry based on the U.S. FOIA has appeared in the U.S. since 1974, has been heavily criticised by Scalia since although the U.S. Freedom of Information Act and its amendments *"were promoted as a boon to the press, the public interest group, the little guy; they have been used most frequently by corporate lawyers[...]* It is a far cry from John Q. Public finding out how his government works". See Antonin Scalia, "The Freedom of Information Act has no clothes", Chapter 4 in Robert G. Vaughn (ed.), *Freedom of Information*, Aldershot: Ashgate, 2000, at p. 118.

<sup>42</sup> See inter alia Ellen Margrethe Basse, Sanford E. Gaines How thinking about trade can improve environmental performance: trade issues in environmental labelling systems [2000] 8(3) Env. Liability 71-84.

environment and use them in a more environmentally-friendly way (for instance by trying to use electrical appliances in a way that will decrease energy consumption).

Environmental information labelling schemes can be mandatory, as with the European Union energy-labelling scheme created by a Council Directive of 22 September 1992 “on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances”.<sup>43</sup> This Directive provides that certain household electrical appliances should be accompanied by a label mentioning their energy consumption and efficiency. There is also an EC wide-scheme of voluntary environmental information labelling, the European Union eco-labelling scheme, which was initially established in 1992, by regulation 880/92<sup>44</sup> and provided for a system of awarding labels to goods only. This regulation was repealed and replaced in September 2000 by regulation 1980/2000<sup>45</sup> and now also includes services. The aims of this eco-labelling regulation according to its preamble is *"to promote products with a reduced environmental impact during their entire life cycle and to provide consumers with accurate, non-deceptive and scientifically based information on the environmental impact of products"*. Consequently, the regulation not only tries to protect the environment through consumer information, but also to address the problem of false or deceptive environmental claims by manufacturers. The scheme works by allowing manufacturers of environmentally friendly products to affix a specific label on their products: the eco-label (a flower logo).<sup>46</sup>

### **e) Encouraging public confidence**

Providing information and especially on environmental risks, can also be a factor that will lead to increased confidence of the general public over issues of ‘environmental-scare’ such as dangers from nuclear plants or outbreaks of animal diseases. Informing the public about environmental risks, will in turn help the general population to assess such risks. As a consequence this could lead to reduced fear and greater understanding of the issues at stake involved in an environmental crisis and more generally will allow individuals to make informed choices about whether they agree to live in a high-risk area or not. Increased disclosure will also encourage public confidence in the work of pollution and environmental control authorities.

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<sup>43</sup> Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, OJ, L 297 , 13/10/1992 p. 16 – 19.

<sup>44</sup> Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme, OJ, L 099, 11/04/1992 p. 1 - 7

<sup>45</sup> Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme, OJ L 237 , 21/09/2000 p. 1 - 12

<sup>46</sup> See for more details the EC Commission website on the eco-label at <http://europa.eu.int/comm/environment/ecolabel/>

## **2) Arguments against legislation favouring access to environmental information**

It cannot be overlooked that there is also opposition to the development of legal provisions favouring access to environmental information. However, governments have, largely dismissed arguments against access.<sup>47</sup>

### **a) Slower decision-making**

It can be argued that, since as analysed above, giving more information to citizens will lead to increased participation and allow for improved judicial action to be taken by objectors, this will lead to slower decision-making due to a more cautious approach by decision-makers so as to avoid challenges (political or legal). However, that is the essence of democratic decision making: that elected officials who take all decisions on behalf of the electorate body, can be controlled both at the ballot box and inside the courtroom.<sup>48</sup>

### **b) Commercial and industrial confidentiality**

Another criticism can be that the regime on access to environmental information might be used by competitors in order to access commercially confidential information. As a consequence, this leads to fears that the viability of businesses might become affected. Undoubtedly, commercial and industrial confidentiality is a legitimate interest conflicting with the right to access environmental information. However, rules providing for access invariably include exclusions for information commercially confidential. It has also been suggested that if confidential information in the hands of public bodies is not correctly protected, this might lead to reluctance of companies to provide any information not required to be provided under a statutory provision.<sup>49</sup>

### **c) Costs**

Undoubtedly, a legal obligation for public authorities of having to provide information upon request, leads to costs for the authorities which will have to be passed on at some stage to the taxpayers. However, this concern is also partially alleviated by the fact that all regimes on freedom of information provide that the requester of information has to pay at least part of the costs of providing it. Of course, it has to be acknowledged that in the end the provision of information will

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<sup>47</sup> According to Bell and McGillivray, see above n. 40, at p. 218.

<sup>48</sup> On the debate about increased public participation in environmental matters, see Lynda M Warren, "Sustainable Development And Governance" [2003] *Enviro LR* 5.2(77).

<sup>49</sup> On the effects of the 1990 Environmental Information Directive and of the right to access environmental information on industry, see Ian Rose, *Industry and Access to Information on the Environment*, in *Protecting the European Environment: Enforcing EC Environmental Law*, edited by Han Somsen, London: Blackstone Press, 1996, Ch. 13 pp. 251-264.

still probably cost the authority some money. The objection thus is that the costs for the public (be it taxpayers, ratepayers or customers), would be out of proportion compared to the benefit that could be accrued from openness. But in any case, such a balancing exercise is almost impossible to undertake, as it is hard to quantify in financial terms the 'benefits' of providing information.

#### **d) Endless litigation and objections**

Furthermore, there had been expressed fears that environmental activists might seek access to environmental information in order to use it in unreasonable and endless enforcement action against industries and businesses. However, even if access to information has led to increased litigation, the fear of the so-called 'green-nutters' flooding industry with litigation has not been realised.<sup>50</sup> And in any case, even if information might be used by environmentalists applying to courts for injunctions against companies, injunctions can only be granted if there is some merit in the application.<sup>51</sup>

#### **e) The interpretation of technical data.**

Lastly, it could be argued that the provision of environmental information will not have any useful purpose, since most of the time information concerning the environment is about complex technical data. So the general public will be unable to interpret and thus use this information effectively.

### **3) Conclusion: legislative activity favouring access indicates the predominance of pro arguments.**

Even if the debate is not closed between opponents and proponents of whether there should be specific legal provisions favouring the provision of environmental information, recent trends both at UK, EC and international level favour such an approach. This in a way demonstrates that the current legislative thinking is underpinned by the idea that the benefit of providing environmental information outweighs its disadvantages and that, in general, providing access to information protects the environment. It might therefore be thought that the argument has been won. However, the counter-arguments have not been totally dismissed by legislators (both at national, EC and international level) as the concerns that they convey have been taken into consideration when establishing the limits of the right to access environmental information. This is especially true, when the exceptions to environmental information are concerned. Thus,

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<sup>50</sup> Ibid. at p. 219.

<sup>51</sup> See Maurice Frankel "How Secrecy Protects the polluter", in Des Wilson (ed.), *The Secrets file, the case for freedom of information in Britain today*, London: Heinemann Educational, 1984, Ch. 3 pp. 22-58, at pp. 34-36.

understanding the arguments against access to environmental information, leads to an understanding of the underlying *rationale* for the exemptions to disclosure.

Finally, it should be noted that all legislation on environmental information does not directly lead to all the positive aspects of environmental information described above. Since information allows a person to understand, assess and only as a consequence of that to act, the positive functions of environmental information are supportive rather than directly acting.<sup>52</sup> Environmental information is thus only a means that allows other factors (such as the willingness of informed citizens to take action in favour of the environment) to achieve a desired objective, as environmental protection.

#### **D) The double nature of access to environmental information.**

Access to environmental information can be analysed through two different perspectives: either as a right or a technique.

##### **1) A technique used for implementing environmental law principles.**

A chronological analysis of the evolution of techniques use by environmental law in order to achieve its goal of environmental protection,<sup>53</sup> shows that initially only command and control techniques were used (consisting of legislation laying down prohibitions and penalties for the polluters that breach them). Later, came in techniques based on a voluntary co-operation of industry and governmental agencies in charge of environmental protection, like agreements between polluters and the government on pollution levels. Such agreements are voluntary agreements, meaning that there is no legal obligation for polluters to follow them and no penalties (criminal or administrative) are attached to their breach.

Access to information has been a technique that has been thoroughly used in order not only to enhance and complement these techniques of environmental protection (both voluntary or not), but also as a self-standing instrument.

The best example of environmental information being used as a complement of other environmental protection techniques, is the example of environmental information registers (examined in detail further on), which contain information on a specific area of environmental activities. A good example is the planning register, which contains information related to planning applications for a specific geographical area, which complements the main method provided in English planning law for planning implementation and development control: the planning permission system.

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<sup>52</sup> See Clfona Kimber, above n. 37, at p. 140.

<sup>53</sup> For a concise introduction of the development of environmental law see inter alia, S. Bell and D. McGillivray in *Ball and Bell on Environmental Law*, Blackstone Press, 5<sup>th</sup> edition 2000, pp. 9-23.

There are also instances where information has been used as a self-standing tool for achieving environmental protection. This is the case for eco-labelling schemes that provide information to consumers through labels affixed on products. Another example, are environmental statements, prepared by private corporations under the Eco-Management and Audit scheme.<sup>54</sup> These environmental statements are like financial statements which represent the financial situation of a company, but concern the environmental impact of the activities of a company and describe all the actions taken in relation to the environment. A major difference is that there is no obligation for companies to adopt such environmental reporting.

Moreover, environmental information can be seen as a self-standing regulatory instrument as far as the environmental impact assessment regime is concerned, which places an obligation on developers to produce an information statement on the possible impact of major projects to the environment. The production of the “environment statement”, a combination of the information provided by the applicant and any representations made, is the end and the final objective of the whole process. This statement then has to be taken into account by the decision-maker.

Finally, there is also the Strategic Impact Assessment Directive,<sup>55</sup> which places the same kind of obligations to assess possible environmental effects, upon regulatory bodies, whenever they plan to enact a legislative or other regulatory rule.

## **2) Access to environmental information as a right.**

Apart from the above instances where access to environmental information is seen as a technique used by environmental law in order to achieve a certain aim, it is also viewed as a self-standing right for citizens. In this respect its justification may be philosophical or political, just as a right to life or freedom of expression can be viewed as an inherent right.

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<sup>54</sup> The Eco-Management and Audit Scheme, was initially established by Council Regulation (EEC) No 1836/93 of 29 June 1993 and was originally restricted to companies in industrial sectors. This Regulation was replaced by Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001, which opened the EMAS to all economic sectors including public and private services. In addition, EMAS was strengthened by the integration of EN/ISO 14001 as the environmental management system required by EMAS and by the adoption of an EMAS logo to signal EMAS registration to the public. Participation is voluntary and extends to public or private organisations operating in the European Union and the European Economic Area. See the EMAS Commission website at: <http://europa.eu.int/comm/environment/emas>

<sup>55</sup> The Strategic Impact Assessment Directive (SEA) Directive 2001/42/EC (published in the OJ L197 of 21 July 2001, page 30), aims to allow for the assessment of the environmental consequences of certain plans and programmes during their preparation and before their adoption (by almost exclusively public bodies). The public and environmental authorities can thus give their opinion and all results are integrated and taken into account in the course of the planning procedure. After the adoption of the plan or programme it also provides that the public is informed about the decision and the way in which it was made. In the case of likely transboundary significant effects the affected Member State and its public are informed and have the possibility to make comments which are also integrated into the national decision making process. The SEA Directive aims at helping to achieve the goal of sustainable development. It is not yet implemented in the UK by specific legislation. See the Commission Environmental impact assessment website at:

<http://europa.eu.int/comm/environment/eia/home.htm> . See also William R. Sheate, The EC Directive on Strategic Environmental Assessment: A Much-needed Boost for Environmental Integration, [2003] 12 E.E.L.R. 331; Anders S. Mathiesen, Public Participation in Decision-Making and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes, [2003] 2 E.E.L.R. 36

So, regardless of whether access to environmental information can be a means to achieve better environmental protection, citizens may be seen to have a right to be informed about certain information that is vital for their well-being, their health and the environmental risks faced by them (i.e. of dangerous pollution levels near their homes etc). Even if the law does not expressly set out such a right, the right to access information may be founded or derived from other fundamental human rights, such as the right to life and the right to enjoy a peaceful family life. Such a dimension of environmental information cannot be overlooked, especially since, first, the UK has incorporated the European Convention on Human Rights in its national law through the Human Rights Act 1998, and second, because human rights are an integral part of the EC legal order, as analysed in more detail further on.

Also, apart from this legal basis, a right to access information can also be founded on the legislation consecrating such a right: the Freedom of Information Act 2000, since this Act creates a general right to access information held by public bodies, it also as a result encompasses the right to access environmental information, as it can be analysed as a component of the general right of access. The general right to access information (thus the one which does not exclusively concerns environmental information, such as the one consecrated by the FOIA 2000), aims not to protect the government but to empower citizens in order to protect democracy. As said by Madison in a much-quoted quotation: "*Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.*"<sup>56</sup> In this context, freedom of information can be linked with the democratic process ideal, since access to information is necessary for effective political participation. It can also be linked with the rule of law, since if legal standards are to limit administrative discretion, then these standards have to be known.<sup>57</sup>

In the UK, it is worth mentioning that the right to access information held by public bodies has been linked with three major constitutional themes. First, it has been linked with the principle of ministerial accountability (the *Carltona* principle), the question being whether ministerial accountability can preclude freedom of information or actually require it. It has also been linked to the principle of the neutrality of the civil service, since this principle might be affected if advice of civil servants to the government is disclosed. Thirdly, it has been linked with the principle of

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<sup>56</sup> James Madison, 4<sup>th</sup> President of the U.S.A. (1809-1817), in a letter to Lieutenant Governor Barry of Kentucky on 4 August 1822. Cited by Michael Supperstone, Timothy Pitt-Payne, *The Freedom of Information Act 2000*, Butterworths 2001, at p. 1.

<sup>57</sup> On the link between freedom of information and the three ideals of the administrative process, namely, the rule of law, the public purpose ideal and the democratic process ideal, see Thomas D. Sargentich, "The reform of the American Administrative Process: the contemporary debate" [1984] *Winsconsin Law Review* 385, reprinted in Robert G. Vaughn (ed.), *Freedom of Information*, Aldershot: Ashgate, 2000, as Chapter 1.



effectiveness of governmental action and whether it is improved or not by increased freedom of information.<sup>58</sup>

Until now, we have referred to a “right” to access environmental information. We believe it is correct to refer to a “right to access information” as opposed to a “freedom”, since public authorities are not just faced with a prohibition on their part from preventing the exercise of access to information (as for instance when they are faced with issues concerning merely a “freedom” such as the freedom of association), but they are also under a positive obligation to effectively answer the request to information and thus actively fulfil the content of the right to access information. It can be contended that when public authorities are faced with a “right” which is invoked by a citizen, they are then not only under a duty to simply refrain from preventing its effective exercise by the person concerned, but have to take positive steps to uphold it and to fulfil it in the claimants interest. This distinction leads from the difference between a right and a freedom, which (for present purposes) is that a right guarantees intervention by the state when protection is required. On the contrary, a freedom guarantees no intervention by the state when an individual exercises that freedom.<sup>59</sup> It is worth pointing out, that unlike say freedom of expression, access to information is predominantly a positive right in that you require action on behalf of a public body.<sup>60</sup> A freedom in this context would be just a right to read information in your possession.

In any case, authors seem to use either terms such as “freedom of information” or “right of access to information” without explicitly distinguishing between them. In any case, the present work would not be suited for a theoretical discussion of the differences between these terms, if any in practice. Interestingly, empirical examination of articles and monographs in Europe suggests that scholars from a common law background seem to refer to a “freedom” of access to information and, on the contrary, scholars from a civil law tradition to a “right” to access information. This difference is also striking when one examines statute law in various countries: in the UK there is the “Freedom” of Information Act 2000, whereas in France it’s about the law on the “right” to access information, although both statutes are quite similar in their effects. Moreover, some

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<sup>58</sup> On these see Vernon Bogdanor, “Freedom of Information: the Constitutional aspects”, Chapter 1 in Andrew McDonald and Greg Terrill (eds.), *Open government - freedom of information and privacy*, Basingstoke: Macmillan, 1998.

<sup>59</sup> For a theoretical discussion on the differences between a right and a freedom, see Edwin Shortt & Claire de Than, *Human Rights Law in the UK*, Sweet & Maxwell, London: 2001, Ch. 1 and the bibliography mentioned at pp. 18-20.

<sup>60</sup> In a report by the independent human rights organisation JUSTICE, *Freedom of Information – a report by Justice*, chairman of Committee Anthony Lincoln, London 1978, it was said that: “‘Freedom of Information’ is a misnomer. What we have to consider is in truth not a freedom at all (c.f. freedom of expression or freedom of choice), but a right of access to official information and whether the public should enjoy such a right and if so, within what limits. Now that the phrase has become universally accepted, it may appear pedantic to criticize the use of the word ‘freedom’ in this context.”

American scholars also use the term of a “community right to know” when referring to freedom to access information.<sup>61</sup>

A possible explanation of why in common law countries the right to access information held by public bodies is called a “freedom” rather than a “right”, is because of the attempts by American constitutional and administrative law theorists to find such a right in the First Amendment to the U.S. Constitution on the Freedom of the press and expression. Their main argument being that since without access to information any right to free speech is diminished as there is nothing to speak about, a freedom to receive information from the government should be inferred from the U.S. Constitution. However the U.S. Supreme Court has not adopted that there can be a constitutional right of access to governmental information.<sup>62</sup>

### **E) Originality of our research.**

In the last part of this introduction we shall explain the interest that our present work has for the scientific community. In other words we shall explain, why there is a need of such a research, and in what way it is original. In order to do this, we will review what has been done before on the same subject, after what we shall explain the approach which we will adopt in analysing the subject.

#### **1) Research review.**

Environmental Information is a subject that can be analysed from different perspectives, either a sociological, an economical or a legal one.

The subject of environmental information has been extensively dealt with from non-legal perspectives. As an example, just in this University since 1990 there has been an average of one thesis per year submitted for Master’s of Science in the Department of Information Science<sup>63</sup>.

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<sup>61</sup> On the French system of access to information, see below the relevant chapter. On the American term of a “community right to know”, see the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) which is a US federal Act; see on this Act, Melinda Cosner, *Community right to know compliance manual : Title III (SARA)*, J J Keller & Associates, 1999.

<sup>62</sup> See Herbert N. Foerstel, *Freedom of information and the right to know. the origins and applications of the Freedom of Information Act*, Westport, Conn.. London. Greenwood Press, 1999, at pp. 10-14. See also the U.S. Supreme Court case of *Richmond Newspapers Inc. v. Virginia* 448 U.S. 555 (1980), where Chief Justice Berger suggested that freedom of expression and speech “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government” (at p. 575).

<sup>63</sup> All of the following are thesis submitted for Master of Sciences to City University’s Department of Information Science:

Powell S., *The development of an information service for the environment agency with a case study of the Thames region.* (2000).

Hanton F., *Environmental information available to businesses.* (1989)

Norman D., *The Environmental Information Needs of the Public.* (1990)

On the contrary, as long as legal research is concerned, there is not any doctoral thesis in the UK nor an up to date monograph<sup>64</sup> covering the subject. Of course, every book on environmental law deals with the subject, but they do not provide an intensive or comprehensive study. There are also monographs analysing access to environmental information, but they all adopt a particular approach of dealing with the subject, either from the point of view of international law<sup>65</sup>, or EC law<sup>66</sup>

## 2) The approach chosen.

Consequently, since there is no work covering access to environmental information in a thorough manner, combining both national, international and European legal rules on the topic and dealing with the latest developments at international and European level, we think there is a need in this area. The present study aims to cover this need.

In doing this, we do not claim to present the reader with a brand new theory. However our work intends to be original in the way that it plans to combine in a single piece of work all the aspects of the subject: both legal and non-legal. Moreover, with respect to the legal aspects of the

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Osterloh K., *Environmental Information for environmental managers.* (1995)

McFadden L., *Environmental Coverage in the National Press.* (1991)

Hovell S., *Evaluating World Wide Web search engines a model & testing using environmental information.* (1996)

Thompson C., *The feasibility of a fee based environmental information service at Imperial College centre for environmental technology library.* (1984)

Kinnear C., *Green information provision by environmental organisations.* (1992)

Moye B., *Local authorities and their use of environmental information.* (1995)

De Silva D., *Online databases and Cd-Roms as sources of environmental information.* (1994)

Tippet T., *Online retrieval of environmental information: a comparative study.* (1992)

Ostle B., *Qualitative research into public environmental information needs in relation to attitudes and motivation* (1991)

Morgan R., *The role and effectiveness of information in encouraging environmental concerns and action.* (1995)

Owe P., *A study of environmental reporting in the UK press.*(1998)

Rose K., *The use of environmental and 'green' information source by businesses.* (1989)

Bull K, *The usefulness of environmental newsletters.* (1990)

Favarato G., *Web search engines: an evaluation of their performance in retrieving environmental information, changes between 1996 and 1998 and current trend.* (1999)

<sup>64</sup> There is a single monograph by Gisèle Bakkenist, *Environmental Information: Law, Policy and Experience*, Cameron May 1994, which is out of date as it does not include any of the ECJ or UK case-law mentioned in the present study.

<sup>65</sup> See the trilingual book: Christine Larssen (ed.), *Dix ans d'accès à l'information en matière d'environnement en droit international, européen et interne : Bilan et perspectives - Tien jaar toegang tot milieu-informatie naar internationaal, europees en intern recht : balans en perspectieven - Ten years of access to environmental information in international, European and Belgian law : stock-taking and perspectives*, Bruylant, Brussels 2003.

<sup>66</sup> Hallo Ralph (ed.), *Access to Environmental information in Europe: The implementation and implications of Directive 90/313/EEC*, Kluwer, 1996.

subject, we intend to analyse them in regard of not only national law, but also international,<sup>67</sup> EC law and also the law of the European Convention on Human Rights.

In other words, we shall be trying to write a synthesis that has never been done before.

### **3) Scope of our examination and aim.**

The present work intends to be first and foremost an analytical work. We shall be examining in detail the legal instruments (both statute law and case-law) which create directly or indirectly a right for individuals in the UK to access information relating to the environment. We shall try to be as exhaustive as possible and cover all such legal mechanisms. However, we shall limit our examination to legal instruments that allow access to primary sources of information and not to secondary sources. The difference between primary sources of information and secondary ones, as suggested by Rowan-Robinson *et al.*,<sup>68</sup> is that a primary source of information holds information in its original form, whether a secondary source takes the information produced by the primary and recycles it for the benefit of others like for instance in a newspaper etc. As he suggests, the distinction is really more convenient than rigorous, however we shall adopt it for present purposes, as our examination aims to concentrate on the specific legal instruments that regulate access to environmental information and not to adopt a wider approach that would have encompassed rules like the freedom of the press, which are too remotely connected with the core subject of this work.

More importantly, all along this work I will focus on the primary objective of freedom of environmental information legislation, which is the protection of the environment. This is the central idea of this work and underpins every part of it. The purpose of the right of access to environmental information is to protect the environment by using informed citizens as means of pressure on public authorities and private companies. This can be contrasted with the general right of access to information held by public authorities, which, even if can lead to the indirect protection of the environment or of other interests, is an end in itself (a right *per se* recognised to individuals). This essential difference between these two rights is concretized in the one exemption from communication which all the relevant freedom of environmental information instruments contain. This relates to all information the disclosure of which would make it more likely that the

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<sup>67</sup> According to Article 38 of the Statute of the International Court of Justice (ICJ) the main sources of international law, which article 38 directs the ICJ to apply, are: (a) international conventions (or treaties), whether general or particular, establishing rules expressly recognised by States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; and (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law. Nevertheless, our analysis of international law will exclusively cover treaty-law, because in the field of the right to access to environmental information, it seems that the other sources of international law do not yet have a significant role to play.

environment (to which such material relates) would be damaged. As we shall see, a conflict might arise between general freedom of information legislation and the right to access environmental information, due to the fact that the ultimate goal of this right is environmental protection through the provision of information.<sup>69</sup> However, at the same time, the requirement of environmental protection must be taken into account and the national decision makers must be ready to sacrifice part of the general right of access in order to allow the right of access to environmental information to fulfil its role fully and to effectively protect the environment. Thus, we shall also be speaking about a possible conflict between general freedom of information legislation and specific rules on environmental information. Since the scope of general freedom of information legislation is much wider than the scope of specific legislation on the provision of environmental information, this could lead to the following result: as the scope of environmental information widens, the scope of general freedom of information will, as a consequence, become more restricted, since the former stems from EC and international law, while the latter is primarily based on national legislative provisions. So, we shall also examine the differences between general freedom of information legislation and rules on environmental information, since the goal of environmental protection can compete with the goal of general freedom of information legislation. Thus, we shall also examine the provisions of the Freedom of Information Act 2000. This Act created a general right for anyone to consult and receive copies of almost any information held by public bodies, although some exemptions apply. This Act does not repeal the Environmental Information regulations or any other special provisions providing access to specific environmental information (like public registers). In fact, section 39 of the Act provides that environmental information is not included under the scope of this statute. Consequently, we will be also describing the overlap (if there is any) between general freedom of information legislation and provisions on access to environmental information.<sup>70</sup>

In addition, we will thoroughly examine the provisions of the Environmental Information Regulations 1992 and of the new 2004 Regulations.<sup>71</sup> As a consequence we will also analyse the provisions of EC Directive 90/313 on the freedom of access to environmental information, which was transposed into UK law by the Environmental Information Regulations 1992, and of Directive 2003/4 which has replaced the 1990 Directive and has been transposed by the 2004 Environmental Information Regulations. We will also examine the provisions of the 1998 Aarhus international Convention which grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice in environmental

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<sup>68</sup> See J. Rowan-Robinson et al., *Public access to Environmental Information: a means to what end?*, [1996] JEL 19, at p. 20.

<sup>69</sup> See below, p. 160 and also p. 301.

<sup>70</sup> See below, *viii*) *Information prejudicial to the environment*, at p. 160.

<sup>71</sup> The EC Directive 90/313/EEC on public access to environmental information has been implemented in the UK through the Environmental Information Regulations 1992, as amended by the Environmental Information Regulations 1998. The 2003/4/EC Directive on public access to environmental information and repealing

matters. We will be analysing the provisions of the Aarhus convention concerning access to environmental information and examine how they combine with the aforementioned UK and EC legislation on the subject.

More specifically, we shall examine the legal rules dealing with public registers, which are official compilations of certain specific sort of information required by legislation to be maintained by public authorities and to be open to public inspection. UK law has for a long time used public registers as a means of making information accessible to the general public. Public registers containing environmental information are definitely one of the means that allow the public to have access to data on the environment and are also important since they were the earliest instruments regulating, albeit in a very restricted manner, access to environmental information.

Apart from the description of all of the above instruments using all reported case-law, we shall also adopt a wider approach, by examining the relationship between environmental information and human rights. The main question we shall try to answer in this respect, is whether access to environmental information can be qualified as a fundamental right and if so to what extent. We shall also examine the opposite situation: can access to environmental information be limited by human rights considerations, even if it is viewed as a fundamental human right, and if so to what extent?

#### **4) Boundaries of our examination**

Because it is not possible in this work to treat extensively with every issue that is related to the right to access environmental information, it is necessary to limit the extent of our work so as to concentrate on the core parts of the subject. Consequently, two limitations should be placed from the beginning to our analysis. The first one concerns the difference between active and passive access to information, and the second one concerns the right to access information held by EC institutions.

##### **a) Active and passive access to information**

The second limitation of our examination, concerns the distinction between active and passive access to information. Passive access concerns the right of the public to seek information from public authorities and the obligation of public authorities to provide information in response to a request. Active access, concerns the right of the public to receive information and the

obligation of authorities to actively collect and disseminate information of public interest without the need for a specific request. We shall only examine passive access to information, as relevant legislative instruments (such as the Freedom of Information Act 2000 and the Environmental Information Directive and the Regulations) almost exclusively deal with this kind of access, where a request has to be addressed to the holder of the information, before access to it is granted. Nevertheless, we shall also examine in detail the relevant legislative provisions on public registers containing environmental information, since, as we shall see, the provision on public registers are relevant to both passive and active access to information.

### **b) The right to access information held by the European Union institutions.**

It is clear from what precedes, that we will include in the scope of our analysis EC law and especially the 1990 and 2003 Environmental Information Directives. However, for the sake of completeness it should be noted that EC law also includes the special rules that grant access to documents of the EC institutions. These rules are of general applicability and do not only concern environmental information, but any kind of information. We shall only describe them at this point summarily, as they only indirectly relate to the subject of the present thesis, which is the right to access environmental information.<sup>72</sup>

A first point to note, is that although the EC imposed in the early 90s an obligation on member states to grant the right to access environmental information via the 1990 Environmental Information Directive, there was no such binding right of access to information held by the EC institutions. The 1992 Maastricht Treaty only contained a non-binding declaration (declaration no. 17) which stressed the importance of transparency and said that: "*The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration.*" This led to the adoption of a joint Code of Conduct by the Commission and the Council<sup>73</sup> and setting out the principle that the widest possible

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<sup>72</sup> Of course, it should be acknowledged that the EC institutions do hold information relating to the environment, see on this point Krämer Ludwig, Access to Letters of Formal Notice and Reasoned Opinions in Environmental Law Matters, [2003] *European Environmental Law Review* 197. For more details on the rules on access to the EC institution's documents, see *inter alia* John Macdonald and Clive H Jones, *The Law of Freedom of Information*, Oxford University Press, 2003, at 763-780. See also the online case study by Tony Bunyan, *Secrecy and openness in the European Union - the ongoing struggle for freedom of information*, Statewatch September 30, 2002, at <http://www.freedominfo.org/case/eustudy/>

<sup>73</sup> Code of conduct concerning public access to Council and Commission documents 93/730/EC, OJ L 340, 31/12/1993 p. 41.

access to documents should be granted to the public. This Code was implemented by the Council and the Commission through separate but similar decisions.<sup>74</sup>

Under these instruments, the European Court of Justice (ECJ) and the Court of First Instance (CFI) have rendered some very interesting judgements in which they established principles that today can either be found in the 2003 Environmental Information Directive or also in the ECJ case-law interpreting the 1990 Environmental Information Directive.

First, although the Community rules did not provide for partial access to documents when confidential information could be separated from information that could be disclosed, the ECJ and the CFI did establish such a principle. The ECJ in the *Hautala* case,<sup>75</sup> on an appeal from the CFI, considered that this principle of partial access was a consequence of the proportionality principle. This principle of partial access was also reaffirmed in the CFI case of *Kuijter v Council*.<sup>76</sup> In this case, the Court also added that in exceptional cases a derogation from this principle can be possible, where the administrative burden of blanking out the confidential parts is so heavy, that it exceeds the limits of what can be reasonably required. This last case is also important because the CFI stressed the principle of transparency, which “*is intended to secure a more significant role for citizens in the decision-making process and to ensure that the administration acts with greater propriety, efficiency and responsibility vis-à-vis the citizens in a democratic system. It helps to strengthen the principle of democracy and respect for fundamental rights.*”<sup>77</sup> This can be linked to the fact that the principle of access to documents of the EC institutions has now been elevated to the rank of a fundamental right of the EC, since it has been expressly included in article 42 of the 2000 Charter of Fundamental Rights of the European Union<sup>78</sup>

Second, in the case of *Carvel and Guardian Newspapers Ltd v Council*,<sup>79</sup> the CFI held that when the EC institutions (in the present case the Council) exercise their discretion to disclose the requested documents, they have to apply a genuine balance test between the interest of the public in gaining access and the interests of the institutions in maintaining confidentiality. Also, the Court held that the institutions are obliged to exercise their discretion to grant or refuse access and cannot simply deny the citizens’ right to access by refusing to exercise their discretion.

Moreover, the case of *Svenska Journalistförbundet v Council*<sup>80</sup> is important, because the CFI held that the institutions were under a duty to state the reasons for their refusal in some details, and that a mere repetition of the applicable exception is not enough, as in such a case it is not

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<sup>74</sup> Council Decision of 20 December 1993 on public access to Council documents 93/731/EC, OJ L 340, 31/12/1993 p. 43. Commission Decision of 8 February 1994 on public access to Commission documents 94/90/ECSC, EC, Euratom, OJ L 046 , 18/02/1994 p. 58.

<sup>75</sup> *Council of the European Union v Heidi Hautala*, Case C-353/99, [2001] ECR I-09565.

<sup>76</sup> *Aldo Kuijter v Council of the European Union*, Case T-211/00, [2002] ECR II-00485.

<sup>77</sup> *Ibid*, at par. 52.

<sup>78</sup> Now renumbered as article II-42 of the Draft Treaty Establishing a Constitution for Europe, OJ C 169, 18 July 2003.

<sup>79</sup> *John Carvel and Guardian Newspapers Ltd v Council of the European Union*, Case T-194/94, [1995] ECR II-2765. See also the case of *Olli Mattila v Council of the European Union and Commission of the European Communities*, Case C-353/01 P, 22 January 2004.

<sup>80</sup> *Svenska Journalistförbundet v Council of the European Union*, Case T-174/95, [1998] ECR II-2289.



possible for the applicant to defend his interests and for the Community courts to exercise their jurisdiction to review the validity of the decision.

In the 1997 Amsterdam Treaty a new Article 191a (now renumbered as Article 255) was added to the EC Treaty. This article establishes "*a right of access to European Parliament, Council and Commission documents...*". However, a Declaration was added in the Amsterdam Treaty, which limits this right by asserting the right of a member state to request that a document originating from it cannot be released without its permission. This article was implemented through Regulation 1049/2001 of 30 May 2001,<sup>81</sup> which grants a right of access to European Parliament, Council and Commission documents to any Union citizen and to any natural or legal person residing, or having its registered office, in a Member State. This new regulation replaces, with effect from 3 December 2001, the previous Code and Decisions on public access to Commission and Council documents, which therefore cease to apply. The new regulation is implemented by internal rules drawn up for this purpose by the individual institutions.<sup>82</sup>

On the whole, regulation 1049/2001 follows the same lines as the earlier Decisions it replaces. The right of access is to documents and the definition of a "document" is a broad one and no category of documents is excluded *a priori* from the right of access, including classified documents. Refusal to grant access must be based on one of the exceptions provided for in the regulation and must be justified on the grounds that disclosure of the document would be harmful. Refusal is justified where disclosure could undermine the protection of:

- the public interest (as regards public security, defence and military matters, international relations, or the financial, monetary or economic policy of the Community or a Member State), or
- privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

Also, unless there is an overriding public interest in disclosure, refusal is justified where disclosure could undermine the protection of:

- the commercial interests of a specific natural or legal person, including intellectual property;
- court proceedings and legal advice;
- the purpose of inspections, investigations and audits.

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<sup>81</sup> 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, OJ L 145 , 31/05/2001 p. 43.

<sup>82</sup> These instruments are: Joint declaration relating to 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 (OJ L 145 of 31.5.2001, p. 43), OJ L 173 , 27/06/2001 p. 5; Bureau Decision on public access to European Parliament documents, OJ C 374 , 29/12/2001 p. 1; Council Decision of 29 November 2001 amending the Council's Rules of Procedure, 2001/840/EC, OJ L 313 , 30/11/2001 p. 40; Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), 2001/937/EC, ECSC, Euratom, OJ L 345 , 29/12/2001 p. 94. Also, Regulation 1049/2001 is made applicable to documents held by the European Environment Agency, through Regulation (EC) No 1641/2003 of the European Parliament and of the Council of 22 July 2003 amending Council Regulation (EEC) No 1210/90 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, OJ L 245 , 29/09/2003 p. 1.

In addition, unless there is an overriding public interest in disclosure, refusal is also justified where such disclosure could seriously undermine the institution's decision-making process in respect of any document:

- drawn up by the institution for internal use or received by it, which relates to a matter where the decision has not yet been taken;
- containing opinions for internal use as part of deliberations and preliminary consultations within the institution, even after the decision has been taken.

The principle of partial access is included, as if only parts of the document are covered by any of these exceptions, the remaining parts of the document have to be released. Moreover, if the requested document originated with a third party, the institution may consult that person or body before deciding whether to release the document. Similarly, a member state may request the institution not to disclose a document originating from it without its prior agreement.

Access has to be granted, or reasons for the refusal have to be provided in 15 days. If access is refused, the applicant can ask the institution to reconsider its decision, by sending a written request (confirmatory application) within 15 working days following receipt of the institution's reply or expiry of the time limit if the institution has failed to reply. The institution then has 15 working days within which to change or confirm its decision. If the refusal is confirmed, then the institution has to give details of how to pursue the appeal further, by either submitting a complaint to the European Ombudsman or bringing an appeal before the Court of First Instance.

It should be noted that even confidential and classified documents are accessible under the 30 year rule, which states that all documents or files which have been closed for more than 30 years are accessible to the public, under the special rules on Historical Archives of the institutions.<sup>83</sup>

Moreover, a very interesting point concerns the relationship between the EC regulation on access to EC institution's documents and the national legislation on access to information (like the FOIA 2000 in England and also the Environmental Information Regulations). This is important since member states and the EC exchange information between them, and thus an applicant might try to bypass a refusal to provide information by an EC institution by submitting the same request to a member state, or vice-versa.<sup>84</sup> This is especially true in the field of environmental information, since under some pieces of EC legislation, member states are under a duty to provide environmental information to the Commission.<sup>85</sup>

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<sup>83</sup> This is the Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, OJ L 043 , 15/02/1983 p. 1, as amended by Council Regulation (EC, Euratom) No 1700/2003 of 22 September 2003 amending Regulation (EEC, Euratom) No 354/83 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, OJ L 243 , 27/09/2003 p. 1.

<sup>84</sup> As demonstrated by the facts in the *Svenska Journalistförbundet v Council* case, see above n. 80.

<sup>85</sup> See Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, OJ L 377 , 31/12/1991 p. 20. It is important to note that if a member state fails to provide to the Commission the requested

Article 5 of the Regulation provides that where a member state receives a request to disclose a document in its possession originating in an EC institution, the member state concerned shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objective of the Regulation, except if it is clear whether the document could have been disclosed or not under the Regulation. Alternatively, the member state may transfer the request to the institution concerned. This provision is in conformity with recital 15 of the Regulation, which provides that, although the object and effect of the Regulation is not to amend national legislation on access to documents, under the principle of loyal co-operation between the EC and member states, the member state should take care not to hamper the proper application of the Regulation.

A final point to note, is that the Aarhus Convention is undeniably applicable to the EC institutions. This is because article 2 of it provides that the Convention applies to the institutions of regional economic integration organisations parties to the Convention and constituted by sovereign States members of the UNECE, if these States have transferred to them their competence over matters governed by the Convention, exactly like the European Community, which has signed the Aarhus Convention and thus its provisions bind its institutions.<sup>86</sup> Thus, it would be interesting to examine whether the current EC Regulation on access to EC institution's documents complies with the Aarhus provisions on access to information. It seems that this is not the case, as the EC is currently amending Regulation 1049/2001 as far as environmental information is concerned in order to align it with the Aarhus convention, through a Proposal for a Regulation applying the provisions of the Aarhus Convention.<sup>87</sup>

This proposal provides that Regulation 1049/2001 will continue to apply to any request for access to environmental information held by Community institutions and bodies, but without discrimination as to the citizenship, nationality, domicile or registered seat of the applicant. This is more liberal than what the regulation provides for non-environmental information. It should be noted that the initial Proposal does not provide for many substantive changes to this Regulation, except that the right of access is granted in relation to all EC institutions and bodies which perform

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information, then this can result in enforcement action in front of the ECJ, as demonstrated in *Commission of the European Communities v Hellenic Republic*, Case C-33/01, [2002] ECR I-05447.

<sup>86</sup> Although the EC has signed the Aarhus Convention, technically it is not yet bound by it, as it has not yet ratified it. To this end, the commission has presented a Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters, 24/10/2003, COM(2003) 625 final. Available from <http://europa.eu.int/comm/environment/aarhus/>

<sup>87</sup> See the Commission's Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, 24/10/2003, COM(2003) 622 final. This proposal will apply the three "pillars" of the Aarhus Convention - access to information, public participation in decision-making and access to justice in environmental matters - to the European Community institutions and bodies. Existing provisions in these matters (like Regulation 1049/2001) are taken into account and amended to the extent necessary to comply with the Convention's requirements. This proposal is currently undergoing the Community legislation-making process.

public functions and not just the ones covered by the Regulation.<sup>88</sup> In addition to conforming with this Regulation, Community institutions and bodies will have to organise environmental information in their field of competency and make it systematically accessible to the public, particularly in databases disseminated by computer telecommunications or by other electronic means. These databases or registers should include reports on the implementation of Treaties, international Conventions or agreements, Community legislation, national or local legislation, measures, plans and programmes relating to the environment, reports on the state of the environment, data derived from the monitoring of activities affecting the environment, authorisations affecting the environment, environmental impact studies and risk assessments. Also, it is provided that environmental information made available for public consultation must be up-to-date, accurate and comparable. To this end, Community institutions and bodies must inform the public, if requested to do so, on the methods of analysis, sampling and measurement procedures used in compiling the information. Furthermore, is included a duty to transfer requests not only between community institutions but also to national authorities, whenever a Community institution or body receives a request for access to environmental information which it does not hold. When doing this, the institution must inform the applicant, as promptly as possible, of the Community institution or body or the member state's public authority which holds the information requested. Finally, it is provided that in the event of an imminent threat to human health or the environment, Community institutions and bodies must collaborate with the public authorities concerned in order to disseminate without delay to the public all information which could prevent or mitigate harm arising from the threat.

Although this Commission's proposal does not modify very much Regulation 1049/2001, the European Parliament has proposed amendments to it that go much further in integrating the Aarhus convention in this Regulation and thus in aligning the access to environmental information regime of the EC institutions with the access to information regime that the EC has imposed on member states through the 2003/4/EC Environmental Information Directive. It remains to be seen what position will prevail in the end.<sup>89</sup>

## **5) Justification of a comparative approach**

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<sup>88</sup> For instance, EC bodies not covered by the Regulation 1049/2001 but which perform public functions are the European Economic and Social Committee, the Committee of the Regions, the Court of Auditors, the European Investment Bank. Still, bodies acting in a legislative or judicial capacity are excluded, in conformity with the provisions of the Aarhus Convention.

<sup>89</sup> See for the latest information on this proposal the website of the European Parliament legislative observatory

[http://www.db.europarl.eu.int/oeil/oeil\\_ViewDNL.ProcViewByNum?lang=2&procnum=COD/2003/0242](http://www.db.europarl.eu.int/oeil/oeil_ViewDNL.ProcViewByNum?lang=2&procnum=COD/2003/0242)

In the present thesis there will be two different forms of comparisons. First, we will be comparing side by side the relevant provisions of UK law, together with relevant EC and international law. In this respect, we will be examining whether, on the one hand, the UK has correctly implemented its EC and international law obligations and, on the other hand, whether EC law itself has correctly followed international law. It should be noted that as far as UK law is concerned we shall mainly analyse the law of England and Wales and only mention the equivalent provisions of Scottish and Northern Irish law, since their provisions closely follow the English rules.

Second, we will also adopt a comparative law approach, in the sense that we will be using the comparative law method in order to examine the way the EC environmental information directives have been implemented in France.<sup>90</sup>

As far as the comparative law method that will be used is concerned, we shall limit our analysis to the written legal rules transposing the EC environmental information directives in France and in England. There is no real need for us to extend on French case-law, because this is an area of EC law, in which due to the principle of supremacy of EC law, it is ECJ case-law that takes precedence and this will be covered in the present thesis elsewhere.<sup>91</sup>

Apart from this difference, we shall be following the almost universally accepted comparative law method elaborated by Zweigert and Kötz.<sup>92</sup> This method can be summarised as follows: one starts with identifying a legal question he wants to examine; then proceeds to treat it comparatively; then critically evaluates any discoveries made; and finally draws conclusions. These conclusions, that stem from the application of the comparative law method, are very important as they allow the researcher to enhance the understanding of his own legal system by learning new ways of approaching the same question.<sup>93</sup> This in itself can justify using the comparative method in the present thesis.

It is also important to explain why France was chosen in order to apply the comparative law method. It can be contended that it is interesting to see how a civil law country like France has approached the problem presented by the transposition of the EC environmental information directives, as opposed to what has taken place in England, a common law jurisdiction. Although one could argue that the distinction between civil law and common law legal systems is not valid when public law is concerned,<sup>94</sup> it is still very interesting to compare these two countries because, as we shall see further on in the relevant chapter, they have transposed the same directives in totally different ways. This difference is even more interesting to be analysed, if one takes into

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<sup>90</sup> See below Chapter 4, pp. 278 – 295.

<sup>91</sup> See below, pp. 55 – 59.

<sup>92</sup> See Konrad Zweigert and Hein Kötz, *Introduction to comparative law*, (translated from German by Tony Weir), 3<sup>rd</sup> edition 1998, Oxford: Clarendon Press, Chapter 3, pp. 32 – 47.

<sup>93</sup> *Ibid.*, at p. 46.

<sup>94</sup> Of course, it should be acknowledged that the grouping of legal systems into legal families (like the in the common law and civil law legal family) is something highly relative and some of these divisions may be valid only for private law and not for public law. See Zweigert and Kötz, above n. 92, at p. 65.

consideration the fact that both France and the UK not only are members of the European Union, but are also signatory states to the ECHR and thus, one could logically expect both countries to have adopted similar solutions on a matter like environmental information, which involves issues of both EC and ECHR law.

## **CHAPTER 1) The content of the right to access environmental information as guaranteed by international law, EC law and UK national law**

In this chapter we shall be examining in detail the legal provisions that are applicable in England and which guarantee a general right to obtain environmental information held by public or assimilated bodies. As we already discussed in the introduction, there are different legal rules creating such a right both at national, international and at EC level. At international level it is the Aarhus Convention of 25 June 1998 on *Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* which establishes such a right. At EC level it is the Directives 90/313/EEC and 2003/4/EC on public access to environmental information, and at national law it is the Environmental Information Regulations 1992 as amended in 1998 and the 2004 Environmental Information Regulations, which also implement these Directives into British law. It is also interesting to mention that the EC environmental information directives do not only extend to the EC member states, but also to all the states members of the European Economic Agreement (EEA).<sup>95</sup>

Instead of examining all these legal instruments separately, we shall be examining their provisions side by side. This method has the advantage of avoiding any repetition between the various aspects of the right to access environmental information, since the provisions of these legal instruments are for the most part of them quite identical. Examining in parallel these legal instruments will also have the advantage of allowing us to determine whether the new EC Directive on environmental information conforms to the Aarhus Convention (since the 2003 Directive aims not only to replace the older Directive 90/313/EEC but also to transpose into EC law the information provisions of the Aarhus Convention) and whether the 2004 English regulations transposing this Directive conform to its requirements. Of course, it should be noted that the Aarhus Convention has not yet been ratified by Britain, though as the Government has widely suggested<sup>96</sup> it plans to ratify it in due time and it has been making efforts to adapt English law to its requirements. In any case the understanding of the Aarhus Convention is necessary since the European Union has taken it into consideration when drafting the provisions of the 2003 Information Directive.

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<sup>95</sup> This is because the term "Member States" contained in these directives is to be understood to include, in addition to its meaning in the relevant EC acts, Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland, according to *the Agreement on the European Economic Area - Annex XX - Environment - List provided for in Article 74*, OJ L 1, 03/01/1994 p. 494. Amended in order to include the 2003/4/EC directive by the Decision of the EEA Joint Committee No 123/2003 of 26 September 2003 amending Annex XX (Environment) to the EEA Agreement, OJ L 331, 18/12/2003 p. 50.

<sup>96</sup> See New draft Environmental Information Regulations: Public consultation, DEFRA, July 2002, at page 2.

Our analysis will also be illustrated by all of the relevant case law both of the European Court of Justice and of British national Courts so as to have a complete understanding of the legal mechanisms in place.

Before initiating the parallel examination of these legal instruments, we shall briefly examine their historical background and also we shall examine what is their place in British law. After that, we shall examine their provisions in detail.

## **A) Binding legal instruments guaranteeing a general right to access environmental information.**

### **1) The Aarhus Convention**

The 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters introduces new procedural safeguards aiming at protecting the environment.<sup>97</sup> The Convention imposes on public authorities three main obligations; first to provide and facilitate access to environmental information to the general public; second to involve the public in the decision-making process on environmental issues, and third to guarantee access to justice for individuals and other legal persons in both cases of a breach of environmental law or of provisions of the convention. Although these three ‘pillars’ of the convention are closely related with each other, the EC (as a signatory of the Convention)<sup>98</sup> is aiming at implementing them through separate legal instruments.<sup>99</sup> The Convention is divided to six parts: the preamble, general provisions (art. 3), access to information (art. 4 and 5), public participation in decision-making (art. 6, 7 and 8), access to justice (art. 9) and the final provisions (art. 10 to 22). The preamble recalls the origins of the Convention, and sets the aims of the Convention. The preamble specifies two ideas: the link between environmental rights and human rights and the promotion of sustainable development by public authorities. The general provisions describe the objective, lay down some principles and definitions which apply to the whole Convention and also impose certain obligations on states. More specifically, article 3 compels parties to introduce and undertake such legislative, enforcement or other measures that would establish a framework for the implementation of the

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<sup>97</sup> For the historical backgrounds that led to the adoption of the Aarhus Convention and most importantly the UNECE draft charter of environmental rights and obligations, adopted by the qualified intergovernmental meeting at Oslo on 31 October 1990, see Stephen Stec, Susan Casey-Lefkowitz, Jerzy Jendroska *The Aarhus Convention: an Implementation Guide*, Economic Commission for Europe, United Nations Publications: New York and Geneva 2000, pp. 1-4. Also available online at <http://www.unece.org/env/pp/acig.htm>

<sup>98</sup> The EC signed the Convention following article 17 of the Convention which provides that regional economic integration organisations can become parties to it. The EC has powers to sign International conventions and agreements relevant to its sphere of competencies, in this case the protection of the Environment. On the external competencies of the EC see Paul Craig and Gráinne De Búrca, *EC law text, cases and materials*, Oxford: Oxford University Press 2003, 3rd ed, pp. 128-131.

<sup>99</sup> See <http://europa.eu.int/comm/environment/aarhus/index.htm>



Convention. In this work, as mentioned before, we shall focus exclusively on the information provisions of the Convention.

The Convention is applicable not only to EC institutions themselves, but the EC also takes it into consideration when drafting new legal instruments concerning matters covered by it.<sup>100</sup> Consequently, the EC, when examining the proposal for a new Environmental Information Directive has taken into consideration the Convention's provisions, as expressed by the declaration the EC made when it signed the Convention according to which: '*the Community also declares that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention*'.<sup>101</sup>

A very interesting aspect of the Convention is also that the Preamble to the Convention provides a clear link between environmental rights and human rights by stating that '*adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including right to life itself*' and also that '*every person has the right to live in an environment adequate to his or her health and well-being*'.<sup>102</sup> It then connects this right with the rights of access to information, public participation in decision-making and access to justice in environmental matters. However, it is also interesting to note that the United Kingdom government when it signed the Aarhus Convention, expressly refused to recognise that these provisions were consecrating a general right to a healthy environment and considered in a Declaration annexed to it that if the convention recognised any environmental human rights, these rights were confined to the procedural rights of access to information, public participation and access to justice in environmental matters.<sup>103</sup>

The Aarhus convention itself entered into force on the 30 October 2001, but as far as EC states are concerned, it has as yet been ratified, and therefore binding, only in a minority of EC member states.<sup>104</sup> The majority of states (including Britain) have decided not to ratify the Convention immediately, but to wait and implement it through the European Directive that will replace the Directive 90/313. Consequently, the Convention is not yet binding on the British

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<sup>100</sup> See Vera Rodenhoff, *The Aarhus Convention and its implications for the "institutions" of the European Community*, 11(3) R.E.C.I.E.L. 2002, 343-357. The author examines all of the Convention's pillars (access to information, public participation and access to justice) and deals with their implications for the EC institutions.

<sup>101</sup> See <http://www.unece.org/env/pp/ctreaty.htm>

<sup>102</sup> This statement is the first express recognition of the right to a healthy environment in an international instrument in the European region, a right that is not expressly provided by the ECHR as explained in the relevant chapter on Human Rights and Environmental Information.

<sup>103</sup> In a Declaration made upon signature the British government stated that: 'The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the "right" of every person "to live in an environment adequate to his or her health and well-being" to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention'.

<sup>104</sup> Information about the status of ratification of the Aarhus Convention can be found on the UNECE's website at the address: <http://www.unece.org/env/pp/ctreaty.htm>.

government,<sup>105</sup> however it has been taken into consideration when drafting the revised regime of the Environmental Information Regulations.

Finally, the Convention has been criticised for the methods it contains for ensuring compliance.<sup>106</sup> The Convention does not provide for a mechanism that would allow individuals or other organisations to complain or even lodge claims to a supra-national body (such as to the ECtHR in Europe). It should always be kept in mind that the Aarhus Convention is an international legal instrument and thus has no direct effect in national British law, unlike the position with EC law which has been directly incorporated into UK law.

## 2) The EC Environmental Information Directive

### a) Legislative history and overview.

The historic basis for Directive 90/313/EEC were laid in 1985, by a draft-resolution of the European Parliament, which invited the Commission to draft a proposal for legislation concerning the right to receive environmental information.<sup>107</sup> Such a proposal was drafted in 1988<sup>108</sup> and after consultation of the European Parliament and the Economic and Social Committee, the 1990 Directive was adopted by the Council on the 7th June 1990. The legal basis of this Directive was the procedure of article 130S of the EEC Treaty, which concern the competencies of the EEC concerning environmental protection. This is consistent with the preamble of the 1990 Directive, which mentions that *'access to information on the environment held by public authorities will improve environmental protection'*. The link between access to information and environmental protection is not explained, though the 2003 Directive in its preamble address this issue by mentioning that *'Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.'* It is interesting to note, that the 2003 Directive mentions that increased transparency will 'eventually' contribute to a better environment, whereas the 1990 Directive mentioned that access to information 'will' improve environmental protection. Thus, certainty over the goals of the Directive seems to have been replaced by a mere possibility.

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<sup>105</sup> It should be noted that in British law, international Conventions are not part of national law until they are expressly incorporated by a specific legislative provision, since the UK is a dualist country.

<sup>106</sup> See J. Ebbesson, *The Notion of Public Participation in International Environmental Law*, 8 *Yearbook of International Environmental Law* (1997) 51, at 96.

<sup>107</sup> European Parliament, 1985. Resolution Document B2-736/85 of 16 July 1985, introduced by Ken Collins, MEP (UK) and Beate Weber, MEP (Germany).

<sup>108</sup> Proposal for a Council Directive on the freedom of access to information on the environment, COM/88/484 FINAL, 28/11/88, OJ C 335 , 30/12/1988 p. 5.

Environmental protection was not, however, the only aim of these Directives. As they both indicate in their preamble, they also aim to ensure equal conditions of competition in the common market as '*Disparities between the laws in force in the Member States concerning access to environmental information held by public authorities can create inequality within the Community as regards access to such information [and/]or as regards conditions of competition*'. In this context environmental information is viewed as a good that has a certain financial value and that can be bought and sold.<sup>109</sup>

The 1990 Directive provided at article 8 that four years after entering into force, Member States would have to report to the commission on the experience gained and on the basis of these national reports the Commission would make a report to the European Parliament and to the Council incorporating proposals for revision.<sup>110</sup> This report identified shortcomings in the 1990 Directive and included a proposal aiming at amending the Directive.<sup>111</sup>

This proposal was based on the procedure provided for at Article 175(1) of the EC Treaty<sup>112</sup> and justified the revision of the 1990 Directive on three grounds. The first of these grounds were to correct the shortcomings of the 1990 Directive (concerning mainly the imprecise definitions of environmental information and public bodies; the wide-ranging list of exemptions to disclosure; costs and time-limits) taking into account the Aarhus Convention. The second ground was the alignment of the proposal to the relevant provisions of the Aarhus Convention so as to enable the Community to ratify that Convention, and the third one to adapt the 1990 Directive to developments in computerised information technologies which saw in the 90s the booming of the internet and wireless communications.<sup>113</sup>

The 2003 Directive as adopted, has fulfilled most thoroughly the second of these aims as its provisions were drafted and amended in a way as to stay as closely as possible in strict conformity with the provisions of the Aarhus convention. As a consequence, the 2003 Directive departs significantly from the provisions of the 1990 Directive and we shall analyse in detail these differences further on. Generally speaking, the major improvement over the 1990 Directive is that

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<sup>109</sup> See below on Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information. See i) Limitations on the subsequent use of disclosed information

<sup>110</sup> Report from the Commission to the Council and the European Parliament on the experience gained in the application of council directive 90/313/EEC of 7 June 1990, on freedom of access to information on the environment, 29.06.2000, COM(2000) 400 final.

<sup>111</sup> Proposal for a Directive of the European Parliament and of the Council on public access to environmental information, 29.06.2000, COM(2000) 402 final, 2000/0169 (COD), OJ C337, 28 Nov. 2000, at p. 156.

<sup>112</sup> Which provides that 'The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174'. The objectives referred at article 174 concern the protection of the environment.

<sup>113</sup> It has been contended that 'The real challenge ahead is not just putting the terms of the Directive and similar legal instruments to use, as important as that is. The real challenge lies in anticipating and adjusting to future demands and technological innovation. The paper paradigm of Directive 90/313/EEC appears increasingly archaic in today's world of modems and megabytes, where monitoring, retrieval and transmission of data can take place with a precision and rapidity not commonly known even a few years ago', *Public Access to Environmental Information*, Expert's corner No 1/1997, Prepared by: Ralph E. Hallo

the scope of the exemptions has been narrowed, since a refusal to disclose information can now only be refused when disclosure would adversely affect a protected interest. The word 'adversely' was missing from the 1990 Directive. Also, the definitions of environmental information and public bodies used in the 2003 Directive represent an improvement over the ones in the 1990 Directive since they are wider. Moreover, in the new Directive time limits for disclosure have been reduced from two to one months and has been included a requirement to supply information in the form requested, if available in that form. Finally, the new Directive expressly covers apart from information held by public bodies, information held by any other person for public authorities and also it specifies that inspections of documents are to be free.

Since the 2003 Directive stays very close to the Aarhus Convention, the question that arises is the difference in nature between these two instruments. The environmental information directives are part of EC legislation and as such can have direct effect, thus creating rights for individuals that can be directly enforced through national courts, if they satisfy the *Van Gend* test (i.e. if their provisions are sufficiently clear, precise and unconditional).<sup>114</sup>

On the other hand, the Aarhus convention is an international agreement, which although has been signed by the EC, probably has not direct effect, as it does not seem to be clear and unconditional enough, especially since it leaves great discretion to signatory states to implement its provisions. In any case, a finding that any of the Aarhus provisions are of direct effect, would seem unlikely, due to the current trend of the ECJ to show great reluctance to find direct effect in respect of international agreements.<sup>115</sup>

A further issue that arises, is that since according to article 10 of the 2003 directive, the 1990 directive will be repealed at the date by which member states are required to implement the 2003 directive (14 February 2005), what will be the effect of this repeal in event of late or incomplete implementation by a member state?<sup>116</sup> Most probably, national measures that have been adopted under the previous 1990 directive will not be automatically repealed too, but rather they will constitute an incorrect implementation of the 2003 directive and thus will have to be interpreted in light of the 2003 directive according to the principle of indirect effect.<sup>117</sup> In any case, the member state concerned could also have under the principle of state liability to pay compensation to an aggrieved party for its failure to fully implement the EC directive.<sup>118</sup>

A final point to consider, is what would be the situation in UK law if the EC ratified the Aarhus convention and thus became bound by it, but not the UK? Would then the UK be bound

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Stichting Natuur en Milieu (Netherlands Society for Nature and Environment), European Environment Agency, 1997, at p. 2. Available from <http://reports.eea.eu.int/>

<sup>114</sup> On direct effect see inter alia, the ECJ cases of *Van Duyn v Home Office*, [1974] ECR 1337; *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR English special edition 1.

<sup>115</sup> On direct effect of international agreements, see Horspool, *infra* n. 159, at par. 7.7.

<sup>116</sup> See Hallo, below n. 306, at p. 13, footnote 66.

<sup>117</sup> See the ECJ case of *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-04135.

and to what extent? It can be contended that in such a situation and on the understanding that the Convention cannot have direct effect as examined above, the UK courts would not be bound by it.<sup>119</sup> However, the courts would still be bound by measures taken by the EC to implement Aarhus, if these measures were of direct effect.

### **b) European Court of Justice proceedings.**

Although specific matters addressed by the ECJ on the basis of Directive 90/313 will be addressed in detail in the relevant parts of this chapter, there is still a need for a general overlook of the relevant ECJ case-law.

Until today there have been eleven times where an action involving directive 90/313 was filed in the ECJ, however only four of them reached the hearing stage, as all others were removed from the register at an earlier stage in the proceedings. There is no case involving the 2003 directive yet.

As far as the actions that have been removed from the register are concerned, the first of them concerned an enforcement action brought by the Commission against Greece (under article 226 of the EC Treaty),<sup>120</sup> whereby the Commission was claiming that Greece had completely failed to transpose directive 1990 in Greek law within the time-limit mentioned in article 9 of the Directive (by 31 December 1992). However, probably because Greece transposed the directive in the meantime, the action was later withdrawn.

The second of these cases concerned a question asked to the ECJ by a German court under the preliminary reference procedure (article 234 of the EC Treaty).<sup>121</sup> The question asked was whether the third indent of paragraph 2 of article 3 of the 1990 directive which mentions as a ground of exclusion from disclosure matters which are “the subject of preliminary investigation proceedings”, encompass proceedings of an administrative authority that end with the issue of an administrative act which can eventually become the subject of judicial proceedings. The case was subsequently removed from the register.

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<sup>118</sup> See *Francovich v Italian Republic* [1995] ECR I-3843; *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029.

<sup>119</sup> However, it seems that the UK Government (as opposed to the UK courts) would still be bound to apply the parts of the Aarhus Convention that fall within the EC's sphere of competencies like the information provisions of Aarhus, as it would be bound by way of the EC's ratification of this Convention. For an analogy with the United Nations Convention on the Law of the Sea (1833 UNTS 396), ratified by both the EC and some Member States, see Churchill Robin, Scott Joanne, *The Mox Plant Litigation: The First Half-Life*, 53 [2004] *International and Comparative Law Quarterly* 643.

<sup>120</sup> *Commission v Greece*, (C-159/95), OJ C 208, 12/08/1995 p. 4. Removed from the Register by an order of the President of the ECJ, OJ C 158, 01/06/1996 p. 12.

<sup>121</sup> *Ulrich Gloger v. Bergamt Kamen*, Reference for a preliminary ruling by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen, (C-296/97), OJ C 318, 18/10/1997 p. 6. Removed from the Register by an order of the President of the ECJ, OJ C 20 of 23/1/1999, p.29.

The third of these actions concerned an enforcement action by the Commission against Portugal.<sup>122</sup> According to article 8 of the 1990 directive member states had to submit to the Commission by the 31<sup>st</sup> of December 1996 a report on the experience gained in the application of the directive in the member state concerned. The Commission was arguing that although the prescribed time-limit had expired the Portuguese Republic had still not submitted this report. The action was also later withdrawn by the Commission, presumably because the Portuguese government did submit the report. This case seems to indicate that the Commission views the requirement found in both directives for states to submit reports on the application of the directives in their territories, as important enough to justify bringing enforcement actions based solely on this ground.

The fourth of these actions concerns an enforcement action brought by the Commission against Spain (under article 226 of the EC Treaty).<sup>123</sup> The Commission brought an action before the ECJ arguing that Spain had failed to fulfil its obligations under the 1990 Directive due to incorrect implementation of the directive in its national law. The Commission claimed that the Spanish transposing legislation did not comply with Directive 90/313, because there were no specific provisions in Spanish law concerning charging for the provision of environmental information and providing that these charges may not exceed a reasonable cost, as article 5 of the Directive provides. Also the Commission argued that the Spanish transposing legislation did not conform with article 3(2) of the 1990 directive as it permitted public authorities to refuse to provide information where it related to files which had been the subject-matter of actions in the past. Also, for the Commission this law was falling short of the directive's requirements as it recognised silence on the part of the administration as being sufficient to be an implied rejection of a request for information. This case was also subsequently dropped.

The fifth of these actions is about an enforcement action brought by the Commission against Belgium<sup>124</sup> claiming that the Belgian legislation had not properly transposed article 3(2) of the 1990 Directive (on the acceptable exemptions). The Commission considered that the present position under Belgian law did not ensure that the competent authorities could never justify refusing access to environmental information, on the basis of exceptions found in a Belgian law but not found in the directive and concerning the protection of a federal economic or financial interest, of the currency, or of public funds, or the duty of confidentiality. Also the Commission was complaining that the Belgian legal system did not provide a clear guarantee that any body hearing an appeal would automatically consider unlawful an implied refusal where reasons had not been formally provided, and thus for the Commission article 3(4) of the 1990 Directive had also been breached. The case was subsequently removed from the register too.

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<sup>122</sup> *Commission v Portugal*, (C-106/99), OJ C 160, 05/06/1999 p. 10. Removed from the Register by an order of the President of the ECJ, OJ C 333, 20/11/1999 p. 22

<sup>123</sup> *Commission v. the Kingdom of Spain*, an action filed on 21 May 1999 (C-189/99), OJ 1999/C 226/26, but later withdrawn from the register, OJ C 118, 21/04/2001 p. 28.

The sixth case concerned an enforcement action brought by the Commission against Germany<sup>125</sup> in respect of the practices of certain authorities in fulfilling their duty to “respond” to a request for information within the two month time period. The Commission was arguing that the practice of some German authorities to only provide an interim answer within the two-month period, stating that access to the information can be granted at a later date, does not accord with article 3(4) of the directive, since such a practice goes against the aim of the directive and the effectiveness of the opportunities for the persons concerned to obtain legal protection. This action has also been abandoned.

The seventh and last of these cases, concerned an enforcement action brought by the Commission against Austria,<sup>126</sup> whereby it was argued that in certain of the Austrian Länder, the 1990 Directive had not been transposed in the time-limit provided for in the Act of Accession of Austria to the European Communities (1 January 1995, according to article 168 of this Act). This case was latter withdrawn by the Commission.

As far as the cases that have been decided by the ECJ are concerned, we shall only summarily mention them at this stage in a chronological order, as we shall look at them in more detail later on.

The first case, the *Mecklenburg* case,<sup>127</sup> was a preliminary reference question submitted by a German court. It concerned a request of a copy of a statement of views submitted by a countryside authority in connection with planning approval for the construction of a road section. The request was rejected by the public body holding the information on the grounds that the statement of views was not "information relating to the environment" within the meaning of Article 2(a) of the Directive, and that also it felled under the exemption for "preliminary investigation proceedings" since it concerned development consent procedures. The ECJ held that a statement of views by a countryside authority was "information relating to the environment" within the meaning of Article 2(a) since it showed that Community law intended the concept of "information relating to the environment" to be a broad one. Also, the ECJ held that exceptions should be interpreted narrowly and thus article 3(2) only covered proceedings of a judicial or quasi-judicial nature, or at least proceedings which would inevitably lead to the imposition of a penalty if an administrative or criminal offence were established.

The second judgement delivered by the ECJ and involving the interpretation of a provision of the 1990 directive was the case of *Commission v Germany*.<sup>128</sup>

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<sup>124</sup> *Commission v Belgium*, (C-402/99), OJ C 6, 08/01/2000 p. 17. Removed from the Register by an order of the President of the ECJ, OJ C 118, 21/04/2001 p. 24.

<sup>125</sup> *Commission v Germany*, (C-29/00), OJ C 149, 27/05/2000 p. 14. Removed from the Register by an order of the President of the ECJ, OJ C 144, 15/06/2002 p. 30

<sup>126</sup> *Commission v Austria*, (C-86/01) OJ C 118, 21/04/2001 p. 17. Removed from the Register by an order of the President of the ECJ, OJ C 233, 28/09/2002 p. 20

<sup>127</sup> *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat* [1998] ECR I-3809.

<sup>128</sup> [1999] 3 CMLR 277, case C-217/97.

This case is an enforcement action initiated by the Commission against Germany, in which it was argued that the German laws enacted specifically to transpose the 1990 directive, did not transpose it correctly. The ECJ held that the general exclusion of courts and criminal prosecution and disciplinary bodies from the definition of public authorities was not contrary to the Directive, as the Commission had failed to show that in Germany these authorities, when acting normally in the exercise of their judicial powers, could also have responsibilities or information relating to the environment

The ECJ also held that the German exclusion of information relating to "administrative proceedings" exceeded the scope of the derogation of article 3(2) of the Directive on "preliminary investigation proceedings", since this term included only administrative proceedings which immediately preceded a contentious or quasi-contentious procedure and which arose from the need to obtain proof or investigate a matter prior to the opening of the procedure.

Also, the ECJ held that Germany had failed to transpose in a clear and precise enough manner the obligation of public authorities to partial communication of information when only a certain part of the information concerned is covered by an exemption. Moreover, the ECJ held that article 5 of the directive which provide that charges for information should be reasonable had been breached, as the German transposing law provided for a charge to be made even where a request for information was subsequently refused.

The third case, the case of *Eva Glawischnig v Bundesminister für soziale Sicherheit*,<sup>129</sup> was another preliminary reference case, in which a question was asked by an Austrian court on the interpretation of article 2(a) of the 1990 directive on the definition of environmental information. The ECJ held that this article is to be interpreted as meaning that the name of the manufacturer and the product description of foodstuffs which have been the subject of administrative measures for controlling compliance with an EC Regulation on the labelling of foodstuffs produced from genetically modified organisms, as well as the number of administrative penalties imposed following those measures, and the producers and products concerned by these penalties, do not constitute information relating to the environment.

The fourth and most recent of these case, is the case of *Commission v France*,<sup>130</sup> which was an enforcement action brought by the Commission against France arguing the incorrect implementation of the 1990 directive. The ECJ held that France had failed to correctly transpose article 2(a) of that directive by restricting the obligation to supply information relating to the environment to "administrative documents." Moreover, the ECJ found that articles 3(1), (2) and (4) of the directive had been breached because French law provided an exception not found in the directive on "generally, secrets protected by legislation" and also because French law lacked a provision under which information relating to the environment had to be supplied in part where it

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<sup>129</sup> *Eva Glawischnig v Bundesminister für soziale Sicherheit*, Case C-316/01, 12 June 2003, OJ C 184, 02/08/2003 p. 10. Available from <http://curia.eu.int>



was possible to separate out information on exempt matter and finally because in the case of implied refusals no reasons had to be provided to the applicant.

### **3) The transposition of the Directive in national law.**

Purdue has contended that the extent to which increased openness was compelled by the 1990 Directive is debatable since many UK measures such as rules on public registers were introduced long before there was any EC obligation. However, it can be safely argued that these provisions were insufficient to constitute a correct transposition of the Directive.<sup>131</sup> We shall therefore examine how the two Environmental Information Directives have been transposed in each part of the United Kingdom. We shall also examine the position in Gibraltar too, which is also a member of the EC as the UK is responsible for its international relations.

#### **a) England and Wales**

The 1990 Directive was implemented in Great-Britain through the Environmental Information Regulations 1992, which were made on the 18th of December 1992 and entered into force on the 31st of December 1992, on the last day of the time-limit provided by the Directive for its implementation by member-states. These 1992 Regulations were amended in 1998 by the Environmental Information (Amendment) Regulations 1998. These regulations applied to England, Scotland and Wales, and were made by the Secretary of State of for the Environment under powers conferred on him by the European Communities Act 1972,<sup>132</sup> after an affirmative resolution of each House of Parliament.

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<sup>130</sup> *Commission of the European Communities v French Republic*, Case C-233/00, 26 June 2003, OJ C 184, 02/08/2003 p. 2. Available from <http://curia.eu.int>

<sup>131</sup> See Michael Purdue, 'The Impact of Environmental Law on Planning Law in the United Kingdom', in Jane Holder (ed.), *The impact of EC environmental law in the United Kingdom*, Wiley, 1997, at pp. 231-2.

<sup>132</sup> More specifically, section 2(2) of the European Communities Act 1972 provides that: 'Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision-- (a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid. In this subsection "designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.' Under this section was made the European Communities (Designation) (No. 2) Order 1992 (SI 1992/1711) which provides in its Schedule 1 that the Secretary of State and any Northern Ireland Department is designated in respect of 'Measures relating to freedom of access to, and dissemination of, information on the environment held by public authorities or bodies with public responsibilities for the environment and which are under the control of public authority'. This Order was repealed by the European Communities

The new 2004 Environmental Information Regulations, which transpose the 2003/4/EC Directive on public access to environmental information, have been made under powers conferred to the Secretary of State under section 2(2) of the European Communities Act 1972 (as with the previous regulations) but also under powers conferred upon him by section 74(3) of the FOIA 2000.<sup>133</sup> This section allows the Secretary of State to make regulations<sup>134</sup> implementing the Aarhus Convention and repealing to that extent any other enactment, including the 1992 Regulations. The regulations apply to the whole of Great Britain and also include Northern Ireland, but do not include the Scottish administration, since pursuant to section 80 of the FOIA the regulation-making power conferred by section 74(3) on the Secretary of State does not include the power to make provisions in relation to information held by any Scottish public body.<sup>135</sup> Special regulations are made by the Scottish executive concerning these bodies, as analysed briefly below. These 2004 Environmental Information regulations, come into force on January the 1<sup>st</sup> 2005, even if the deadline for the implementation of the 2003/4/EC Directive is February the 14<sup>th</sup> 2005. This is because the government wants the regulations to come into force in parallel with the implementation of the remainder of the Freedom of Information Act 2000, which also comes into full force on the 1<sup>st</sup> of January 2005.

At this point, there is no need to explain in any more details the substantive provisions of these regulations, since they will be examined thoroughly in the course of this chapter which concentrates on the position in England and Wales. However, as we shall see, most of these provisions are very similar (if not identical) to the ones in force in the rest of the United Kingdom.

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(Designation) (No. 4) Order 2003 (SI 2003/2901), which now provides that the Secretary of State is exclusively designated in respect of access to environmental information.

<sup>133</sup> More precisely, all regulations are made under the powers conferred to the Secretary of State by section 74 of the FOIA 2000, except for regulations 4, 12(8), 18(10), 18(11) and 19, which are made under section 2(2) of the European Communities Act 1972. According to the Explanatory Memorandum submitted to Parliament by DEFRA

(available at [http://www.legislation.hmso.gov.uk/si/si2004/draft/em/uksidem\\_0110496108\\_EN.pdf](http://www.legislation.hmso.gov.uk/si/si2004/draft/em/uksidem_0110496108_EN.pdf)), this is because regulation 4 implements article 7 of the Directive and deals with the dissemination of information other than in response to a request, an issue that is not part of the access to information provisions of the Aarhus Convention, which is implemented through section 74 of the FOIA 2000. Similarly, regulation 12(8) implements article 4(2) of the Directive whose provisions on emissions are wider than those in the Aarhus Convention on certain exceptions to disclosure that do not apply when the request for information relates to information on emissions. Finally, regulations 18 (10) and 18(11) and 19 deal with criminal offences that are not within the powers conferred by section 74 of the FOIA 2000. However, neither the 2003/4/EC Directive mentions that criminal offences have to be created for the correct transposition of this Directive, and thus these three regulations seem to be *ultra vires* as made outside the powers conferred to the secretary of State by both s. 74 of the FOIA 2000 and the European Communities Act 1972. Finally, it should be noted that the FOIA provisions implementing the 2003 Directive were brought into force by the Freedom of Information Act 2000 (Commencement No. 4) Order 2004 (SI 2004/1909).

<sup>134</sup> According to s. 82 of the FOIA 2000, these regulations have to be made by a statutory instrument and a draft of this instrument has to be laid before, and approved by a resolution of, each House of Parliament.

<sup>135</sup> These are listed in s. 80(2) of the FOIA as including the Scottish Parliament, any part of the Scottish Administration, the Scottish Parliamentary Corporate Body, any Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998).

## **b) Northern Ireland**

The 1990 Directive has been applied to Northern Ireland by the Environmental Information (Northern Ireland) Regulations 1993,<sup>136</sup> which came into force on the 31st of March 1993, three months after the deadline for the transposition of the Directive. These Regulations were made by the Northern Ireland Department of the Environment under delegated powers conferred by the European Communities Act 1972.<sup>137</sup>

There is no need to examine in detail these Northern Ireland provisions since they are identical in content to the English 1992 Regulations (save for the usage of different words in some instances without any alteration of the overall meaning).<sup>138</sup>

In 1998, these Regulations were amended by the Environmental Information (Amendment) Regulations (Northern Ireland) 1998,<sup>139</sup> so as to reflect the changes made to the 1992 English regulations by the 1998 Regulations.

As long as the transposition of the Aarhus Convention and the 2003 Directive in Northern Ireland is concerned, this has taken place through the English Environmental Information Regulations 2004 that extend to England, Wales and Northern Ireland and repeal the above-mentioned Northern Ireland Regulations. This is possible under section 74 of the FOIA 2000 which enables new Environmental Information Regulations to be made by affirmative resolution, in line with the requirements of the Aarhus Convention for England, Wales and Northern Ireland.<sup>140</sup>

## **c) Scotland**

The 1990 Directive was initially implemented in Scotland through the 1992 Regulations, which provided at reg. 1(3) that they extended to Great Britain.

However, the Aarhus Convention and the new Directive, will be implemented in Scotland through specific provisions made by the Scottish Executive. To that extent, the Freedom of Information (Scotland) Act 2002, introduces a general right of access to information held by Scottish public authorities, supervised by an independent Scottish Information Commissioner. This Act is more or less similar to the FOIA 2000, the biggest differences being the harm-test used in it, which favours even more disclosure in Scotland. Under the Scottish Act, when a harm-test applies information can only be withheld if disclosure would, or would be likely to 'prejudice substantially' the protected interest by the exemption, whereas in the FOIA 2000, the exemption

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<sup>136</sup> Statutory Rule 1993/45.

<sup>137</sup> See above, n. 132.

<sup>138</sup> See the Annex for a table of equivalence of the provisions of these two regulations.

<sup>139</sup> Statutory Rule 1998/238.

<sup>140</sup> This is possible since section 88(2) of the FOIA 2000 provides that this Act extends to Northern Ireland and also because of the European Communities (Designation) (No. 4) Order 2003 analysed above at footnote n. 132.

applies merely if disclosure would, or would be likely to 'prejudice' the public interest protected by the exemption. Section 62 of the Act empowers Scottish Ministers to make specific Regulations on public access to environmental information so as to implement the Aarhus Convention.<sup>141</sup> Concerning the 2003 Directive, it will also be implemented in Scotland by regulations made by the Scottish Executive pursuant to the European Communities Act 1972 as it applies to Scotland.<sup>142</sup> As with England there will be a single set of regulations transposing both Aarhus and the 2003 Directive in Scotland.

To this effect, in May 2002 the Scottish Executive Environment Group issued a consultation paper inviting comments on the principles that should underlie the new regime on access to environmental information for Scotland.<sup>143</sup> In April 2004, a new consultation paper was issued inviting comments on the draft of the new Environmental Information (Scotland) Regulations 2004.<sup>144</sup> As with the English regulations, these regulations aim to be as close as possible with the general freedom of information regime so as to help Scottish public authorities administer the two regimes and to make it easier for the public to understand.

These Scottish regulations and the new 2004 English environmental information regulations are very similar, since they both implement the same international instruments: the

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<sup>141</sup> S. 62 of the Freedom of Information (Scotland) Act 2002 provides that: '(1) In this section "the Aarhus Convention" means the Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters signed at Aarhus on 25th June 1998. (2) For the purposes of this section, "the information provisions" of the Aarhus Convention are Article 4, together with Articles 3 and 9 so far as relating to that Article. (3) The Scottish Ministers may, in relation to information held by or requested from any Scottish public authority, by regulations make such provision as they consider appropriate-- (a) for the purpose of implementing the information provisions of the Aarhus Convention or any amendment of those provisions made in accordance with Article 14 of the Convention; and (b) for the purpose of dealing with matters arising out of, or related to, the implementation of those provisions or of any such amendment. (4) Regulations under subsection (3) may in particular-- (a) enable charges to be made for making information available in accordance with the regulations; (b) provide that any obligation imposed by the regulations in relation to the disclosure of information is to have effect notwithstanding any enactment or rule of law; (c) make provision for the issue by the Scottish Ministers of a code of practice; (d) provide for sections 43 and 44 to apply in relation to such a code with such modifications as may be specified in the regulations; (e) provide for all or any of the provisions of Part 4 to apply, with such modifications as may be so specified, in relation to compliance with any requirement of the regulations; and (f) contain such transitional or consequential provision (including provision modifying any enactment) as the Scottish Ministers consider appropriate.' This section came into force on the 30th September 2002, according to reg. 2 of the Freedom of Information (Scotland) Act 2002 (Commencement No 1) Order 2002 (SSI 2002/437).

<sup>142</sup> Interestingly the Scottish Executive can transpose with Scottish Statutory Instruments European Legislation on all matters within its exclusive competence, according to section 2(2) of the European Communities Act 1972 which was amended by the Scotland Act 1998, Schedule 8, paragraph 15(3). The functions conferred upon the Minister of the Crown under section 2(2) of the European Communities Act 1972, insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998.

<sup>143</sup> See Scottish Executive Environment Group, *Proposals for a new regime on Public Access to Environmental Information - A Consultation*, May 2002, Paper 2002/16, available at <http://www.scotland.gov.uk/library5/environment/paei-00.asp>

A summary of responses received was published in April 2004, see Scottish Executive Environment Group, *Proposals for a new regime on Public Access to Environmental Information - Summary of responses to a Consultation Paper 2002/16 - May 2002*, available at <http://www.scotland.gov.uk/library5/environment/ppaei.pdf>

<sup>144</sup> See Scottish Executive Environment Group, *Access to Environmental Information - A Consultation*, April 2004, Paper 2004/5, available at <http://www.scotland.gov.uk/consultations/environment/ateic-00.asp>

Aarhus Convention and the 2003/4 Directive. Thus there is no need to analyse in detail all the provisions of the Scottish regulations, but only to refer to the main differences.

The main difference is that the Scottish regulations are more detailed than the English ones.

As far as charging for disclosing information is concerned, the Scottish regulations are extremely detailed as, unlike their English counterpart, they contain a definition of what is to be considered as “reasonable charges” that can be levied. First, as in the 2004 English Regulations, it is made clear that no charge can be made for merely allowing an applicant to access public registers or lists of environmental information or for allowing an applicant to inspect the information requested on the premises of the authority. But in contrast, the Scottish Regulations are more detailed, since they mention that a reasonable charge is considered to be a fee which does not exceed the costs to the authority of producing the information requested, except where the information requested is also made available on a commercial basis by the authority and the continued collection and publication of such information would be prejudiced if the authority did not charge a market-based fee. In this last case, it’s the market-based fee that can be charged.<sup>145</sup> Also, as in the 2004 English Regulations, there is a provision for Scottish public authorities to require payment of charges in advance of making information available, if this is reasonable.

Furthermore, although both regulations contain the same exemptions to disclosure, the Scottish ones are more liberal in the sense that they favour greater access to information as they explicitly mention that exceptions are to be interpreted in a restrictive way and also that when the public interest in maintaining the exception is weighted against the public interest in making the information available, Scottish public authorities are to exercise a presumption in favour of disclosure. This presumption is also present in the 2004 English Regulations.

Finally, a very interesting point is that the Scottish regulations mention that “Any statutory bar or rule of law (apart from these Regulations) which would prevent the making available of information in accordance with this regulation shall not apply”.<sup>146</sup> This means that only the exemptions to disclosure found in the regulations are to be applied and any statutory bars to disclosure found in any other enactments are to be disregarded. This is a statement that acknowledges the fact that the regulations stem from EC law and as such take precedence over any contradictory piece of UK or Scottish legislation (such as the Freedom of Information (Scotland) Act 2002) due to the principle of supremacy of EC law. As we shall see further on, a similar statement is also contained in the 2004 English Regulations.<sup>147</sup>

It should also be noted that the 2004 English Regulations provide at reg. 2(1) that they do not apply to Scottish public bodies as defined by s. 80(2) of the FOIA and s. 3 of the Scotland Act

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<sup>145</sup> These provisions can be found in the preamble to the 2003/4 Environmental Information Directive, at par. 18.

<sup>146</sup> At reg. 4(4).

<sup>147</sup> See below, 5) Do the environmental information regulations supersede other enactments prohibiting disclosure?

1998. These Scottish public bodies are mainly the Scottish Parliament, any part of the Scottish Administration, the Scottish Parliamentary Corporate Body, or any Scottish public authority with mixed functions or no reserved functions as these are defined by the Scotland Act 1998. This separation by functions rather than geographical area is necessary, since the new English regulations are still applicable in Scotland but only when they concern public bodies which are exercising competencies not devolved to the Scottish Ministers and thus are not part of the Scottish Administration. This is also true for Scottish public authorities operating outside Scotland, to which the Scottish regulations are still applicable. Such a solution is equivalent to the one adopted by the FOIA 2000 which applies to authorities situated in Scotland, provided they are public authorities whose sole functions are reserved ones within the definition of the Scotland Act 1998.

#### **d) Gibraltar.**

Gibraltar is a British dependent territory inside the European Union for most purposes and thus citizens of Gibraltar are also European Union citizens. Gibraltar is not a member-state of the EC but is within it under Article 299(4) of the EC Treaty which applies the Treaty to 'the European territories for whose external relations a Member State is responsible' and thus it joined in 1973 as a UK Dependant Territory. As a result, European Legislation applies in Gibraltar as it does in any other Member State but for four domains which are exempt: 1) Gibraltar is outside the scope of the European Common Agricultural Policy; 2) it is outside the area of the Common Customs Tariff; 3) the rock is exempt from the common rules on the VAT on goods and services and, 4) it is exempt from the provisions on the free movement of goods (but not services). Since Gibraltar is in the EC as part of the UK, it is the UK Government that retains ultimate responsibility for the application of EC law in Gibraltar even if it has delegated to the Government of Gibraltar responsibility for giving effect to EC legislation in the territory.<sup>148</sup> Because the legal system in Gibraltar is based on the common law and statute law of England, it is interesting to examine how the Environmental Information Directives have been transposed, as one would expect the transposition to be similar. However, as we shall see, the way the Directive was transposed was quite different from the one adopted in England.

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<sup>148</sup> On the constitutional status of Gibraltar and other related matters see House of Commons, Foreign Affairs Committee, Fourth Report, June 8, 1999, available online at: <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmaff/366/36602.htm>

The 1990 Environmental Information Directive has been transposed in Gibraltar by the Public Health (Freedom of Access to Information on the Environment) Rules 1992,<sup>149</sup> an order made by the Governor of Gibraltar which came into effect on the 1<sup>st</sup> November 1992. This order is extremely interesting since it sticks very closely to the wording of the 1990 Directive, probably in an effort to avoid an erroneous transposition.

An extremely interesting feature is that no definition is given of the terms of 'environmental information' and of 'public authority' and instead the Order refers directly to the definitions present in the 1990 Directive, since rule 2(2) provides that '*Expressions used in these rules have the meaning they bear in the Directive*'. This has the advantage of preventing challenges of definitions not in conformity with the Directive's.

As long as the practical provisions on access are concerned, the Order merely repeats the provisions of the Directive and provides that any natural or artificial legal person can request environmental information from public authorities or from a body with public responsibilities for the environment and under the control of a public authority, without having to prove an interest. Information has to be provided as soon as possible and at the latest within two months, and only a charge not exceeding the reasonable costs for providing the information may be made. Reasons for refusals shall also be given in writing and partial disclosure of exempt information shall be performed wherever possible.

Similarly to the structure adopted under the English 1992 Regulations, the Gibraltar Order divides exemptions to disclosure into discretionary and mandatory exemptions.<sup>150</sup> However, the Gibraltar Order almost identically repeats the wording of the exemptions mentioned in the Directive, thus avoiding the problem that arose with the 1992 English Regulations which had to be amended in 1998 because the European Commission considered that the scope of the exemptions had been extended beyond what was permitted under the 1990 Directive.<sup>151</sup>

Rule 4(1) of the Order provides that a request to provide environmental information may be refused where it affects the confidentiality of the proceedings of public authorities, international relations and national defence, public security, matters which are, or have been, subjudice, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings, commercial and industrial confidentiality, including intellectual property. Also rule 5 provides that a request can be refused if it would involve the supply of unfinished documents or data or internal communications or where the request is manifestly unreasonable or formulated in too general a manner.

Rule 4(2) of the Order provides that a request to provide environmental information must be refused where it affects the confidentiality of personal data or files or both, or if it affects

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<sup>149</sup> Legal Notice No. 143 of 1992, Gibraltar Gazette No. 2,697 of 12/11/1992 Legal Notices Second Supplement.

<sup>150</sup> On the academic discussions about whether such a distinction not provided for by the Directive is compatible with it, see below.

<sup>151</sup> All these matters are discussed in detail below.

material supplied by a third party without that party being under a legal obligation to do so, provided the third party concerned or who supplied this information has not consented to disclosure. Also, information the disclosure of which would make it more likely that the environment to which it relates would be damaged, has to be excluded from disclosure under rule 4(3).

From the above, it is clear that the Gibraltar 1992 Order transposing the 1990 Directive sticks closely to the text of the Directive and only departs from it when it puts exemptions into two categories. This method of transposition has the added advantage of ensuring a correct transposition. However, the drawback, is that the 1990 Directive contains very general terms (such a 'public authorities' and most of the exemptions to disclosure) that are left for member states to define in more detail. If the transposing legislator does not do that, then this is left for the implementing public authorities to do which could lead to possible diverging practices. But such a risk might be minimal in a 'country' like Gibraltar whose public administration is relatively small in size.<sup>152</sup> All in all, it can be contended that the method chosen in Gibraltar for the transposition of the 1990 Directive is superior to the one adopted by the British Government in respect of Great-Britain and Northern Ireland, which led to inconsistencies with the Directive that had to be corrected with subsequent amendments in 1998.

There seem to be no plans yet for an early transposition of the 2003 Environmental Information Directive in Gibraltar, as in England, though the time limit for its incorporation into national laws is the 14<sup>th</sup> February 2005.

#### **4) The Freedom of Information Act 2000 and the Data Protection Act 1998**

The purpose of the Freedom of Information Act 2000 is to create a right for every person to access any information held by public authorities which is not exempt from disclosure. The Act amends the Data Protection Act 1998 and the Public Records Act 1958, so as to make their provisions compatible with this new right. As discussed previously, before the Act, there was no such general right, as the Code of Practice on Access to Government Information was a non-binding voluntary scheme, which only required government departments and other public authorities under the jurisdiction of the Parliamentary Commissioner for Administration to make certain information available to the public. The Act, on the contrary, not only creates a binding right of access, but also provides for a wider scheme for accessing information as it covers a larger range of public authorities including the local government, the National Health Service bodies, schools and universities, the police and other public bodies such as quangos and executive agencies. It should be noted that the FOIA comes into full force in 2005.

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<sup>152</sup> It is the Environmental Agency that is responsible for the enforcement of the Environmental Information Directive in Gibraltar. The Agency acts as agents for the Government of Gibraltar. See their web-site:



The Act is divided into parts. Part I of the Act creates the general right of access to information held by public authorities and by other relevant bodies for the Act's purposes. The technique adopted for determining the Act's coverage is not, as in the case of the Environmental Information Regulations, to give a general definition of the types of public bodies to which it applies. Rather, the Act simply lists the bodies subject to its provisions in a Schedule (Schedule 1) and confers upon the Secretary of State (now the Lord Chancellor)<sup>153</sup> the power to add to the Schedule or remove bodies from it. This part also lays down time limits for the provision of requested information, generally 20 working days, and guidelines concerning charges that can be levied.

Part II lists the exemptions from the right to access information held by public bodies. There are 22 separate sections, each one establishing a specific exception from disclosure. Public authorities have a legal duty to release information and also to confirm or deny the existence of sought information, unless it is covered by an exemption. The exemptions fall into two categories: those whose use has to be justified under a harm test weighting the public interest to disclosure versus the interest protected by secrecy, and absolute exemptions.<sup>154</sup> Under the former category, public authorities can withhold information if it causes prejudice to matters such as international relations, national security, defence, the economy, law enforcement and commercial interests. In contrast, absolute exemptions do not have to be justified and cover areas like information provided in confidence, information supplied by or relating to bodies dealing with security matters, court records, personal information and parliamentary privilege.

Parts IV and V deal with arrangements for enforcements and appeals, and create a new independent administrative body, the Information Commissioner (which combines the role of the Data Protection Commissioner under the Data Protection Act 1998) and a special administrative tribunal, the Information Tribunal. This new Information Commissioner oversees the correct application of the Act. An appeal against a decision to refuse to disclose information by a public authority lies to the Information Commissioner, whose decisions are binding on the authority concerned, subject to an appeal to the Information Tribunal. However, under section 53 there is a power for the executive to override the Information Commissioner's decisions that oblige the public authority concerned to disclose the information withheld. A Minister can issue a certificate with the result that the Commissioner's decision "shall cease to have effect". The underlying rationale for this executive power seems to be that Ministers better understand the public interest

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[http://www.gibraltar.gov.gi/gov\\_depts/public\\_services/environment.htm](http://www.gibraltar.gov.gi/gov_depts/public_services/environment.htm)

<sup>153</sup> It should be noted that all references in the FOIA 2000 to the Secretary of State have been replaced with references to the Lord Chancellor, since all functions under the Act have been transferred to the Lord Chancellor under the Transfer of Functions (Miscellaneous) Order 2001 (SI 2001/3500), which came into force on the 26 November 2001. There is however one exception under which the Secretary of State still retains his powers, concerning the power of the Secretary of State under s. 74 of the Freedom of Information Act 2000 to make regulations implementing the information provisions of the Aarhus Convention.

<sup>154</sup> These two subdivisions are referred to by Macdonald as prejudice-based and class-based exemptions, depending on whether disclosure would be likely to prejudice particular interests. See Macdonald below, at 578. We shall also refer to them further on as absolute and qualified exemptions.

and are accountable to Parliament for the exercise of such political judgments. Such a certificate may be issued only where the information concerned is exempt information and only if the minister concerned has on reasonable grounds formed the opinion that the public authority concerned has not failed to comply with its obligations. This executive power is limited to requests addressed to governmental departments and some other bodies.

Section 19 of the Act also obliges public authorities to adopt publication schemes relating to the publication of information held by the authority. Such schemes have to be approved by the Information Commissioner, and specify the classes of information which the authority publishes, the manner of publication and whether the information is available to the public free of charge or on payment. This duty on public authorities, can be said to go a step beyond the core access right created by the Act, since if all of the information a body possesses is published (especially online), then there is no need for a right of access. This is reflected in section 21 of the Act, which provides that material made generally available in accordance with a publication scheme is exempt from the right of access. Thus, the authority is not obliged to respond to requests for it. As only a relatively small percentage of public authorities have not yet adopted publication schemes, from this point of view alone, the Act has been considered to be a success.<sup>155</sup>

The procedures on access to information and appeal procedures, as well as the role of the Information Commissioner are mirrored in the new environmental information regulations. As we shall examine further on these provisions, there is no need at this point to analyse in more detail the operation of the FOIA 2000.

As far as the relationship between the FOIA 2000 and the Regulations is concerned, as we shall see further on, section 39 of the FOIA tries to avoid any overlap between these two instruments by providing that the Act does not apply, in principle, in the case of environmental information. This is to avoid the concurrent application of the two regimes and to allow the environmental information regime to apply in preference to the FOIA 2000.

In any case, it should be noted that, overall, if the FOIA 2000 is compared with the new 2004 environmental information regulations (but also the new 2003/4 Directive), the environmental information regime is more liberal than the general access to information regime. This is mainly due to two major differences.

Firstly, although both regimes contain a similar list of exemptions to disclosure, the environmental information regime has no absolute (class) exemptions, since all exceptions are subject to a public interest test. Thus, public bodies always have to weigh up whether the public interest in favour of disclosure might outweigh the public interest favouring secrecy.

Secondly, the coverage of the 2004 Regulations is much wider than the FOIA, since the definition of public bodies is wider in the Regulations, as we shall see in detail further on.

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<sup>155</sup> According to Cinzia Biondi, *Freedom of Information in Practice - Part I*, [2003] *Privacy & Data Protection* 3.7(10). On publication schemes in general see the Campaign for Freedom of Information Report,

It is clear from the above, that the 2004 environmental information regulations are a more powerful legal instrument than the FOIA 2000, at least in the field of environmental information. Thus the environmental information regime in England can be considered as being more liberal than the general regime. This finding contrasts with what Wilcox had predicted in 2001, that “*passage of the Freedom of Information bill should render the 1992 regulations a secondary, rather than a primary, information search tool for the British public*”.<sup>156</sup>

Apart from the FOIA 2000, there is also the Data Protection Act 1998, which sets out rules for processing personal information.<sup>157</sup> The Act requires data controllers to comply with the data protection principles, which require, *inter alia*, that personal data is processed fairly and lawfully. More importantly for present purposes, the Act also creates the right of subject access, which allows every person to find out what information is held about them (personal information) on computer and in some paper records.

The Information Commissioner oversees not only the FOIA 2000 but also the Data Protection Act 1998, as both Acts relate to information policy and do overlap where personal information is considered for disclosure under the FOIA 2000.

As we shall see further on, the FOIA 2000, tries to avoid any overlap between the two Acts, by providing that a request by an individual for his own personal information will be exempt under the FOIA and will continue to be handled under the Data Protection Act. However, when an applicant requests personal information concerning a third party, or where responding to a request would involve the disclosure of personal information about a third party, the request falls within the remit of the FOIA. However, in that case the public authority must apply the safeguards found in the Data Protection Act (the Data Protection Principles), when handling and releasing such information.

The Data Protection Act 1998 is also a statute that creates a right to access information, however it is limited to private individuals about whom personal data are kept. It also protects the dissemination of such data to other third parties without the consent of the concerned individual. However, in order to avoid the Act becoming a barrier to the provision of information under other statutory provisions providing for disclosure (such as the provisions on registers or the Environmental Information Regulations), section 34 of the Data Protection Act 1998 states that most of the provisions of the Act are to be disapplied when personal information is to be made available to the public by or under any enactment other than the FOIA 2000. Of course, this does not mean that personal data confidentiality is disregarded when environmental information is concerned, since as we shall see further on, there is an exemption to disclosure covering personal information in the Environmental Information Regulations.

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commissioned by the Department for Constitutional Affairs, *Central Government Publication Schemes - Good Practice*, February 2004, available at: [http://www.cfoi.org.uk/pdf/ps\\_report.pdf](http://www.cfoi.org.uk/pdf/ps_report.pdf)

<sup>156</sup> William A. Wilcox Jr, *Access to Environmental Information in the United States and the United Kingdom*, [2001] 23 *Loyola of Los Angeles International & Comparative Law Review* 121, at p. 245.

## 5) Do the environmental information regulations supersede other enactments prohibiting disclosure?

As we have seen, the Aarhus Convention and the 2003 environmental information directive have been implemented in the UK through the relevant (English or Scottish) environmental information regulations. Before examining the provisions of the English regulations in depth, a question that arises is whether these regulations can supersede other enactments prohibiting disclosure. In fact, the November 2002 Lord Chancellor's Second Report to Parliament on the Review of Legislation Governing the Disclosure of Information,<sup>157</sup> contains a list of 381 items of primary or secondary legislation containing explicit provisions prohibiting disclosure of information. All these statutory exemptions to disclosure supersede the provisions of the Freedom of Information Act 2000, since section 44 of the Act creates an absolute exemption to disclosure, when the disclosure of the information requested is prohibited by or under any enactment (except than under the FOIA 2000) or disclosure is incompatible with any Community obligation. The Lord Chancellor's report indicates that it is planned that most of these instruments will be repealed in the near future.

As far as the environmental information regulations are concerned, these statutory provisions of the FOIA prohibiting disclosure pose no problem in theory, since the regulations stem from EC law and as such take precedence due to the principle of supremacy of EC law<sup>158</sup> over not only the FOIA 2000, an Act of the UK parliament, but also any other enactment.

This can also be inferred from section 74(4) of the FOIA which mentions that the new environmental information regulations may provide that any obligation imposed by these regulations in relation to the disclosure of information, is to have effect notwithstanding any enactment or rule of law. This section merely acknowledges the impact of the principle of supremacy of EC law, a well-established principle, and thus this section aims to make this clear to public officials applying the regulations, rather than introducing a new legal rule. This is also made clear in reg. 5(6) of the 2004 Regulations, which mentions that '*Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply*'. The problem with this statement is that, although it is correct that the environmental information regulations do take precedence over any other piece of domestic legislation prohibiting disclosure, some of these prohibitions have been enacted in pursuance of EC law provisions or international

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<sup>157</sup> The Data Protection 1988 is discussed in more details further on. See also Rosemary Jay and Angus Hamilton, *Data Protection – Law and Practice*, Thomson – Sweet & Maxwell, 2<sup>nd</sup> edition 2003.

<sup>158</sup> See below n. 160.

<sup>159</sup> See Margot Horspool, *European Union Law*, London: Butterworths, 3<sup>rd</sup> edition 2003, pp. 167-179. Also see *R. v. Secretary of State for Transport, ex p. Factortame Ltd* [1999] 4 All ER 906 (HL).

treaties requiring secrecy in certain areas.<sup>160</sup> In these cases, it is not correct to say that the regulations should take precedence, since the principle of supremacy of EC law only applies between EC law and national law, but not EC law and other international law. However, the correct approach in this situation is impossible to ascertain, since if the environmental information regulations are said to take precedence as they stem from the Aarhus convention and an EC directive, then the UK might still be in breach of other international obligations it has. On the contrary, if these other international obligations are given precedence over the regulations, then the UK might breach the Aarhus Convention and the 2003 environmental information directive ! In any case, it is evident that the UK government has chosen to favour disclosure, by giving precedence to the regulations over any other enactment, even those adopted in pursuance of an international obligation.

## **B) The content of the right to access environmental information.**

In this section we shall describe in detail the requirements of all of the relevant legal instruments that provide for a right to environmental information. They will be described in parallel and their respective provisions will be compared with each other so as to see if the norms of a higher rank are compatible with the norms of a lower rank. Namely it should be analysed whether English law is compatible with the Convention and the Directive, and whether the Directive is compatible with the Aarhus Convention.<sup>161</sup>

### **1) The extent of the right to environmental information.**

#### **a) Definition of environmental information**

The right of access is to environmental information, but 'environmental information' is not an easy concept to define. Moreover, after a general definition has been established, there arises the

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<sup>160</sup> The Lord Chancellor's *Second Report to Parliament on the Review of Legislation Governing the Disclosure of Information*, November 2002, identifies 57 items of legislation prohibiting disclosure that fulfil international obligations of the UK. Available online at <http://www.dca.gov.uk/foi/foidoirpt2.htm>

Some of these provisions directly concern environmental information such as section 174 of the Merchant Shipping Act 1995, which relates to protection of information obtained in implementation of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, or reg. 17 of the Plant Protection Products Regulations 1995 (now repealed) which implemented a specific European obligation of confidentiality for member states under article 14 of Council Directive 91/414 of 15 July 1991 concerning the placing of plant protection products on the market.

<sup>161</sup> We take as granted that the Aarhus Convention has binding effects on EC law as expressed by the Community when it signed the Convention (see above n. 101). We shall not enter into the theoretical debate of the relationship and ranking between EC law and international law.

issue of whether the right of access extends only to the environmental information contained in documents or to the documents that contain it too. Finally, there is the issue of whether information not directly held by a relevant authority for the application of the environmental information regime, but by a different person, is still accessible under this regime.

### **i) Environmental information *ratione materiae*.**

The concept of environmental information is a pivotal one not only because it prescribes the boundaries of applicability of the environmental information regime but also because, as stated in Stec *et al.* “it is logical to interpret the scope of the terms “environment” and “environmental” accordingly in reference to the detailed definition of “environmental information” wherever these terms are used in other provisions of the [Aarhus] Convention.”<sup>162</sup> Thus these terms also help us define which “environment” environmental information regimes aim to protect, since none of them provides a definition of the environment. Also, it can help in providing for a legal definition of the environment for other legal instruments, which do not define it but include a reference to it. In that sense, the examination of this definition has a wider significance for environmental law.

#### **1) In the Aarhus Convention**

The Aarhus Convention defines this concept in paragraph 3 of article 2 and splits environmental information into three categories (in three subparagraphs)<sup>163</sup> and within each category illustrative lists are provided.

First, in subparagraph (a), environmental information includes any information in any material form relating to the state of the elements of the environment. The Convention provides a non-exhaustive list of such elements which can be “air and atmosphere”, “water”, “soil, land, landscape and natural sites”, and “biological diversity and its components, including genetically modified organisms”. These terms are not defined though some of them such as air, atmosphere, soil and land can be interpreted as bearing their everyday meaning. For some other terms it might be helpful to look at the definitions given to them by other instruments at international and

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<sup>162</sup> See above n. 97, at page 35.

<sup>163</sup> Art. 2 par. 3 of the Aarhus Convention mentions: “3. “Environmental information” means any information in written, visual, aural, electronic or any other material form on:

The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;”

European level.<sup>164</sup> For instance, the Council Directive on the deliberate release into the environment of genetically modified organisms (2001/18/EC) provides the following definition of a genetically modified organism: "*genetically modified organism (GMO)*" means an organism, with the exception of human beings, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination<sup>165</sup>. Also, Article 2 of the Convention on Biological Diversity gives the following definition of biological diversity: "*the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems*".<sup>166</sup> The list also includes "the interaction among these elements", which reflect the current trend in environmental law towards recognising that the interaction between various elements is important in protecting the environment, as demonstrated by the integrated pollution prevention and control regimes (notably the IPPC EC Directive<sup>167</sup>).

Second, the Convention in the second group of environmental information described in subparagraph (b), mentions two categories of information which are to be considered as environmental information. This group is concerned with substances and activities that can affect the environment.

It covers any cost-benefit and other economic analyses used in environmental decision-making. This reflects the trend towards the usage of economic analysis and cost-benefit calculations in modern environmental law and policy.<sup>168</sup> The Convention however does not define the term "environmental decision-making", which might seem problematic since some decisions even if they have environmental consequences might have also other aims and so this could include almost any aspect of governmental policy.<sup>169</sup> For instance, economic analyses on affordable housing might take into consideration the environment, so could be considered as environmental decision-making.

On the other hand, the Convention considers as environmental information any information on 1) factors, 2) activities or 3) measures that affect or are likely to affect the elements of the environment, as mentioned in the previous subparagraph. The Convention lists some of these factors which can be substances such as energy, noise and radiation. These factors are any natural agents and there is no distinction as to whether they are produced by human actions or natural causes. There is also a list of the activities and measures and these can be any administrative

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<sup>164</sup> As mentioned in *Stec et al.*, above n. 97, at p. 36.

<sup>165</sup> Art. 2 of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC OJ of the EC, L 106 , 17/04/2001 p. 1.

<sup>166</sup> For the full text of the Convention on biological Diversity of June 1992, see <http://www.biodiv.org/>

<sup>167</sup> Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ of the EC, L 257 , 10/10/1996 p. 26.

<sup>168</sup> See *inter alia*, S. Bell and D. McGillivray in *Ball and Bell on Environmental Law*, Blackstone Press, 5<sup>th</sup> edition 2000, page 15.

<sup>169</sup> See Wilsher, above n. 304, at page 682.

measures, environmental agreements, policies, legislation, plans and programmes, thus covering every action of public bodies. They are not expressly linked to human activities but would be normally such in practice.

Third, in subparagraph (c) the Convention explicitly considers as environmental information the state of human health and safety, cultural sites, and other aspects of the built environment. However, since this could be a far reaching provision, they are only included to the extent that they are or may be affected by the elements of the environment, or by the factors, activities or measures outlined in subparagraph (b). Since subparagraph (b) refers to subparagraph (a) the elements mentioned therein are also included for the interpretation of paragraph (c). Subparagraph (c) matters are environmental information only if potentially affected by the factors, activities or measures in (b), which in turn have to affect the environment through an environmental element mentioned in subparagraph (a). This is a very complicated wording, but it was deemed necessary when drafting the Convention in order to prevent a whole range of human health and safety information unrelated to the environment falling under the definition.<sup>170</sup>

## 2) In the 2003 Directive and the Environmental Information Regulations 2004.

The definition in the 2003 Directive sticks very close to the definition in the Aarhus Convention.<sup>171</sup> This is due to the fact that the European Commission considered during the adoption stage that it was more appropriate to stick as closely as possible to the definition of the Aarhus convention.<sup>172</sup> However, there are differences in that the Directive provides more detailed illustrative lists of what can be environmental information, and which complete, without modifying, the meaning of the definition used in Aarhus. These differences are undoubtedly useful, since they help in the understanding of what is environmental information, though we doubt if they

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<sup>170</sup> Such as information relating to specific medical procedures or safety mechanisms. See *Stec et al.*, above n. 97, at p. 38.

<sup>171</sup> At art. 2 par. 1 of the 2003 Directive: “ ‘Environmental information’ shall mean any information in written, visual, aural, electronic or any other material form on:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) ”.

<sup>172</sup> See the Opinion of the Commission, below n. 226.



add anything that was not already impliedly included in the general definition of the Aarhus Convention.

First, as analysed before, the state of the elements of the environment are considered as environmental information and an example of these elements are natural sites. The Directive defines natural sites as expressly '*including wetlands, coastal and marine areas*'.

Second, the 2003 Directive adds to the definition of measures and elements affecting or likely to affect the elements of the environment (which are considered as environmental information), '*waste, including radioactive waste, emissions, discharges and other releases into the environment*'. What is waste is not defined, though reference could be made to Directive 75/442 on waste<sup>173</sup> which defines waste as any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force.

Also, the 2003 Directive adds to the definition of measures and elements affecting or likely to affect the elements of the environment, all '*measures or activities designed to protect those elements*'.

Moreover, expressly considered as environmental information by the 2003 Directive are all '*reports on the implementation of environmental legislation*'.

Finally, the 2003 Directive also expressly includes under the definition of the state of human health and safety, which is environmental information, '*the contamination of the food chain, where relevant*'. The usage of the phrase 'where relevant' is confusing and difficult to understand. However, if one looks at how this phrase was adopted, it seems that it indicates that not all of the information on the contamination of the food chain is environmental information, but only those that are relevant to the elements of the environment. Initially, the European Parliament had included an amendment in the European Commission's proposal of the Directive that was seeking to introduce into the definition of environmental information food safety. However, both the Council of the European Communities<sup>174</sup> and the European Commission<sup>175</sup> refused this amendment, considering that food safety was outside the scope of environmental information. Still, at the conciliatory stage the above-mentioned median position was adopted at the expense of clarity. In any case, it will be almost impossible to distinguish which information on the contamination of the food chain is relevant and which is not, thus probably resulting in diverging approaches between various member-states or public authorities. However, an attempt to indicate where such a distinction could be has been made by the ECJ in the case of *Eva Glawischnig v Bundesminister für soziale Sicherheit*, is examined later.

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<sup>173</sup> At art. 1 of the Council Directive 75/442/EEC of 15 July 1975 on waste, OJ L 194 , 25/07/1975, p. 39. See also Ludwig Kramer, *The distinction between product and waste in Community law*, [2003] 11(1) Env. Liability 3-13.

<sup>174</sup> See Common Position (EC) No 24/2002 of 28 January 2002 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC, OJ C 113E/1.

<sup>175</sup> See Opinion of the Commission, below n. 226.

The new 2004 Regulations mention at reg. 2(1) that environmental information “has the same meaning as in article 2(1) of the Directive” and then repeat verbatim the same definition found in the 2003 Directive.

### 3) Comparison with the 1990 Directive and the Environmental Information Regulations 1992.

It is interesting to note, that even if the definition of the 1990 Directive already encompassed a broad definition of environmental information, it was considered that this definition had to be made more comprehensive and explicit (in the new Directive) so as to encompass certain categories of environmentally-relevant information which had been excluded by various restrictive interpretations in member states.<sup>176</sup> The scope of application of the 90/313 Directive covered any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes.<sup>177</sup> The 1992 regulations used a similar wording.<sup>178</sup> Since this definition is similar to the new ones mentioned above (in the 2003 Directive and the 2004 Regulations), apart from the fact that it is less detailed, the ECJ decisions which have interpreted it are still relevant today and thus shall be examined further on.

### 4) Specific references to the environmental information directives in other binding EC legislation

It should also be noted that apart from the general definition of environmental information found in the environmental information directives, a multitude of other pieces of secondary EC law contain references to these directives.

First, a great number of Commission decisions which grant financial assistance to specific projects (mainly the building of various infrastructure projects like motorways, airports etc) also provide a clause that the Member State concerned shall ensure transparent and open access to appropriate information requested by the public in relation to that project and that with regard to

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<sup>176</sup> See the Proposal for a Directive of the European Parliament and of the Council on public access to environmental information, COM/2000/0402 final, 28/11/2000, OJ C 337 E, p. 156.

<sup>177</sup> At art 2 par (a): ‘ “information relating to the environment” shall mean any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes;’

<sup>178</sup> Regulation 2(2) which provides that: ‘... information relates to the environment if, and only if, it relates to any of the following, that is to say-- (a) the state of any water or air, the state of flora or fauna, the state of any soil or the state of any natural site or other land; (b) any activities or measures (including activities giving rise to noise or any other nuisance) which adversely affect anything mentioned in sub- paragraph (a) above or are likely adversely to affect anything so mentioned; (c) any activities or administrative or other measures (including any environmental management programmes) which are designed to protect anything so mentioned.’

environmental projects the provisions of Council Directive 90/313/EEC have to be respected. As an example, a 1993 Commission Decision on the grant of financial assistance for a sewage treatment project, contains the provision that *“The Member State concerned should ensure that the general public are aware of the role played by the Community in financing the project. The following measures, inter alia, should be undertaken with this end in view: [...] from the outset, the Member State concerned shall ensure that there is transparent and open access to appropriate information requested by the public”*.<sup>179</sup> This is a standard clause, contained in all of these decisions.<sup>180</sup>

Second, many binding community acts (mainly directives and regulations) adopted by community institutions in the field of environmental protection contain a specific reference to the provisions of one of the environmental information directives, usually explicitly extending or limiting the scope of the right to access environmental information to cover the information gathered by state authorities in the application of the directive or regulation containing this reference.<sup>181</sup> As an example, article 17 of Directive 2003/87/EC establishing a scheme for

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<sup>179</sup> In: Commission Decision of 6 October 1993 concerning the grant of assistance from the cohesion financial instrument to the following project in Ireland: Dublin (Ringsend) sewage treatment (stage 1) No CF: 93/07/61/014, 93/708/EEC, OJ L 331, 31/12/1993 p. 29.

<sup>180</sup> There are approximately 188 Commission Decisions adopted between 1993 and 1994 that concern the grant of assistance from the cohesion financial instrument to the realisation of a specific project. All these measures contain the above-mentioned clause. This clause has been inserted in accordance with Council Regulation (EEC) No 2082/93 of 20 July 1993 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ L 193, 31/07/1993 p. 20, which provides in its preamble that when providing financial assistance from community structural funds *“there should be greater transparency in the implementation of structural assistance whereas, to that end, care should be taken to ensure compliance with Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment”*.

<sup>181</sup> **Reference to the 2003/4/EC directive is made in the following acts:** Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC, OJ L 158, 30/04/2004 p. 7; Directive 2003/87/EC (see below); Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25/06/2003 p. 17, and also in the following proposals of EC acts still in the course of adoption: Proposal for a Regulation of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (Reach), establishing a European Chemicals Agency and amending Directive 1999/45/EC and Regulation (EC) on Persistent Organic Pollutants [SEC(2003 1171)OE], COM/2003/0644 final - COD 2003/0256; Proposal for a Directive of the European Parliament and of the Council amending the Directive establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms [SEC(2003) 785], COM/2003/0403 final - COD 2003/0173; Proposal for a Directive of the European Parliament and of the Council on the management of waste from the extractive industries COM/2003/0319 final - COD 2003/0107; Proposal for a Council Decision on the signature, on behalf of the European Community of the Protocol on civil liability and compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters, COM/2003/0263 final; Proposal for a Directive of the European Parliament and of the Council establishing an infrastructure for spatial information in the Community (INSPIRE), [SEC (2004) 980], COM (2004) 516 final, 2004/0175 (COD).

**Reference to the 90/313/EEC directive is made in the following acts:** 2003/241/EC: Commission Decision of 26 March 2003 amending Commission Decision 1999/391/EC of 31 May 1999 concerning the questionnaire relating to Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC) (implementation of Council Directive 91/692/EEC), OJ 2003 L89/17; Regulation (EC) No 304/2003 of the European Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals, OJ 2003 L63/1; Directive 2002/49/EC of the European Parliament and of the Council

greenhouse gas emission allowance trading within the Community mentions that “*decisions relating to the allocation of allowances and the reports of emissions required under the greenhouse gas emissions permit and held by the competent authority shall be made available to the public by that authority subject to the restrictions laid down in Article 3(3) and Article 4 of Directive 2003/4/EC*”.<sup>182</sup>

These two groups of secondary EC legislative acts which explicitly make reference to the environmental information directives, can be seen as being a specific list of what constitutes environmental information, alongside the general definition provided for in the information directives. Although most of the times such information would still be covered by the general definition, the community institutions, probably in an attempt to clarify things, expressly refer to the environmental information directives. Thus, for the sake of completeness, one cannot just stop at the general definition of the environmental information directives, but also has to examine whether the specific information he is asking for, is not expressly being characterised as environmental information falling under the scope of the environmental information directives, by an explicit provision found in one of the many directives or regulations adopted in the field of environmental protection.

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of 25 June 2002 relating to the assessment and management of environmental noise, OJ 2002 L189/12; Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste, OJ 2000 L332/91; 1999/391/EC: Commission Decision of 31 May 1999 concerning the questionnaire relating to Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC) (implementation of Council Directive 91/692/EEC) (notified under document number C(1999) 1395), OJ 1999 L148/39; Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, OJ 1999 L182/1; Council Directive 1999/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations, OJ 1999 L85/1; Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ 1998 L330/32; Council Directive 98/81/EC of 26 October 1998 amending Directive 90/219/EEC on the contained use of genetically modified micro-organisms, OJ 1998 L330/13; Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market, OJ 1998 L123/1; 96/733/EC: Commission Recommendation of 9 December 1996 concerning Environmental Agreements implementing Community directives, OJ 1996 L333/59; Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ 1997 L61/1; Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ 1996 L257/26; Council Directive 94/67/EC of 16 December 1994 on the incineration of hazardous waste, OJ 1994 L365/34; Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market, OJ 1991 L230/1; Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, OJ 1991 L135/40; and also in the following proposals of EC acts still in the course of adoption: Proposal for a Regulation of the European Parliament and of the Council on persistent organic pollutants and amending Directives 79/117/EEC and 96/59/EC, COM/2003/0333 final - COD 2003/0119; Proposal for a Council Regulation concerning the export and import of dangerous chemicals, COM/2001/0803 final - ACC 2002/0026, OJ 2002 C126E/291; Amended Proposal for a European Parliament and Council recommendation providing for minimum criteria for environmental inspections in the Member States, COM/99/0652 final - COD 99/0358; Amended proposal for a European Parliament and Council Directive on the incineration of waste OJ 2000 C150E/1; Proposal for a Directive of the European Parliament and of the Council establishing an infrastructure for spatial information in the Community (INSPIRE), 23/7/2004, COM(2004) 516 final, 2004/0175 (COD).

<sup>182</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25/10/2003 p. 32.

## 5) In European Court of Justice case law.

There are only three European Court of Justice cases so far which have construed the definition of environmental information: the *Mecklenburg case*,<sup>183</sup> the *Commission v. France*<sup>184</sup> case, and the case of *Eva Glawischnig v Bundesminister für soziale Sicherheit*.<sup>185</sup>

In the *Mecklenburg case*, the European Court of Justice had the occasion to reiterate the widest possible reading of the general definition of what is environmental information. The Court first affirmed that the wording of the definition of environmental information makes it clear that the Community legislature intended to make that concept a broad one, embracing both information and activities relating to the state of the sectors of the environment. The ECJ proceeded to note that in order to constitute information relating to the environment, for the purposes of the directive, it is sufficient for a statement of views put forward by an authority to be an act capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the directive (water, air, land etc). That is the case, where a statement of views is capable of influencing the outcome of development consent proceedings as regards interests pertaining to the protection of the environment. As a consequence, the Court ruled that the definition of environmental information of Directive 90/313 is to be interpreted as covering a statement of views given by a countryside protection authority in development consent proceedings (concerning planning approval for the construction of a bypass), if that statement is capable of influencing the outcome of those proceedings with respect to interests pertaining to the protection of the environment.

In the case of *Eva Glawischnig v Bundesminister für soziale Sicherheit*, the issue was whether details of examinations carried out by the national administrative authorities to monitor compliance with the rules on the labelling of certain foodstuffs produced from genetically modified organisms established out in the regulation on the labelling of food-products containing GMO ingredients<sup>186</sup> can constitute information relating to the environment within the meaning of the 1990 directive. The Advocate General, in his opinion,<sup>187</sup> first considered that information on whether complaints have been made or what penalties have been imposed with respect to the marketing of products whose labelling does not comply with these Community provisions, does not in itself describe or give any indication as to the present situation of the “state of water, air, soil, fauna, flora, land and natural sites.” Second, he considered that the information in question does not relate to activities or measures capable of adversely affecting the environment, since examinations carried out by the Austrian authorities to monitor compliance with the labelling of

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<sup>183</sup> *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat* [1998] ECR I-3809.

<sup>184</sup> *Commission of the European Communities v French Republic*, Case C-233/00, [2003] ECR I-6625.

<sup>185</sup> *Eva Glawischnig v Bundesminister für soziale Sicherheit*, Case C-316/01, [2003] ECR I-5995.

<sup>186</sup> Council Regulation (EC) No 1139/98 of 26 May 1998 concerning the compulsory indication of the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC (OJ 1998 L 159, p. 4). Regulation No 1139/98 was amended by Commission Regulation (EC) No 49/2000 of 10 January 2000 (OJ 2000 L 6, p. 13).

<sup>187</sup> Opinion of the Advocate General Tizzano, delivered on 5 December 2002 on Case C-316/01, at par. 15. Available from <http://curia.eu.int>

foodstuffs containing GMOs is an activity that is clearly not, in itself, capable of adversely affecting the environment. Thirdly and most importantly, the Advocate General referred to the judgement in *Mecklenburg*, where it was established that in order to constitute information relating to the environment, the activity of public authorities must consist of acts capable of protecting the state of one of the sectors of the environment covered by the directive, such as air water, land etc. Then he referred to the purpose of the GMO labelling regulation, as laid down in its preamble, which is not about protecting human health or protecting the environment (even if the environment is taken as including human health), but the free movements of goods and the interests of consumers. He based his interpretation strictly on the preamble of the GMO labelling regulation and its legal basis, which concern the removal of potential obstacles to the free movement of products containing genetically modified soy and maize, and the provision of information to consumers about the content of foodstuffs so as to enable them to make a rational choice when buying them. He then concluded that since the information sought concerned examinations carried out to ensure compliance with the GMO labelling regulation, such information does not relate to activities or measures designed to protect the environment within the meaning of the directive. This interpretation is undoubtedly restrictive and is based strictly on a literal interpretation of the aim of the GMO labelling regulations, which is an economic one and one aiming at protecting consumers. These regulations are undoubtedly an economic instrument, though they aim at protecting indirectly, the environment, since GMOs are seen by some as a threat to the ecosystem. It is thus an economic and market device which aims at empowering consumers to oust from the market GMO products and thus limiting their cultivation and expansion.<sup>188</sup> The inherent environmental objective towards the protection of the state of land and the eco-system is evident though the Advocate-General only concentrates on the aims of the regulations as set out in them, without looking further on. Such literal, interpretation of what is in fact an environmental protection instrument, is a very restrictive interpretation, different from the interpretation given by the ECJ in general, where a teleological approach prevails. The ECJ in its judgement, upheld this interpretation and ruled that the name of the manufacturer and the product description of foodstuffs which have been the subject of administrative measures for controlling compliance with Regulation 1139/98 concerning the compulsory indication in the labelling of certain foodstuffs produced from genetically modified organisms and the number of administrative penalties imposed following those measures, and the producers and products concerned by such penalties, do not constitute information relating to the environment within the meaning of article 2(a) of the 1990 Directive. The Court even if it accepts that the concept of environmental information is a broad one, adds that it is not an all encompassing concept as it states that: '*Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however*

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<sup>188</sup> On economic and market devices aiming at indirectly protecting the environment in general, see Alexandre Kiss and Dinah Shelton, *Principles of European Environmental Law*, 2<sup>nd</sup> edition 1999, Cambridge University Press, Ch. 5: Techniques of Environmental Law, at pp. 112 et seq.

*minimal, with one of the environmental factors mentioned in Article 2(a)*'.<sup>189</sup> In any case, it should be noted that under the new Directive, the state of the elements of the environment expressly include GMOs, and thus any measures which concern them (as the ones in this case) should be considered as environmental information.<sup>190</sup>

In the case of *Commission v. France*, the ECJ had to examine whether France had correctly transposed the Environmental Information Directive in its national law by only providing for a general regime to access administrative information.<sup>191</sup> This was considered as possible, in principle, as long as the whole of the Directive is correctly transposed in a precise and binding manner. As far as the definition of environmental information is concerned, the Advocate General,<sup>192</sup> first examined whether the definition of information that is accessible under the 1978 general freedom of information regime was sufficient so as to cover at least all environmental information covered by the 1990 environmental information Directive. She considered that the definition of 'administrative documents' of the French general freedom of information regime could not be considered as equivalent to the Directive's definition, since under this French generic definition are only accessible documents that have a certain link with the exercise of public functions, thus leaving out documents totally unrelated to duties performed by public authorities. The Advocate General arrived to this conclusion by referring to the interpretation of the ECJ in the *Mecklenburg* case, where it was decided that the notion of environmental information had to be interpreted widely and that consequently any information on the environment is covered and not only information relating to the protection of it. So, she concluded that information simply referring to the state of the environment, such as general information documents, are covered by the Directive but not by the general freedom of information regime. It is also important to stress, that the Advocate General rejected the argument put forward by the French government that an interpretation of the definition of 'administrative documents' in conformity with the definition given by the Directive, by the competent administrative body supervising the correct application of the French regime,<sup>193</sup> was sufficient so as to be a precise transposition of the Directive. This is important since it indicates that even if the Environmental Information Directive could be

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<sup>189</sup> At par. 25 of the judgement.

<sup>190</sup> However, as the ECJ indicates at par. 5 of its judgement, the new 2003 Directive cannot be taken into account since '... as Directive 2003/4 replaces Directive 90/313 with effect only from 14 February 2005, the latter directive is the one which applies to the main proceedings in this case'.

<sup>191</sup> See for more details the relevant chapter on the French system of access to information. France, only in 2001 and due to the commencement of legal action in front of the ECJ transposed the 1990 Directive. However, the European Commission has a right to pursue an action for incorrect transposition of EC law, even if the member-state has transposed the legislation in question after the time-limit given in the reasoned opinion addressed by the Commission under article 266 of the EC Treaty, if there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, towards other Member States, the Community or private parties (Case C- 29/90 *Commission v Greece* [1992] ECR I-1971, par. 12, and Case C-207/00 *Commission v Italy* [2001] ECR I-4571, par. 28, Case C-166/00 *Commission v Greece* [2001] ECR I-9835, par. 9).

<sup>192</sup> See the Opinion of the Advocate General Christine Stix-Hackl, delivered on 14 January 2003 on Case C-233/00. Available from <http://curia.eu.int> (in French)

<sup>193</sup> This body is the Commission on Access to Administrative Documents, examined in detail in the relevant chapter on the French system of freedom of environmental information.

transposed through general freedom of information legislation, such legislative instruments should precisely define accessible information so as to encompass beyond any doubt environmental information and not require any 'external' interpretation by a court of law or other body,<sup>194</sup> so as to cover the Directive's requirements.

The ECJ upheld this interpretation and it also added that it follows from the use of the phrase 'including administrative measures' in the definition of environmental information found in article 2(a) of Directive 90/313 that this definition must be of a wider scope than all the activities of the public authorities. As a consequence, the Court ruled that the 1990 Directive applies to any measure, of whatever kind, which is likely to affect or protect the state of one of the sectors of the environment covered by that directive, so that information relating to the environment must be understood to include documents which are not related to carrying out a public service.<sup>195</sup>

One has to acknowledge that the ECJ seems to have taken two opposing views of the scope of environmental information in the respective cases of *Commission v France* and *Eva Glawischnig v Bundesminister für soziale Sicherheit*. In the former case we are told that environmental information covers any measure likely to affect or protect the state of one of the sectors of the environment but in the latter we are told that this is not totally true and that there are limits to the definition of environmental information. It is difficult to explain why the ECJ has reached these opposing views. However, it can be argued that it is not very important because these 2 cases were decided under the old 1990 directive, and now, under the 2003 directive, the scope of the definition of environmental information has been widened even further and expressly includes information on GMOs.

#### 6) In United-Kingdom case law.

There are also two English cases which decide issues evolving around the definition of what is environmental information under the definition of the Environmental Information Regulations 1992.

The case of *R. v. British Coal Corporation ex parte Ibstock Building Products Limited*,<sup>196</sup> concerned the information given to British Coal by a member of the public that naval munitions had been dumped down in about 1947 in one of the Ibstock mineshafts for disposal. A request was made for the name of the informant under the 1992 regulations and this was refused by British Coal, arguing *inter alia* that the name of the informant was not information relating to the state of the land and thus was not environmental information and so the regulations were not applicable.

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<sup>194</sup> As held in the ECJ case of *Commission of the European Communities v Kingdom of the Netherlands*, 10 May 2001, Case C-144/99: at par. 21: 'even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty'. Available from <http://curia.eu.int>

<sup>195</sup> At par. 46 and 47 of the judgement.

<sup>196</sup> [1995] Env. L.R. 277.



Harrison J., expressly stated that the definition of what is environmental information has to be interpreted broadly. He also considered that the source of any information relating to the dumping of the munitions can be said to 'relate to' the state of the land because it directly affects the quality of that information and that it was necessary to know the source of the information in order to assess the credibility of the information and to assess how much weight can be attached to it. He also mentioned that since the purpose of the legislation was to provide for freedom of access to information on the environment, it would have been strange if the legislature had intended that only the bare information itself should be disclosed, without it being possible to ascertain whether it was right, wrong or indifferent. Therefore, he concluded that the source of the information which relates to the state of the land is capable of being information which 'relates to' the state of the land and thus is environmental information. This case, which was the first English case applying the 1992 regulations, is important since it established the principle that environmental information is a concept that has a broad meaning, even before the ruling of the ECJ in the *Mecklenburg* case. It also establishes the principle that the source of environmental information, is environmental information itself and cannot be separated from it (except when it falls into one of the exemptions).

The second English case that dealt with the definition of environmental information, was the case of the *Birmingham Northern Relief Road*.<sup>197</sup> This case concerned the challenge by way of judicial review of a refusal by the Secretary of State for the Environment, Transport and the Regions to disclose under the 1992 regulations a copy of the concession agreement made between him and Midland Expressway Ltd for the construction of the Birmingham Northern Relief Road, the first toll-financed motorway in Britain. Sullivan J., stated that whether information relates to the environment, is a factual issue that has to be decided by the Court and there is no discretion involved in this classification on the part of public authorities. The Court also accepted that the definition of environmental information in Article 2 of the Directive was very broad, and that this broad definition had been carried through into the 1992 Regulations and expressly endorsed the same interpretation given in the *Ibstock* case. Then the Court ruled that the concession agreement was in fact environmental information since it contained information relating to the environment. The Court also accepted that even if an agreement can be described as a 'commercial document' this does not mean that it does not contain information, which relates to the environment. This seems to indicate that it is the content of a document, rather than its title or its description, which are important when determining whether it is covered or not by the Regulations.

## **ii) The form of accessible information**

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<sup>197</sup> *R. v. Secretary of State for the Environment, Transport and the Regions & Midland Expressway Limited, ex parte. Alliance against the Birmingham Northern Relief Road & Others* [1999] JPL 231.

Has the information to be in a specific physical or immaterial form so as to be considered as information which ought to be disclosed if it is requested?

The Aarhus convention indicates that environmental information may be in any material form either existing today or yet to be discovered<sup>198</sup> and provides examples of written, visual, aural and electronic forms. *Stec et al.*<sup>199</sup> consider that the ‘any other material form’ phrase used in the Convention is not meant to restrict the definition of environmental information to finished products or other documentation and that therefore information in raw and unprocessed form is obtainable as well as documents. The new 2003 Directive as well as the new Regulations<sup>200</sup> expressly mention in identical terms that accessible environmental information can be in any form whatsoever. They also add that the information might also be in any “format” apart from any “form”. The term of “form” refers to the physical appearance of information such as paper, oral, video or electronic, whether “format” refers to the different ways of presenting information within a particular form.<sup>201</sup>

The 90/313 Directive<sup>202</sup> took a similar approach since it applied to any information in written, visual, aural or data-base form, even if there was no express reference to forms not yet discovered. The 1992 regulations transposed this requirement by being applicable to information contained in ‘any records’.<sup>203</sup> This was interpreted by the Government as any information held by a body in documents, pictures, maps, records, registers, reports, returns, computer records and other non-documentary records.<sup>204</sup>

One further issue that arises is information in an incomprehensible or illegible form. This could especially be information stored in an obsolete computer format, which cannot be read anymore by modern computers. Could this information be communicated? The answer seems to be yes. If illegible or incomprehensible information can be reproduced on a paper format (or another digital format that can be ‘read’ by existing machines) then it would have to be communicated. However, if supposedly, the information was held on media (disks etc) so technologically obsolete as to have become *de facto* illegible by existing machines and computers, then this data should be treated as being non-existent, and thus there would be no obligation to disclose it, as examined below.

### **iii) Is there a right to access documents or only information?**

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<sup>198</sup> Art. 3.

<sup>199</sup> See *Stec et al.*, above n. 97, at p. 35-36.

<sup>200</sup> Aarhus art. 2(1) and at Reg. 2(1).

<sup>201</sup> See Ralph Hallo, *Proposal for a new directive on public access to environmental information: An analysis*, Brussels 2001, European Environment Bureau document no. 2001/004, at p. 7, available from <http://www.eeb.com>

<sup>202</sup> At art.2(a).

<sup>203</sup> At Reg(2)(4).

<sup>204</sup> See the Guidance, below n. 269, at par. 15.

The requirement that copies of actual documents should be provided, and not only the information requested in extracts or abstracts, is an important one, since it ensures that members of the public are able to see the specific information requested in full, in the original language and in context,<sup>205</sup> without being subject to arbitrary 'editing' of information by civil servants. Otherwise, this could lead to possible attempts by public authorities to censor requested information before disclosing it.

The Aarhus Convention explicitly addresses this issue and provides<sup>206</sup> that public authorities must disclose copies of the actual documents containing the information requested, rather than excerpts or summaries. The only exception to this requirement is when the requested information is available in another form, though this is a different issue and means that the documents requested might not necessarily be in a paper form or a specific form requested. The right of access under the Convention extends to the documents themselves, even if the person that makes the request does not necessarily have a right to obtain the documents he asks in a paper form (since the same document can be in various forms).

The new 2003 Directive, also mentions<sup>207</sup> this requirement of access to documents rather than the information itself. However there can be a possible confusion in this area. The Directive instead of clearly speaking about 'documents' containing the information requested as the Convention, merely refers to 'copies' of the information requested. In view of the clear intention of the Aarhus Convention, the usage of the word 'copies' in the Directive should not be taken as referring to a paper format in which the requested information can be disclosed, but to the actual copies of the documents containing the requested information, even if these documents are not in paper form.

This issue also applies in the United-Kingdom, where both the 1992 regulations and the present Freedom of Information Act 2000, are not about a right to obtain documents themselves, but to information contained in them.

Concerning the 1992 Regulations, it is not clear at all whether they include the right to access documents, or only extend to information. In a 1996 report by the House of Lord's Select Committee on the application of the regulations, this issue was picked up, and the Committee recommended clarification on the issue of whether access to information includes the right of access to documents.<sup>208</sup>

The government's response to this question was that the Regulations and the Code of Practice on access to information made it clear that there was no commitment to make documents

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<sup>205</sup> *Stec et al.* above n. 97, at p. 54.

<sup>206</sup> At art. 4 par. 1: public authorities have to provide information '...including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information ...'

<sup>207</sup> At art. 4: 'Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless ...'

<sup>208</sup> House of Lords Select Committee on the European Communities: Freedom of Access to Information on the Environment (with Evidence), 1996-97, HL Paper 9, at 6.

available as opposed to information in response to requests for information.<sup>209</sup> This seems to be the approach implicitly adopted by the Court of Appeal in the case of *London Borough of Tower Hamlets ex parte Tilly*.<sup>210</sup> This case concerned a request to disclose under the 1992 regulations of a report from the South End Institute of Public Health of a study on high volatile organic compounds found in the air in a specific area. This report was incorporated in a second report produced by the London Borough of Tower Hamlets. The Council after judicial proceedings had commenced, disclosed the second report, which it claimed contained all of the information found in the initial report, in addition to further information. The claimant, however, insisted on having the initial report disclosed. The Court of Appeal refused to grant leave to move for judicial review (as previously refused in the High Court) relying on the fact that the applicant had got the report she was asking for and that there was no evidence suggesting that the Council had any other report in their possession which was at variance with the report that had been produced. This reasoning, even if not explicit, suggests that since an applicant has got all of the information contained in a document he asks, he is not entitled to see the **initial** document in which that information was contained. So, the Court of Appeal seems to adopt the view that the 1992 regulations recognise a right to access information rather than to the documents themselves. The problem with this approach is that there is no guarantee as to whether all of the information present in the initially requested document has been disclosed. The new Regulations seem to address this problem through criminal sanctions, though they do not solve the difficulty of finding out whether information has been withheld.

The new 2004 regulations are evasive on this issue and do not provide a clear answer, but merely mention that information should be provided in the form requested if it is 'reasonable',<sup>211</sup> thus making it possible to provide summaries or extracts of documents when deemed unreasonable to do otherwise. It is thus probable, that this could lead to the recognition of a right to access information rather than documents themselves, especially since this was also the case under the previous regulations and the FOIA. The FOIA provides at s. 11 that public authorities can disclose requested information in a different form than the one requested if this is reasonable in the circumstances and if disclosure in the requested form is not reasonably practicable. One of the acceptable forms for communication is digests or summaries of the information. Thus, summaries or digests are acceptable when this is reasonable, and this indicates that the FOIA is not about a right to access documents but about a right to obtain information.

In conclusion, if it is clear in Aarhus that there is a right of access to the actual documents and not just the information contained in them, it seems that this requirement is not expressly and unambiguously transposed in EC law nor in the new Regulations. This, if combined with the fact

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<sup>209</sup> Government Response to the House of Lords Select Committee Report on Freedom of Access to Information on the Environment, Feb. 1997, at par. 18. Available from <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldselect/ldecom/069xii/ec1233.htm>

<sup>210</sup> [1996] Env. L.R. D23, [1996] 6(6) PELB 45.

<sup>211</sup> Reg. 6.

that there isn't a right of access to documents themselves neither in the FOIA nor in the 1992 regulations as applied in the *Tilly* case, might mean that the requirement of accessing documents as well as information won't be upheld in a legal challenge because of the vague provisions of the new Directive and Regulations. However, the English courts ought to interpret the Regulations in the light of both Aarhus and the Directive and so the courts ought to also allow access to documents containing the information requested.

**iv) Environmental information *ratione loci*: information held by a public authority.**

When it has been established that the requested information is environmental, an important issue is where is the information being held and by whom. A logical answer to this is that since environmental information is to be provided by public authorities, the requested information has to be in the possession of the public body to which a request is made. This in turn raises the issue of information held on behalf of a public body by another person and on information held by a public authority but not produced by it. These issues are somewhat important since public bodies do not always keep physical possession of their records.<sup>212</sup> This is especially true concerning computer records, as some private companies provide secure off-site storage of computerised disks for backup purposes. In England, this is also important since some information can be passed for safekeeping to the National Archives (formerly the Public Record Office) and until it is released for general inspection, the ownership remains with the providing body.<sup>213</sup>

First it should be noted that the Aarhus Convention does not explicitly address any of these issues, thus leaving it for the transposing legislators to provide. Only par. 3 of art. 4 provides that requests might be refused when the information is not held by the public authority. This if analysed *a contrario*, would seem to indicate that when a public authority holds information, then there is a duty to provide it. However, there is no indication of when information is deemed to be held by a public authority and if this includes information merely received by it and not produced by that body. This was also the case under the 1990 Directive that spoke about 'available' data, without defining it.<sup>214</sup> This term was transposed in the 1992 Regulations as information in an 'accessible form'.<sup>215</sup> This was interpreted by the Government as any information held by a body whether or not it was obtained as a result of that body's environmental responsibilities and located 'within the

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<sup>212</sup> Stec et al, above n. 97, at p. 56.

<sup>213</sup> See the Guidance, below n. 269, at par. 15.

<sup>214</sup> At art. 2(a).

<sup>215</sup> At reg. 2(1)(b).

body's buildings or elsewhere'.<sup>216</sup> This interpretation by the Government, has no binding effect and the provisions do not expressly address this issue.

The new Directive is on the contrary, very precise and indicates that information held by a public authority shall be defined as information either in its possession or physically being held by a natural or legal person on their behalf and which has been produced or received by that authority.<sup>217</sup> These provisions have now been transposed in English law, through the new 2004 Regulations.<sup>218</sup>

#### **v) Accuracy of information.**

A further issue that arises, is whether information can be withheld on the basis of its accuracy. Such a criterion, does not appear neither expressly nor impliedly in any of the legal instruments that deal with the general right of accessing environmental information examined herein. Consequently, one could expect any information held by public authorities to be available regardless of its accuracy, since that would be the only interpretation that would not restrict access, in conformity with a purposive approach.<sup>219</sup> This is the approach impliedly taken by the Government in its Guidance on the application of the 1992 Regulations: '*Bodies are advised to consider the accuracy of any information they hold [...] In all cases validation could be costly. For these and other reasons, bodies would be well advised to protect themselves by issuing a disclaimer where appropriate about the accuracy of information that they release to the public and its source*'.<sup>220</sup> It is clear from this phrase, that if some information is deemed inaccurate, authorities are not to withhold it, but rather to issue a warning to the applicant.

However, this was not the approach taken by Eady J. in *Maile v. Wigan Metropolitan Borough Council*.<sup>221</sup> This High Court case, concerned a challenge under the 1992 Regulations of the refusal by a local authority to disclose an incomplete list of potentially contaminated sites that could in some respects be misleading to the public and which could cause unnecessary alarm and despondency among the local citizens and landowners. The judge mentioned as *obiter dicta*<sup>222</sup> that '*The regulations are concerned with the availability of information (and I emphasise that word)*

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<sup>216</sup> See Guidance, below n. 269, at par. 15.

<sup>217</sup> Art. 2 par. 3 and 4.

<sup>218</sup> At reg. 3(1) and 3(2).

<sup>219</sup> Since the Environmental Information Regulations stem from an EC Directive, they have to be construed using a purposive approach. See for an example concerning an Act of Parliament the case of *Campbell v Mirror Group Newspapers* [2002] EWCA Civ 1373 at par. 97, where it was stated that since the Data Protection Act 1998 was based on an EC directive, the English courts had to adopt a purposive approach to construction.

<sup>220</sup> See the Guidance, below n. 269, at par. 21.

<sup>221</sup> [2001] JPL 193. The case and its facts are discussed elsewhere in full.

<sup>222</sup> *Ibid*, at par. 8.

*and not speculation or preliminary thoughts based on limited research*'.<sup>223</sup> Even if this is not a binding statement, it expresses a certain interpretation of the 1992 Regulations, which seems to contradict the purpose and the clear word of the Directive and the Government's analysis of the Regulations. All in all, it can be contended this statement is simply erroneous.<sup>224</sup>

Even if information has to be disclosed regardless of its accuracy, the 2003 Directive does contain an innovative provision dealing with the quality of environmental information. Article 8 of the Directive provides that member states must ensure 'so far as within their power' that information compiled by them or on their behalf is up to date, accurate and comparable.<sup>225</sup> To enable the public to verify that, public authorities must also disclose on request information on the measurement procedures, including methods of analysis, sampling, and pre-treatment of samples, used in compiling environmental information. First, it should be noted that this quality requirement for environmental information does not apply to information not compiled by member states (or on their behalf) and thus does not apply to information compiled by private or non-governmental bodies,<sup>226</sup> even if held by authorities that are under a duty to provide it to the public upon request. This requirement seems only to apply to member states themselves, thus only public authorities *stricto sensu* as defined before. Second, the exact scope of this requirement is unclear since it is only addressed to member states and does not seem to be formulated in binding terms. It can thus be contended that it has no direct effect.<sup>227</sup>

The new 2004 Regulations, seem to correctly transpose this requirement by providing in reg. 5(4) that when the information made available is compiled by the public authority it shall be up to date, accurate and comparable, but only "so far as the public authority reasonably believes". Also, reg. 5(5) provides that as information on releases into the environment are concerned, if the applicant requests it, it has to indicate, if this is possible, of the place where information can be found on the measurement procedures, including methods of analysis, sampling, and pre-treatment

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<sup>223</sup> As we shall examine further-on, the Court ruled that information did not have to be communicated since it was incomplete information. This statement, though, seems to refer to the accuracy of the information regardless of it being in the course of completion or not.

<sup>224</sup> As Bakkenist indicates 'Arguments that the public will misinterpret data causing unwarranted alarm and ill-founded "remedial" actions are not accepted as an excuse for withholding detailed and technical data, especially as environmental and consumer organisations increasingly employ specialists able to interpret such data. In general it may be expected that abuse of information in order to cause alarm is actually less possible if actual data on risk is available and explained', see below n. 311, at p. 83.

<sup>225</sup> At par. 1 of art. 8: 'Member States shall, so far as is within their power, ensure that any information that is compiled by them or on their behalf is up to date, accurate and comparable'.

<sup>226</sup> As the European Commission indicated when refusing amendments by the European Parliament intended to extend this requirement to all available information: '*It is not up to the public authority to guarantee that the content of the information is of a good quality when the information originates from other sources than from the public authority itself*'. See the Opinion of the Commission pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council on public access to environmental information amending the proposal of the Commission pursuant to Article 250 (2) of the EC Treaty, COM/2002/0498 final, 5/9/2002. Available from <http://europa.eu.int>

<sup>227</sup> And thus the only competent authority to bring a legal action against an incorrect transposition of this requirement would be through the EC Commission. See Horspool, *op. cit.*

of samples, used in compiling the information, or refer the applicant to the standardised procedures used.

**vi) Environmental information *ratione temporis* – Historical records and transferred records**

An interesting issue that should be briefly examined is whether the Directive and the Regulations have retroactive effect. Is information that came into the possession of public authorities before the entering into force of the Regulations accessible? A possible *rationale* for such information not being accessible would be that information given to public authorities in belief it would never be made public, should remain confidential, even if not covered by one of the exemptions.<sup>228</sup> However, since such an interpretation would certainly undermine the purpose of access to environmental information, what is accessible data should be interpreted in conformity with its literal meaning, thus including any information regardless of its date of acquisition.

This leads to the question of whether there is a time-limit for environmental information to be accessible? Such time-limits can either concern the future or the past. Concerning the future, as we shall examine in more detail further on, there is no right to access and therefore ask for information that has not yet been created, since there is an exemption relating to materials in the course of completion. If materials not yet completed are not to be disclosed, then *a fortiori* materials whose creation process has not even started are not to be disclosed either. In any case, such materials would be inexistent at the time of the request and could not be considered as environmental information either way.

As a consequence of the above, the environmental information regime does not allow a request requiring the periodic and regular provision of information to be honoured, as when one subscribes to a magazine for it to be sent periodically in the future.

Concerning the past, the question that arises is whether very old archives are accessible. Since neither Aarhus nor the Directive provide for such a limitation, it can be safely concluded that even if materials have been transferred in historical archives, this does not affect the rights of individuals to access them.

A further question that arises is under which statutory provisions is environmental information present in such archives accessible. Is it accessible under the regulations, or under the specific provisions governing and limiting access to such archives (e.g. the Public Records Act 1958)? Since the Environmental Information Regulations stem from EC law, this indicates that the Regulations override less liberal (more restrictive) provisions of such other regime governing access to information. This means that the Environmental Information Regulations, in conformity

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<sup>228</sup> See Bakkenist, below n. 311, at p. 50.



with the fact that the Environmental Information Directive is a minimum threshold for member-states to achieve,<sup>229</sup> cannot supersede more liberal provisions even if it is an EC law instrument.

In any case, the new 2004 Regulations provide at reg. 17 that they also apply to archived historical records, but that the bodies that are in charge of such records have to be involved in the decision-making process. To this end, reg. 17(1) mentions that when a request relates to information contained in a historical record and the public authority concerned considers the public interest test might favour a refusal of disclosure, then it cannot accept or refuse to disclose it without consulting the Lord Chancellor, if it is a public record within the meaning of the Public Records Act 1958, or the appropriate Northern Ireland Minister, if it is a public record to which the Public Records Act (Northern Ireland) 1923 applies. However, the public body concerned seems to be free not to follow the result of this consultation, but this will be rare in practice. The definition of a "historical record" can be found in s. 67(1) of the FOIA 2000 and is any record that is more than 30 years old.

Sometimes, some records are transferred to the National Archives for safekeeping before they become historical records. These records are referred as "transferred public records" by s. 15(1) of the FOIA 2000. Since the ownership of these record remains with the providing body, reg. 17(2) provides that the appropriate records-keeping authority shall consult the responsible authority on whether there might be an exception to disclosure of that information under regulation. Reg. 17(3) and 17(4) provide that it is for the authority who owns the information to make a determination and apply the public interest test, but that the decision on whether disclosure should take place or not, cannot be reached without consulting the Lord Chancellor, if it is a public record within the meaning of the Public Records Act 1958, or the appropriate Northern Ireland Minister, if it is a public record to which the Public Records Act (Northern Ireland) 1923 applies. This is logical, since it is for the public body who owns the information to make the final decision on disclosure and apply the public interest test.<sup>230</sup>

However, this solution seems to be unnecessarily complex and time-consuming, especially when transferred records are concerned. For instance, if one wants to get a copy of a record not older than 30 years originally held by DEFRA but since then transferred to the National Archives, then the request has to be addressed in the first place to the National Archives. If this record has not been previously designated by DEFRA as being freely accessible under the Environmental Information Regulations, then the National Archives cannot release the record, but have to consult the responsible authority DEFRA. Then DEFRA has to make a determination by applying the public interest test, but before doing so, they have to consult the Lord Chancellor! After all that,

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<sup>229</sup> This stems from paragraph 24 of the preamble of the 2003 Directive, which mentions that 'The provisions of this Directive shall not affect the right of a Member State to maintain or introduce measures providing for broader access to information than required by this Directive'.

<sup>230</sup> For the sake of completeness, it should be noted that if the Information Commissioner issues a decision in relation to transferred records, the public body that can appeal against this decision is not the records authority, but the responsible authority that owns this information and is responsible for deciding to grant access or not. See reg. 18(6)(f).

DEFRA has to communicate its determination back to the National Archives, which then has to apply that determination and release the record or inform the applicant of the refusal. All this seems to be very time consuming and this is why no specific time-limits are set for these procedures. Reg. 17(3)(b) only mentions that “*the responsible authority shall communicate its determination to the appropriate records authority within such time as is reasonable in all the circumstances*”. This seems to be an incorrect transposition of the 2003 Directive, because the time-limits mentioned in the Directive are not flexible and cannot be subject to the “reasonableness” of the circumstances and have to be abided by in any case without exceptions. However, one could argue that it is implicit that it is the time-limit of 20 days provided by the regulations (extendable to 40 days for complex or voluminous requests) that has to be applied. Nevertheless, such an interpretation seems to be at odds with reg. 17(3)(b) which provides for a time-limit based on what is “reasonable”. But in any case, it seems unlikely that all these bureaucratic procedures could be finished in 20 or even 40 days, especially if the request is complex or concerns voluminous amounts of information.

It could also be contended that these provisions on transferred records are not compatible with the 2003 Directive, since the duty to provide environmental information applies to any information a public body holds, even if it holds it on behalf of another person. Thus, in regards of EC law it is the records holder who is ultimately responsible to correctly apply the Directive, something that the 2004 Regulations do not acknowledge for transferred records, since they grant the power to provide access or not to the original owner of the record.

#### **vii) Non-existent information.**

Lastly, it should be examined what happens when requested information is non-existent because either it has been lost (misplaced etc) or has been destroyed. This might sound like an oxymoron, since it is impossible to provide what does not exist, but one could think that public bodies have a duty to recreate destroyed or lost information and a duty of archiving information for future reference. However, since the right to information only applies to information that is held or available, this indicates that there is no right to access non-existent information, since it is simply not held any more, neither by or on behalf of the public authority. This is also the approach taken by the Government in its Guidance on the application of the 1992 Regulations, where it is mentioned that the right to access environmental information does not extend to information destroyed in accordance with established office procedures and does not extend to non-existent information that could be only created by manipulating existing information.<sup>231</sup>

However, destroying records could be a way subversively to circumvent the requirements of the freedom of information regime. On the other hand, legal provisions restricting the destruction of records might result in huge storage and archiving costs, especially since now there

is also digital data to conserve, which requires special techniques. Bakkenist,<sup>232</sup> would welcome a revision of public authorities' procedures on destruction of documents containing environmental information and long set times for maintaining data.

The new Regulations partially address this issue by creating the offence of altering records with intention to prevent entitled disclosure (examined in detail below). This offence is only committed if a request for information has been made to the public authority and so as to prevent disclosure, records etc. are destroyed or altered. This indicates that from the moment a request has been made, public authorities in a strict sense (and only they since this offence does not apply to private individuals) have a duty to disclose whatever has not been yet destroyed and thus have a duty to keep it till it is disclosed. This approach seems to be a balanced one, taking both into consideration the legitimate expectations of the public to access existing information at the time of their request, and the costs for public authorities of having to perpetually or for very long periods of time to archive their data sets. However, there seems to be a loophole which would allow public authorities to destroy information in advance of any request. The FOIA 2000 tries to address this issue by providing in s. 46 that the Lord Chancellor is to issue a code of practice setting out practices which he considers public authorities and other authorities whose records are subject to the Public Records Act 1958 should follow in relation to the keeping, management and destruction of their records. In doing so, he is to have regard to the public interest in public access to such records. Indeed, the Lord Chancellor's Code of Practice on Record Management indicates that the destruction of records should be delayed if it is known to be the subject of a request for information, until either disclosure has taken place or all possible Appeal procedures have been exhausted.<sup>233</sup>

#### **b) The necessity of a request – active dissemination of environmental information.**

As we have seen, the Aarhus Convention, the Environmental Information Directives and the implementing regulations all provide for a mechanism under which public authorities owe a

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<sup>231</sup> See the Guidance, below n. 269, at par. 15.

<sup>232</sup> See Bakkenist, below n. 311, at p. 51.

<sup>233</sup> The Lord Chancellor's Code of Practice on the Management of Records, Issued under section 46 of the Freedom of Information Act 2000 in November 2002, was brought into force by the Freedom of Information Act 2000 (Commencement No. 2) Order 2002 (SI 2002/2812) and is available at <http://www.dca.gov.uk/foi/codesprac.htm>

Also, the Government in the Explanatory Notes to the FOIA 2000 indicates at par. 159 that 'The requirement to have regard to the public interest in access to records reflects the intention that the code will establish standards of good practice in relation to record-keeping. Good practice would increase the efficiency with which information can be located and retrieved by authorities in response to requests for information, and therefore increase the amount of information which will be available under Part I of the Act consistent with the imposition of cost limits'. It should be kept in mind that Codes of Practice do not legally bind as such public authorities.

duty to citizens to provide information when requested to do so. This duty is also a right for anyone to receive such information, as long as it has been requested.

The question that arises is whether this right to obtain environmental information can be relied upon under Aarhus and the Directive, even when there has been no request made. Of course, as we examine elsewhere, there is a duty under the ECHR for public authorities to provide environmental information *motu proprio* in some cases.

The case under the old Directive and the implementing 1992 regulations is simple. Although, article 7 of Directive 90/313 provides that member states shall take all necessary steps to provide “general information” on the state of the environment through means such as periodic publication of reports, any other information is accessible only if previous requests are made. Also, this requirement of article 7 does not cover active dissemination of information when health risks are involved, neither does it seem to be of direct effect since it is clearly directed towards states only and not towards individuals. Moreover, the transposing Environmental Information regulations 1992 do not explicitly transpose this requirement. They do not contain any provisions creating any obligations for public authorities to disseminate information. Consequently, it seems clear that under the 1992 regulations there is no right to access information unless a specific request is made to a public authority. This has been confirmed in *R. v. The Secretary of State for the Environment Transport and Regions Ex p. Anthony Marson*,<sup>234</sup> in which Jowitt J. blatantly ruled that “*It simply does not lie in the mouth of the applicant to complain of a failure to disclose that which he was entitled to but did not ask for.*”

The situation seems to be in theory different under the Aarhus Convention and the new Directive. Article 5 of the Aarhus Convention, deals with the active access to information, thus disclosure of information without a request having been made. This article requires states to keep and update such information relevant to their activities. Also, states shall ensure that there exists a mandatory system, which would monitor and disperse among public authorities information on activities affecting the environment. This could be achieved by either creating bodies like the Environment Agency which monitor the state of the environment, or through legislation requiring companies to monitor and report their polluting and potentially dangerous activities, as already in place in the United Kingdom.<sup>235</sup> Moreover, public authorities have to inform the public in the event of any imminent threat to human health or the environment. In such a case, the information that public authorities must release includes anything that could enable the public to take measures to prevent or lessen harm arising from the threat. There already exist more detailed legal instruments that provide for such emergency information dissemination in cases of major industrial accidents

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<sup>234</sup> 23 March 1998, CO/911/98 (unreported application for leave, available from <http://www.casetrack.com>).

<sup>235</sup> See generally on these points the comprehensive book by David Woolley et al., *Environmental Law*, Oxford University Press, Oxford 2000, or any other textbook on Environmental law cited in the Bibliography section.

both at EC and at international level,<sup>236</sup> thus this provision seems to generalise the emergency information requirement to any accident.

In addition to these requirements, public authorities have to ascertain that the public is aware of the information they possess and under what conditions environmental information may be obtained. Provisions on access to information have to be transparent and effective. The Convention provides a list of practical measures for achieving the public is informed of its right to access environmental information upon request: creating public lists, registers or files, establishing and maintaining information points, and requiring officials to support the public in its searches.<sup>237</sup> States are also asked to support the dissemination of environmental information through electronic databases through the internet, by disseminating in particular reports on the state of environment, texts of relevant legislation, policies, programs, plans and performance indicators of public bodies relating to the environment. In addition, each party is asked to progressively take steps to establish a coherent nation-wide system of pollution inventories or registers on a structured computerised and publicly accessible database, completed through standardised reporting. This requirement is very vague, though states can adhere to the facultative protocol to the Aarhus Convention under which companies will be required to publicly disclose information on their output of pollutants and this information will be placed on a register.<sup>238</sup>

In general, it can be concluded that article 5 of the Aarhus Convention requires parties to collect and disseminate environmental information, clarifying in detail what information shall be collected and disseminated, and lists methods through which information shall be collected or disseminated. However, it is drafted in clearly imprecise terms leaving to states the freedom to choose between the time and manner of implementing it and thus other binding legal instruments are needed.

It is article 7 of the 2003 Directive that transposes the above-mentioned dissemination requirement of the Aarhus Convention. This article, similarly to Aarhus, contains a non-exhaustive list of the kind of environmental information which should as a minimum be disseminated to the public throughout the Community by member-states.<sup>239</sup> Also, it is required that public authorities

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<sup>236</sup> In the EC there are the Seveso Directives of the European Council on the major-accident hazards of certain industrial activities and major-accident hazards involving dangerous substances, see above n. 235. At international level there is amongst many others the 1992 UN/ECE Convention on the Transboundary Effects of Industrial Accidents, see Philippe Sands, *Principles of international environmental law*, vol. 1, Manchester University Press 1995, at Ch. 16: Environmental Information.

<sup>237</sup> Information about how information can be accessed is referred to in some works under the term meta-information. See e.g. Stec *et al.*, above n. 97, at p. 72.

<sup>238</sup> This Protocol on pollutant release and transfer registers to the Aarhus convention on access to information, public participation in decision-making and access to justice in environmental matters, was adopted in May 2003 in Kiev at the Fifth Ministerial Conference 'Environment for Europe'. The legal basis for the adoption of this piece of "secondary international legislation" is article 5, paragraph 9, and article 10, paragraph 2 of the Aarhus Convention. The Protocol, which has been signed by 36 States and the European Community, concerns the establishment and public access to nationwide pollutant release and transfer registers, which are defined as inventories of pollution from industrial sites and other sources. See for more details <http://www.unece.org/env/pp/prtr.htm>

<sup>239</sup> Art. 7 par. 2(2) of the 2003/4 Directive provides that: 'The information to be made available and disseminated shall be updated as appropriate and shall include at least:

have to 'take the necessary measures' to maintain environmental information, especially of the kinds listed, in forms or formats that are readily reproducible and accessible by computer telecommunication networks such as the Internet. However, there is a clear exception to this requirement: the information that has to be made available by electronic means need not include information collected before the entry into force of the 2003 Directive unless it is already available in electronic form.<sup>240</sup> The rest of the detailed practical arrangements of how information is effectively made available and disseminated through the internet, is left up to the Member states. Public authorities are also required to disseminate, immediately and without any delay, all information held by them which could enable people likely to be affected by an imminent threat to human health or to the environment to take measures to prevent or mitigate harm arising from the threat. All these dissemination obligations are, however, subject to the same exceptions as apply to requests for information.<sup>241</sup>

These Directive requirements, do not seem to be precise enough so as to be of direct effect, and thus cannot be relied upon by individuals seeking access. However, the list of what has to be disseminated is important since it can be used as an indication of what is deemed to be environmental information under the Directive. The only binding effect of this article seems to be that member states are under a duty to disseminate via the internet the minimum elements that have to be disseminated under this article and mentioned above. This dissemination has to take place by the date limit for implementation of this Directive, which is set by article 10 at the 14<sup>th</sup> of February 2005. There is also a requirement under art. 8(1) that all such information which is compiled by public authorities, has to be as far as possible up to date, accurate and comparable.

As already mentioned, these provisions do not seem to create any right for individuals and so have no direct effect. As a consequence, the only way through which a breach of these requirements could be enforced, would be through the bringing of a procedure in front of the ECJ under articles 226 or 227 of the EC treaty for failure of transposition of the above-mentioned

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- a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;
  - b) policies, plans and programmes relating to the environment;
  - c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;
  - d) the reports on the state of the environment referred to in paragraph 3;
  - e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;
  - f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;
  - g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3'.

<sup>240</sup> As provided by art. 7 par. 1. The 2003 Directive entered into force according to its art. 12 on the day of its publication in the OJ of the EC, which was 14/2/2003.

<sup>241</sup> Since according to par. 5 of art. 7 of the 2003 Directive 'The exceptions in Article 4(1) and (2) may apply in relation to the duties imposed by this Article'. This limitation is laid in similar terms by art. 5(10) of the Aarhus Convention.

provisions.<sup>242</sup> However, apart from the dissemination of the information present in the above-mentioned list, there does not seem to be any other obligation sufficiently precise so as to be legally enforceable through this way. In any case, this list is very vague, since even if it mentions what kinds of information has to be disseminated, it does not mention the quantity of such information, thus reluctant member-states could simply disseminate limited amounts of each kind of information listed in the Directive (but up to date, accurate and comparable), in order to escape a finding of non-compliance by the ECJ.

It is reg. 4 of the 2004 Regulations that transposes these EC requirements. This regulation repeats with a different wording article 7(1) of the 2003 Directive and mentions that a public authority shall in respect of environmental information that it holds progressively make the information available to the public by electronic means which are easily accessible and take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information. However, it is provided that the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1<sup>st</sup> January 2005 in non-electronic form. This is in clear breach of the 2003 Directive in which this date is the date of 'entry into force of this Directive'<sup>243</sup>, which is according to article 12 of the Directive the date of its the publication in the Official Journal, which is 14/2/2003. The regulations also mention that the information covered by this duty to disseminate are all the types of information mentioned in article 7(2) of the 2003 Directive to which reg. 7(4) expressly refers, in addition to facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals. Apart from this last type of information, the UK government did not want to go any further than sticking to the Directive's requirements and thus missed an opportunity to expand this dissemination duty. This would have been useful, since the more information actively disseminated, the fewer resources public authorities have to allocate to respond to requests.<sup>244</sup> But the advantage of the current approach, is that the 2004 Regulations do not go any further than the dissemination duty contained in the FOIA 2000 (at sections 19 to 20) and concerning the publication schemes that have to be maintained by authorities caught by the Act. So, public authorities that already comply with these FOIA requirements, automatically also comply with the dissemination requirements of the Regulations.<sup>245</sup> Thus, this duty will be new only for bodies not subject to the FOIA, but only subject to the Regulations.

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<sup>242</sup> On the details of this procedure, which can be initiated by either the Commission or another member-state, see Horspool, *op. cit.*

<sup>243</sup> Art. 7 par. 1.

<sup>244</sup> See on this point, the Draft Governmental Guidance on the 2004 Environmental Information Regulations at Chapter 5 (as of 24 July 2004), <http://www.defra.gov.uk/corporate/consult/envinfo/index.htm>

<sup>245</sup> *Ibid.* at Ch. 5.3. It should be noted the publication scheme provisions of the FOIA have been brought into force by the Freedom of Information Act 2000 (Commencement No. 2) Order 2002 (SI 2002/2812) and have been extended by the Freedom of Information Act 2000 (Commencement No. 3) Order 2003 (SI 2003/2603).

In conclusion it can be said that the **right** to receive environmental information without making a prior request (active access to information) is still at an embryonic stage, since the relevant provisions of the 2003 Directive have no direct effect and the 2004 Regulations do not go very far.

In any case, it should be noted that the duty to actively disseminate environmental information is very limited, since nothing in the 2003 Directive or the 2004 Regulations requires public bodies to collect data or otherwise create information of any kind. However, this aspect of voluntary reporting will inevitably become of great importance in the future, since whenever some information has already been disseminated publicly, the right to access it upon request does not arise any more. Consequently, in theory, it could be suggested that dissemination of environmental information would render the right to access it upon request obsolete when all publicly held information would be remotely available through the internet. However, in practice, this would never happen, since there will always exist information covered by an exemption for which a balance test would be required on a case by case basis.

### **c) Which persons can request information?**

Can anybody request environmental information or can there be some restrictions based on grounds of nationality or any others? Can legal persons be excluded or possibly NGO's? This is important since a right to access environmental information only recognised to a limited category of persons would be less effective than a right recognised to anyone.

The Aarhus Convention provides, in its article 4, that the right to access information is recognised to any member of the public. The term "public" is defined in article 2 and includes any natural or legal persons. This means that any natural or artificial legal person can request access and that he cannot be discriminated on grounds of nationality. Such an interpretation is consistent with article 3, paragraph 9, which requires that for the application of the Convention no person shall be excluded on the grounds of nationality, domicile, citizenship, or for artificial legal persons, place of registered seat and centre of its activities. This is very liberal and the Convention does not stop here. It also mentions that associations, organisations or groups of natural or legal persons are also to be considered members of the public if this is the case under national legislation. This seems to cover the situation where these groups even though they have no legal personality (because if they had they would be considered as legal persons) are nevertheless considered as members of the public by some national legislation and are granted some rights contained in the Convention.<sup>246</sup> However, these groups can only be considered to be members of the public where the requirements established by national legislation are met. Thus these groups without legal personality can only exercise their rights in the particular legal systems where they are expressly

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<sup>246</sup> See on this point, *Stec et al.*, above n. 97, at p. 40.



allowed to do so.<sup>247</sup> This provision is important for Non-Governmental Organisations, as it allows them to access information regardless of them gaining legal personality or not<sup>248</sup> but it remains dependent on national law.

Both the new and the old environmental information Directive, expressly mention that the right to access environmental information is recognised both to natural and artificial legal persons.<sup>249</sup> The directives do not indicate which legal persons are covered, though this term should be interpreted in the light of the Aarhus convention, so as to include groups with no legal personality, on the terms discussed above.

The 1992 regulations provided that environmental information was to be made available to 'every person' requesting it.<sup>250</sup> The regulations did not expressly provide whether this term included artificial legal persons, though since the Directive did, it ought to have been interpreted that way. In any case, even if supposedly artificial legal persons were not included, as analysed in the case of *Stirrat Park Hogg v. Dumbarton District Council*,<sup>251</sup> since they can only exist through acts of other natural persons representing them, they can also indirectly benefit from the right of access granted to individuals, thus making this discussion of little practical significance. In any case, even if the new Regulations do not repeat the definition of an applicant as being any natural or legal person requesting environmental information found in the 2003 Directive, but only mention a reg. 2(1) that an applicant is 'the person who made the request', the definition of the 2003 Directive applies.

#### **d) From whom can information be requested?**

This issue is a fundamental one, since an environmental information regime to be effective needs as many bodies with environmental responsibilities as possible to owe a duty to provide environmental information. The issue is also especially important in Britain where in the recent past it was uncertain whether privatised utilities were covered by the Environmental Information

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<sup>247</sup> In British law, this would extend the right to clubs and other unincorporated associations. On these, see Sue Arrowsmith (ed.), *Encyclopaedia of Public and Private Partnerships*, London: Sweet & Maxwell, 1999.

<sup>248</sup> On the importance of the Aarhus Convention for NGOs, see Jonas Ebbesson, *Background Paper No. 5: Information, Participation and Access to Justice: the Model of the Aarhus Convention*, delivered at the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002 Geneva, available online at <http://www.unhchr.ch/environment/bp5.html>. See also Sean T. McAllister, "Human Rights And The Environment: The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters" 1998 *Colorado Journal of International Law and Policy*, 1998 Yearbook, 187.

<sup>249</sup> Directive 90/313/EEC provided at art. 3(1) that environmental information was to be made available to 'any natural or legal persons'. The Directive 2003/4/EC speaks about 'any applicant' in its article 3(1), but the word applicant is defined by article 2(5) as 'any natural or legal person requesting environmental information'.

<sup>250</sup> Reg. 3(1).

Regulations 1992.<sup>252</sup> In all of the regimes establishing a duty to provide environmental information, such a duty is limited to public authorities. This leads to the logical question as to what is a public authority and to why should only public and not all private bodies too, be under a statutory duty to provide environmental information.

### **i) Which persons are considered as public authorities?**

The obligation to provide environmental information on request applies to all public authorities, but some private bodies are also included for the application of the Directive and the implementing regulations. This distinction is similar to the one made under the FOIA 2000, though different in scope. Also, as we shall see bodies acting in a judicial or legislative capacity are excluded altogether, though this exclusion might be problematic.

#### **1) Public authorities *stricto sensu*.**

The whole system of access to environmental information can only be effective if it applies without exceptions to all bodies through which the State exercises its powers and duties, referred to as public authorities. So, first Directive 90/313 included all such bodies by defining them in a wide-ranging definition as ‘any public administration at national, regional or local level’.<sup>253</sup>

The same bodies are also covered by the more recent international instruments, even if they use more elaborate definitions. The Aarhus convention clearly covers all governmental and public administration authorities of whatever function and level.<sup>254</sup> The same bodies are also covered by the 2003 Directive in slightly different terms.<sup>255</sup> The term ‘public administrative functions’ which is used in the Convention and in the Directive, is not expressly defined in neither of these instruments but it is stated that it should be determined according to national law. Such a reference to national law is problematic since it might result in different transpositions of the Convention and promote basic differences in interpretation.<sup>256</sup> However, this also has the advantage of allowing some flexibility to States over some matters that cannot be dealt satisfactorily in an international convention due to the very different nature of each national legal system. However, there is a

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<sup>251</sup> (1996) SLT 1113. See the relevant chapters on Registers for a discussion of this case, which was about the Scottish planning registers.

<sup>252</sup> See on this point Richard Burnett-Hall, *Environmental Law*, Sweet & Maxwell, London 1995, page 918.

<sup>253</sup> At art. 2(b).

<sup>254</sup> Art. 2, par. 2(a) and 2(b): ‘“Public authority” means: (a) Government at national, regional and other level; (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;’

<sup>255</sup> At art. 2, par. 2(a) and 2(b) of the Directive, which are almost identical to art 2(a) and 2(b) of the Convention, the only difference being that the Directive also expressly includes in public administration bodies all ‘public advisory bodies’.

certain limit to this ability of national law to define what are public administrative functions, by making express references to specific duties, activities or services in the environmental field which have to be considered as such.

The old 1992 Regulations included all Ministers of the Crown, government departments, local authorities and other persons carrying out the functions of public administration at such levels but who have responsibilities relating to the environment.<sup>257</sup> The new 2004 Regulations similarly include all bodies carrying out functions of public administration, but without the limitation that these bodies must have responsibilities in relation to the environment.<sup>258</sup> Also they include, by reference to the FOIA 2000, all public authorities which are considered as such by s. 3(1) of that Act, with some minor differences, that mainly aim to exclude some limitations found in the FOIA, so as to make the definition wider in the Regulations.<sup>259</sup>

The definition used in the FOIA Act is narrower, as we shall see further on, than the one under the regulations. The Act designates as public authorities all authorities listed in Schedule 1 to the Act or are designated as such by an order of the Secretary of State, or are considered as 'publicly-owned companies'. More precisely, Schedule 1 to the 2000 Act using where appropriate generic descriptions, names the principal authorities in national and local government, together with the principal public authorities relating to the armed forces, national health service, education, the police and other public bodies and organisations. Bodies can be added to this list<sup>260</sup> through two categories of orders. First, section 4(1) of the Act gives power to the Secretary of State to make an order to add to Schedule 1 a reference to any body or the holder of any office which is not listed and which is established by the Crown or by an enactment or by subordinate legislation or by a Minister in his capacity as Minister or by a government department or by the National Assembly for Wales. Second, section 5 of the Act gives power to the Secretary of State to make an order, to add any person that appears to exercise functions of a public nature or is providing under a contract with a public authority any service whose provision is a function of that authority. Finally, considered as public authorities are all publicly-owned companies, as defined by section 6. These are all corporate bodies, either wholly owned by the Crown, or wholly owned by any public

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<sup>256</sup> See on this point, *Stec et al.*, above n. 97, at pp. 30-31.

<sup>257</sup> Reg. 2(1).

<sup>258</sup> At Reg. 2.

<sup>259</sup> From the application of the FOIA 2000 are excluded altogether the Special Forces, the Security Service, the Secret Intelligence Service, the Government Communications Headquarters, any unit or part of a unit which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in the exercise of its functions, the National Assembly for Wales, the Scottish Parliament, any part of the Scottish Administration, the Scottish Parliamentary Corporate Body, and any Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998). These exclusions can be found in s. 84, s. 80(2) and par. 6 of Sched. 1 to the FOIA 2000. These bodies are, however, caught by the 2004 Regulations, since although the definition found in reg. 2(1) makes reference to the definition found in the FOIA 2000, it explicitly mentions that these exclusions do not apply as far as the Regulations are concerned.

<sup>260</sup> Also, these two sections provide for the Lord Chancellor to remove public authorities from the list of Sched. 1, whenever they cease to fulfil the conditions set by the Act for them to be considered as such.

authority listed in Schedule 1<sup>261</sup> other than a government department or an authority which is listed only in relation to a particular kind of information.

## 2) Private bodies with public environmental responsibilities.

However, limiting the duty to provide information on the above-mentioned public bodies, would leave out a lot of private bodies exercising public administration functions, following the modern tendency of privatising and de-regulating public services<sup>262</sup> and would undermine the effectiveness of the right to access environmental information.

For this reason, the 1990 Directive provided that bodies with public responsibilities for the environment which were under the control of public authorities were to be treated for the purposes of the Directive in the same way as public authorities.<sup>263</sup> However, this was criticised as being a wide and unclear definition,<sup>264</sup> leading to possible misinterpretations by some private bodies so as to avoid having to provide information.

So, to avoid difficulties with the applicability of the Aarhus Convention to privatised utilities,<sup>265</sup> the Convention also specifically applies to any person (even natural legal persons) that has public responsibilities or functions, or provides public services, in relation to the environment and is under the control of the above-mentioned categories of *stricto sensu* public authorities.<sup>266</sup> This is a far-reaching category since it includes any entity either private or public, as long as it is controlled by the bodies mentioned before (which do not necessarily have to be public ones since they include both governmental bodies and private persons performing public administrative

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<sup>261</sup> Section 6(2) defines a company wholly owned by the Crown as a company having no members except: Ministers, government departments or companies wholly owned by the Crown or any person acting on their behalf and also defines a company wholly owned by a public authority other than a government department as having no members except: that public authority or companies owned by that public authority; or any other person acting on their behalf.

<sup>262</sup> See Patrick Birkinshaw, *Reforming the Secret State*, Open University Press, Milton Keynes: 1990, at p. 48.

<sup>263</sup> Art. 6.

<sup>264</sup> See between many others William Birtles, *The European Directive on Freedom of Access to Information on the Environment*, [1991] JPL 607, at p. 609.

<sup>265</sup> This has been especially true in Britain, where privatised water utilities had unsuccessfully contended in *Griffin v South West Water Services Ltd* [1995] IRLR 15 that they were not "emanations of the State" for the purposes of Directive 75/129 (the Collective Redundancies Directive). The court applying the criteria laid down by the ECJ in *Foster v British Gas* (C188/89) [1991] C.L.Y. 1672a, held that the privatised water utility was a "State authority" since it was required by legislation to carry out a public service, namely the supply of water and sewerage undertaking, it possessed "special powers" conferred by legislation and the legislative provisions and the conditions of its licence indicated that it performed its public service duties under the "control" of the State.

<sup>266</sup> Art.2 par. 2(c): '(c) 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 body or person falling within subparagraphs (a) or (b) above'.

functions) and it has a public function towards the environment. The 2003 Directive also uses exactly the same definition as Aarhus for these bodies.<sup>267</sup>

The 1992 Regulations included a provision<sup>268</sup> that all bodies with ‘public responsibilities for the environment’ being under the control of a public body as defined by the Regulations and analysed above, were covered. The term ‘control’ was left undefined, though the accompanying Guidance defined it as being ‘a relationship constituted by statute, rights, contracts or other means which either separately or jointly confer the possibility of directly or indirectly exercising a decisive influence on a body’.<sup>269</sup> This definition being in any case vague, the Government in its 1992 consultation paper on the proposed regulations included a long list of bodies thought of being covered by the Directive.<sup>270</sup> However, after the regulations were adopted, the accompanying Guidance rejected the idea of providing a list of covered authorities on the ground that “circumstances vary and change”, adding that “organisations will need to take a view themselves as to whether they fall into any of the above categories and that “in cases of dispute, it will be for the Courts to decide”.<sup>271</sup> This change of approach, however, has left it open for these bodies included in the first list to deny they are covered, thus creating much uncertainty, as we shall examine in detail below.

The new 2004 Regulations, also adopt a similar definition of any body, office holder, or person having public responsibilities or exercising functions of a public nature or providing public services, in relation to the environment and is under the control of a public person (as defined above). The difference between this definition and the one present in the 1992 regulations is that the 2004 regulations also expressly add as relevant bodies all persons which carry out functions of a public nature or provide public services in relation to the environment. This makes clear that public services run by private companies are now included (like electricity, gas and water utilities companies, which perform their duties subject to various specific statutory requirements and under the control of regulatory public bodies), even if they would also be under the 1992 regulations since such private bodies are controlled by public authorities.<sup>272</sup>

It is clear that the new regulations intend to solve much of the issues concerning which private bodies are covered, that had arisen under the 1992 regulations. However, they still remain vague on one issue: they do not define what are public responsibilities or functions of a public nature or public services. Therefore, this will have to be interpreted in view of the existing general

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<sup>267</sup> At art. 2(c).

<sup>268</sup> Reg. 2(3)(b).

<sup>269</sup> Department of Environment, Guidance on the Implementation of the Environmental Information Regulations 1992, par. 10. This text is a sort of a circular with no legally binding effect. Available from <http://www.defra.gov.uk/environment/pubaccess/guidance/index.htm>

<sup>270</sup> Department of Environment Consultation Paper, January 1992, annex D. This list has been reproduced in [1993] JPL 623-626.

<sup>271</sup> Guidance, par. 12.

<sup>272</sup> However, under the 1992 regulations, as we examine further on, such privatised utilities companies have firmly refused that they were covered.

principles of English administrative law, as laid down in cases such as *Foster v British Gas Plc*,<sup>273</sup> in which it was held that an emanation of the state could be defined as a body who had been made responsible, pursuant to a measure adopted by the state, for providing a public service that was under the control of the state and which exercised special powers for the purpose, beyond those which operated between individuals.

All in all, it is unambiguously clear that the new 2004 regulations are of a much wider scope than the old 1992 regulations<sup>274</sup> and also than the current Freedom of Information Act 2000, since they expressly include all private bodies performing public environmental responsibilities.

### 3) The issue of bodies acting in a legislative or judicial capacity

Starting from the 1990 Directive, bodies acting in a legislative or judicial capacity were specifically excluded from providing any environmental information.<sup>275</sup> This is also the case in the 2003 regulations which provide in reg. 3(b) that 'these Regulations shall not apply- (b) to any public authority acting in a judicial or legislative capacity'. It is clear from these wordings, that these bodies are only intended to be excluded when acting in their judicial or legislative capacity (and thus information held in this capacity is not to be disclosed) and not when they are acting in another capacity, such as an administrative one. An example of this distinction could be the House of Commons Library Department, which although is part of the House of Commons, a legislative body, is not acting in such a capacity, and therefore should disclose any environmental information it holds. This interpretation was the one adopted by Justice Jowitt in the *Marson* case,<sup>276</sup> where he considered that the term 'legislative function' found in the 1992 Regulations refers to those things done in relation to the preparation and enactment of legislation and not to any function carried out in pursuance of a power conferred by primary or secondary legislation. In his view, this interpretation was demonstrated by article 1(b) of the 1990 directive which, given a purposive construction, exempts from the scope of the directive information held by a public body acting in a legislative capacity, that is, in its capacity as a legislative body.

The Aarhus Convention, also expressly excludes all bodies or institutions acting in a judicial or legislative capacity. This exemption applies at any level, thus not only national courts or parliaments are subject to it but also regional parliaments and even local councils when exercising legislative functions. *Stec et al.* explain this exclusion by reference to the fundamentally different character of decision making of bodies acting either in a legislative capacity, where elected

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<sup>273</sup> See above n. 265. See also *Fidge v Governing Body of St Mary's Church of England (Aided) Junior School* [1997] 3 CMLR 630.

<sup>274</sup> This is consistent with the fact that the 2003 Directive is wider in scope than the 1990 one, when covered bodies are concerned.

<sup>275</sup> Art. 2(b) of the 1990 Directive.

<sup>276</sup> *R. v. The Secretary of State for the Environment Transport and Regions Ex p. Anthony Marson*, 23 March 1998, CO/911/98 (unreported application for leave).

representatives are more directly accountable to the public through elections, or in a judicial capacity, where tribunals must apply the law impartially without regard to public opinion.<sup>277</sup> We cannot see how this argument can explain this exclusion, since environmental information is not about accountability of elected officials to the public or impartial justice, but about environmental protection. In any case, access to environmental information can help support accountability. It can be contended that as long as legislative or judicial functions are not harmed by disclosure, then openness should prevail. Nothing seems to justify such a broad exemption, which is not even counterbalanced by a public-interest test as with the other sorts of exclusions.

The 2003 Directive, in conformity with all of the above, expressly provides that member-states may exclude from the definition of public persons, bodies 'when acting' in a judicial or legislative capacity.<sup>278</sup> However, the Directive also continues and adds that

If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

This seems to indicate that if at the date of adoption of this Directive,<sup>279</sup> some member-states have not provided for a review procedure within the meaning of article 6 (which speaks about both a judicial and administrative review procedure, as analysed further-on),<sup>280</sup> then member-states can altogether exclude these bodies even when not acting in a judicial or legislative capacity. This, for instance, could lead to administrative departments of judicial or legislative bodies being excluded from providing any environmental information, even if they do not perform any such functions. This however, seems to be a breach of the Aarhus Convention, which does not provide for such a blanket exception, and only exempts from the definition of public bodies, bodies acting in a judicial or legislative capacity. In any case, the conditions for the application of this provision would not have been fulfilled in England and Wales, since the Freedom of Information Act 2000 expressly provides for the existence of review procedures within the meaning of art. 6 of the 2003 Directive.

The effect of this specific provision in the UK seems to be academic, since as we have mentioned before, the 2004 Regulations expressly exempt bodies acting in a judicial or legislative capacity only when acting in such a capacity.<sup>281</sup> The 2004 Regulations also expressly exclude both Houses of Parliament in order to avoid an infringement of their privileges.<sup>282</sup> This provision aims to prevent a conflict between the constitutional privileges of the Houses of Parliament and the Environmental Information Regulations. However, it is doubtful whether this exception, not found in the 2003 Directive, is compatible with it, especially since the ECJ has indicated in the case of

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<sup>277</sup> See above n. 97 at page 34.

<sup>278</sup> Art. 2(2).

<sup>279</sup> This date is 14 February 2003, since according to art. 12 the directive shall enter into force on the day of its publication in the OJ.

<sup>280</sup> See below, and also Michael Purdue, Current Topics – The new European Directive on public access to environmental information, [2003] JPL 516.

<sup>281</sup> At Reg. 3(3)(a).

*Commission v France*<sup>283</sup> that member states cannot add to the list of exemptions. The fact that the privileges of Parliament are norms of a Constitutional nature in the UK, is insufficient to justify this limitation, since the ECJ has held that EC law is supreme even over national norms of a constitutional rank.<sup>284</sup>

However, this provision could be construed in conformity with ECJ case-law which seems to accept that judicial authorities could be totally excluded from the duty to provide information, provided they did not hold any environmental information. This seems to be possibly implied from the case of *Commission v Germany*,<sup>285</sup> which concerns the 1990 Directive. In this case, the Commission claimed that the German transposing legislation was incompatible with the Directive since courts, criminal prosecution authorities and disciplinary authorities were excluded from the definition of public authorities and this even in the exercise of administrative activities. The Commission submitted that a court or criminal prosecution authority might have information on the environment, in particular in the form of statistics, not necessarily obtained in the context of judicial activities. The counter-claim advanced by Germany was that its courts, criminal prosecution authorities and disciplinary authorities could not have responsibilities relating to the environment otherwise than in the context of their judicial activities. The Court noted that it was for the Commission to prove the existence of the alleged failure to fulfil obligations and that it could not rely on any presumption for that purpose. The ECJ rejected this ground of action on the basis that insufficient evidence had been provided to establish that such authorities had information on the environment obtained outside their judicial activities and therefore was falling within the scope of the Directive. This ruling seems to indicate that an exemption to exclude judicial authorities when acting both in a judicial or administrative capacity is acceptable, only if such authorities do not hold any environmental information in relation to their administrative activities. In any case, Krämer<sup>286</sup> has criticised this decision on the basis that courts do hold statistics relating to prosecutions and convictions for environmental offences, and this data can be evidence of how well environmental protection laws are enforced in practice. We can only agree with this view.

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<sup>282</sup> At Reg. 3(3)(b).

<sup>283</sup> Examined in detail further on.

<sup>284</sup> See the case of *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle Fur Getreide und Futtermittel*, (Case 11-70), [1970] ECR 1125, in which the ECJ stated that “the law stemming from the Treaty...cannot...be overridden by rules of national law....[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights [in]...the constitution of the State or the principles of a national constitutional structure.”

<sup>285</sup> Case C-217/97 *Commission v Germany*. For a summary of the case see [2000] Env Law 12(93) or [1999] Env LM 8.11(10).

<sup>286</sup> Ludwig L. Krämer, *Casebook on EC environmental law*, Oxford : Hart, 2002, at p. 141.



4) The issue of authorities denying being covered by the regulations and the problem of lists of relevant bodies<sup>287</sup>

The application of the 1992 regulations in practice has shown that a number of bodies have stated that they considered they did not fall within the Regulations' definition of a 'relevant person', and thus have refused they have a legal duty to provide any sort of information other than through gestures of good-willingness. Most surprisingly, as we shall see, some of these bodies had either been included in the 1992 Government's list of bodies thought being covered by the Directive,<sup>288</sup> or could be considered as bodies of the public sector. However, when faced with requests to disclose information, they, sometimes persistently, refused to accept they were covered by the regulations. These bodies can be put into two categories, bodies that formally belong to the public sector and bodies that formally belong to the private sector.

The first category of such bodies, are corporate bodies that are set up as private corporations, which are public limited companies in the following examples. The first of such bodies was British Nuclear Fuels Ltd (BNFL), a public limited company wholly owned by the UK government,<sup>289</sup> which considered that it did not have any 'public responsibilities for the environment'. This argument has been fully and successfully, in our view, proved as unsubstantiated by Frankel and Ecclestone.<sup>290</sup> We shall not re-examine herein all the arguments and counter-arguments, since the 2004 Regulations, by making an express reference to bodies caught by the FOIA in which publicly-owned companies are included, have therefore included nationalised industries like BNFL that are wholly owned by the government.

Alongside these bodies are included all the privatised water public limited companies that in the 1980s took over the sewerage and water supply functions of the former water authorities. Interestingly, as we examine elsewhere, these bodies have statutory responsibilities to provide information through the maintenance of statutory registers,<sup>291</sup> though they have considered themselves not to be caught by the regulations.<sup>292</sup> This was also the case for the former Railtrack plc.<sup>293</sup> The 2004 regulations seem to cover these companies (even though the 1992 ones were

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<sup>287</sup> This issue will not be dealt here in every detail, since it is a policy issue regarding primarily information sciences, though more details and empirical data can be found in Peter Roderick, United Kingdom, in *Access to Environmental Information in Europe*, ed. By Ralph E. Hallo, Kluwer Law, London: 1996, at pp. 261-268; also in Maurice Frankel and Andrew Ecclestone, *The Environmental Information Regulations and THORP*, published by the Campaign for Freedom of Information, London: 1993, also available at <http://www.cfoi.org.uk>

<sup>288</sup> See above n. 270.

<sup>289</sup> This is still the case according to BNFL's 2002 annual report, where it is stated (p. 28) that the unique shareholder is the Secretary of State of the Department of Trade and Industry. Available from <http://www.bnfl.co.uk>

<sup>290</sup> See M. Frankel and A. Ecclestone, above n. 287.

<sup>291</sup> See the relevant chapter on registers.

<sup>292</sup> On the relevant claims and counter-arguments see Roderick, below n. 313, at p. 266-267.

<sup>293</sup> Ibid. Today replaced by Network Rail, a company limited by guarantee.

covering them too)<sup>294</sup> since reg. 2(1) expressly includes persons carrying out functions of public administration.

The second category of such bodies, are public bodies that are related to the government and exist in order to assist its course of affairs by performing various public functions. These bodies are the Health and Safety Executive (HSE), the Radioactive Waste Management Advisory Committee (RWAC), the Crown Estate, the Ordnance Survey and British Coal. All these bodies have denied in the past being caught by the 1992 regulations, so as to be able to refuse to provide environmental information.<sup>295</sup> All these bodies are now caught under the new regulations. Some of them are covered because they are expressly included in the list provided for in Schedule 1 of the FOIA 2000, and others are caught as being persons carrying out functions of public administration or have public responsibilities or provide public services, in relation to the environment, under the control of another public body caught by the Regulations.<sup>296</sup>

These examples show one of the major difficulties of transposing Aarhus and the Environmental Information Directives in the British context of administrative law. These international legal instruments use general definitions so as to cover public authorities. Such definitions can be easily transposed in legal systems, like France, where there are already general definitions of public bodies and public services, however it is more difficult in the British public law context where such legal definitions do not exist. Thus in Britain, where no certain legal definitions exist and therefore public bodies appear in lists compiled by the Government,<sup>297</sup> such general definitions when transposed in national law as such, and not as legally binding lists (as for instance the list included in Sched. 1 to the FOIA) are problematic because they allow for some of these bodies to argue they are not covered by the regulations. This can lead to the result illustrated by the previous examples, in which bodies that are considered by the Government as relevant bodies,<sup>298</sup> consider themselves not to be bound by the regulations. The new regulations have tried to address this issue by referring to the list of bodies under the FOIA, and thus refer to a legally binding list of bodies. However, not all of the bodies with public responsibilities towards the environment are included there (notably privatised public services) and so, these practices of denying being covered by the regulations might still arise in the future.

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<sup>294</sup> Ibid.

<sup>295</sup> On all of these bodies, see Roderick, *op. cit.*

<sup>296</sup> More precisely, the HSE, the RWAC and British Coal Corporation, are cited as being relevant public authorities in Sched. 1 to the Freedom of Information Act 2000.

<sup>297</sup> For the latest publication of such lists, in which the Government indicates that: 'A public body is not part of a government department, but carries out its function to a greater or lesser extent at arm's length from central government. [...] The term "public body" is a general one which includes: Nationalised Industries, such as the British Waterways Board; Public Corporations, such as the BBC; NHS Bodies, which comprise NHS Trusts and Special Health Authorities; and Non-Departmental Public Bodies (NDPBs)', see Cabinet Office, *Public Bodies 2002*, The Stationary Office, London: 2003, at p. iv.

<sup>298</sup> By inclusion, for some of them, in the 1992 list of bodies subject to the regulations.

To remedy this Bakkenist would welcome a list of all relevant bodies covered by the regulations, either at UK or at EC level.<sup>299</sup> This would be an interesting and useful idea, which however would impose some inflexibility on the system, since this list would probably not be updated as quickly as developments are taking place in the public-private sector and could thus leave out bodies which temporarily exercise responsibilities for the environment, thus leading to confusion.<sup>300</sup> However, it should be noted that if such lists are not legally binding, they would probably not provide a final solution to the problem shown here, since it would still be open for public bodies (especially privatised ones) to argue they were not caught under the general definition of public bodies. On the other hand, providing in the regulations an extensive list of covered authorities, would present the danger of leaving out some bodies that only temporarily exercise public functions, such as some contractors providing public services for a short period of time on behalf of another public authority.

In any case, even if the 2004 regulations, which combine a binding list with a general definition, have these defaults, they provide an inexpensive and rapid mechanism through which claims by various authorities that they are not covered, could be assessed, without having to go to the courts. It should be noted that the UK government has again indicated in 2004 that there can be no list of such bodies.<sup>301</sup> There seems to be no other way round the problem except the present approach of mixing a general definition with lists of covered bodies.

## **ii) Why public authorities only?**

As we have seen, all of the general regimes on environmental information are applicable only to information held by public bodies or equivalent ones. The main question that arises is what can justify such a limitation? Why not provide that **any private person too** has to provide environmental information he holds and make any undue refusal a criminal offence? This is not

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<sup>299</sup> See Bakkenist, below n. 311, at p. 60. This is also the solution welcomed by *Stec et al.*, above n. 97, at p. 34. And also by the Campaign for Freedom of Information, in its Response to the Public Consultation on New draft Environmental Information Regulations (10 Oct. 02), accessible online from <http://www.cfoi.org.uk>

<sup>300</sup> The Government has clearly indicated in 1997 that there would be no list of authorities covered by the regulations: 'The Government remains reluctant to provide a non-exhaustive list for two main reasons. First, only those organisations which indisputably fall within the eligibility criteria given in the Directive could be included in such a list. Such a list would serve no useful purpose since those organisations likely to be on it already accept that they are covered by the Regulations. Second, the Government believes that organisations excluded from such a list would argue that their exclusion is an admission that they are not obviously covered by the Regulations. They might then decide to respond to requests for environmental information. On balance, the Government believes that more organisations are likely to provide access to environmental information in the absence of such a list than would be the case if such a list existed'. Above n. 209, at par. 8.

<sup>301</sup> See the Draft Guidance, above n. 244, at Ch. 2.6: "*There can be no comprehensive list of those bodies that are under the control of another body because such relations are dynamic and are prone to frequent change. This means that bodies may move out of or into the scope of these Regulations. Organisations will need to take a view as to whether they are a public authority covered by the Regulations.*".

something new, since a lot of particular statutory provisions concerning certain specific types of information, make compulsory the provision of information from any person that has it.<sup>302</sup> Usually information collected this way is made publicly available through registers compiled and maintained by public agencies. Why not bypass this stage and allow the public to access directly any environmental data? Indeed, many private companies, especially large multinational corporations, can be in possession of very significant environmental information. It seems logical that since the right to access environmental information exists in order to protect the environment, it would be even better for the environment if anyone holding such information was legally bound to provide it. Thus, a limitation to public bodies only, seems unjustified in environmental protection terms.

A possible explanation for such a limitation is the fact that the regime on environmental information was based on general freedom of information regimes, which are limited to public bodies only.<sup>303</sup> One of the main conceptual underpinnings of general freedom of information legislation is that the people should be entitled to access information held by public authorities, since the state is a creation of the people for the people and thus any information it holds is the people's. However, the right to access environmental information is based on a totally different idea: environmental protection. Thus the limitation to public bodies only can only be justified if it would better serve the environment, which does not seem to be the case. On the contrary, as we have seen, the Aarhus Convention extends to any private person if it performs public duties in relation with the environment and is controlled by a public entity. As contended by Wilsher: *"these institutions hold vast amounts of important information and make decisions which can be as significant as decisions taken by the traditional organs of 'state'. This can be seen to be particularly so in environmental matters, because so many private bodies have environmental responsibilities. Bringing these bodies within the framework of freedom of environmental information legislation is thus a key issue."*<sup>304</sup> In a similar way Woolf LJ has argued extra-judicially that judicial review proceedings should be extended to the actions of large corporations.<sup>305</sup> So, why not extend the access to environmental information regime, which already applies to some private bodies, to any private person? This could allow the public to directly access data only held by some

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<sup>302</sup> For instance various Acts of Parliament (such as the Environmental Protection Act 1990) oblige any private entity that makes discharges to air, water etc to provide such information to public authorities which place it on publicly available registers. See the relevant Chapter on registers.

<sup>303</sup> With the notable exception of South Africa's freedom of information legislation, which also creates an individual right of access to information held by any private person whenever the requested information is required for the exercise or protection of any rights. As private persons for the application of these provisions are considered all persons which are not public bodies, with the exception of natural persons acting in their private capacity as opposed to their professional capacity. See Currie Iain, South Africa's Promotion of Access to Information Act, 9 [2003] 1 *European Public Law* 59.

<sup>304</sup> See Daniel Wilsher, Freedom of Environmental Information: Recent Developments and Future Prospects, 7 (2001) 4 *European Public Law* 671, at p. 680.

<sup>305</sup> See Harry Wolf, Public Law - Private Law: Why The Divide? - A Personal View, [1986] *Public Law* 220 at 225: "Powerful bodies, whether they are public bodies or not, because of their economic muscle may be in a position to take decisions which at the present time are not subject to scrutiny and which could be unfair or adversely affect the public interest".

private corporations and that are crucial for environmental protection, such as some information on pollutant emissions held by big industries. However, there would be a problem in defining which private bodies are so powerful that have to be subject to such a duty.

Of course, extending environmental information regimes in this way should not be a way to ignore issues of confidentiality or privacy. Though these issues can easily be addressed by exceptions to the types of information that have to be disclosed, in the same way as the current environmental information regimes do.

In any case, it seems that there is no theoretical legal barrier to prevent an extension of the right to access environmental information to information held by any person (either artificial or natural private legal persons), or at least to any private corporation with responsibilities towards the environment.

## **2) How can information be accessed**

In this part we examine, the legal provisions that provide for the practical arrangements for access to environmental information held by public bodies.

The important conclusion that can be drawn from the examination of how the practical arrangements for access are dealt by the various legal instruments recognising a right to environmental information, is that the first in time provisions (such as the 1992 regulations and the 1990 Directive) considered these as technical details of secondary importance left to public authorities and member states to implement. In contrast, the latest of such legal instruments (as the 1998 Aarhus Convention, the 2003 Directive and the new Regulations) regulate in greater detail some practical arrangements of access, such as the form in which information is disclosed or the form of requests and refusals, due to the fact that diverging practices in various public bodies or between various member states,<sup>306</sup> has lead to the transformation of a theoretically common right to environmental information, into a right varying in effectiveness in practice due to the different policies either restrictive or permissive to accessing information.

### **a) The definition of the practical arrangements for access.**

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<sup>306</sup> As Hallo indicates: 'The practical arrangements are, in fact, an essential component of effective access to information. Where the practical arrangements have been organised indifferently or poorly, the usefulness of access to environmental legislation is substantially diminished. Unfortunately, this is all too often the case. [...] The public is also not well served by leaving it entirely to individual public authorities within member states to define the practical arrangements. This leads to such diversity in arrangements that confusion is the rule.' In *Access to Environmental Information in Europe*, ed. By Ralph E. Hallo, Kluwer Law, London: 1996, at p. 15.

The issue that is examined first is whether the practical arrangements under which environmental information is effectively made available are defined at supra national level (and if so to what extent) or if such arrangements are delegated at state level. Also, it shall be examined if whenever such arrangements have been left for states to decide, states are allowed to further delegate the definition of practical arrangements to other bodies mainly at local level.

### 1) At supranational or at national level?

Interestingly, the two international legal instruments that provide for access to environmental information both make the choice only to regulate some aspects of the practical arrangements for access and leave all the rest to states to regulate. This has the advantage of allowing great flexibility to member states to adapt the requirements of Aarhus and the Directive to their particular legal systems and especially to the existing general regime on access to information (if any).

It was Directive 90/313/EEC that was the less detailed and left most of the practical issues for member states to decide. However, this led to criticisms since apparently there were some abuses of this vagueness and both the subsequent Aarhus Convention and the new Directive became more specific by containing detailed provisions on forms of access, costs, time-limits, and appeal procedures. These shall be examined further on in detail, though it should be noted that the new Directive, without being very different from the text of the Convention, is more detailed.

In any case, implementing at international level an extremely detailed scheme on environmental information access, would have been unrealistic and any advantages of it would have been outweighed by the complexity of imposing it into various legal cultures with different access to information regimes already in place. So, both Aarhus and the 2003 Directive remit some detailed and of secondary importance matters for states to decide.<sup>307</sup> During the adoption of the 2003 Directive, the Commission rejected European Parliament amendments seeking to specify in great detail the practical arrangements for providing the information, on the grounds that the proposed Directive is a framework directive, which should give Member States a certain degree of flexibility when transposing the Directive into national law.<sup>308</sup>

### 2) Can states further delegate their competencies?

This question is mainly of theoretical and of academic interest, at least in England, since the new Regulations, implementing the Directive and the Convention and aligning the

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<sup>307</sup> Analysed *infra*.

<sup>308</sup> See Opinion of the Commission pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council on public access to environmental information, 5.9.2002, COM(2002) 498 final, at p. 6.

environmental information regime with the FOIA, define most of the details of the implementation of information access. They also provide that for any details not dealt with in the Regulations, the Secretary of State may issue a Code of Practice providing guidance to public authorities on the application of the Regulations.<sup>309</sup> Thus, there is no room for further delegation, since it is for the Government to arrange the practical arrangements for access.

However, this was not the case under the previous 1992 regulations. Reg. 3(2) provided that it was the duty of every relevant person, who held information to which the Regulations apply, to make such arrangements for giving effect to them. It did not provide any more details than that information was to be provided in a reasonable form, time and place; all other matters being left for every individual public authority to decide. The reason for this according to the UK Government, was that due to the wide range of functions, responsibilities and procedures it is “not possible” to prescribe a uniform way for information access.<sup>310</sup> It seems that this has become “possible” in case of the FOIA and the new regulations ...

There has been a controversy on whether Directive 90/313, which provided by art. 3(1), par. 2, that practical arrangements for access were to be dealt by member states, allowed member states to further delegate this competence to lower-level public authorities. All authors seem to agree that adding this extra layer, is an incorrect transposition of the Directive. For Bakkenist,<sup>311</sup> the wording of the Directive (member states “shall define” practical arrangements) imposes a direct duty on states themselves, that cannot be passed to others. Waite,<sup>312</sup> is of the same opinion and also states that this can lead to a plethora of different arrangements by various authorities making the system very complex for the wider public at which it is aimed. Roderick<sup>313</sup> also shares these views, adding that even if such a transfer of the Directive’s obligation was permissible, the regulations do not require public authorities to define practical arrangements so as to achieve effective accessibility. We believe these views to be correct and these criticisms might have been one of the reasons why the new regulations have abandoned this system of further delegating.<sup>314</sup>

## **b) The form of requests to access information**

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<sup>309</sup> Reg. 16. On the 27<sup>th</sup> July 2004, DEFRA published a *Draft Code of practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004*, available at: <http://www.defra.gov.uk/corporate/consult/envinfo/index.htm>

<sup>310</sup> As stated in DOE’s guidance on the implementation of the 1992 Regulations, at par. 22.

<sup>311</sup> See Gisèle Bakkenist, *Environmental Information: Law, Policy and Experience*, Cameron May 1994, at p. 66.

<sup>312</sup> See Andrew Waite, *The United Kingdom*, at p. 235, in M. Prieur op cit.

<sup>313</sup> See Peter Roderick, *United Kingdom*, in *Access to Environmental Information in Europe*, ed. By Ralph E. Hallo, Kluwer Law, London: 1996, at p. 256.

<sup>314</sup> Also, as we analyse elsewhere (see the Chapter on the French transposition of Directive 90/313), it is interesting to compare with the situation in France where the definition of practical arrangements of access was not passed on to each public authority, but always was directly provided in legislative instruments.

A request for information in practice can be made orally or in writing. However does a request to access information legally have to be made in writing or is a verbal request sufficient for the public authority to be obliged to respond to it?

The first question that arises is whether the relevant international legal instruments expressly provide an answer to this question, or leave the matter unregulated and let it for national legislators to decide.

The Aarhus convention does not directly provide an answer to this question though paragraph 7 of article 4 mentions that if the request for information is in writing, the refusal must also be in writing. This, if analysed a contrario, would seem to indicate that the Convention accommodates any form of request as long as the refusals to written requests are in writing. Also the same paragraph 7 provides that if the request was made verbally and the applicant requested an answer in writing, the refusal must be in writing.

The Directive 2003/4/EC adopts exactly the same approach. Thus, it does not expressly provide that requests have to be in writing, though it indicates that refusals are to be notified to the applicant in writing or electronically "*if the request was in writing or if the applicant so requests*".<sup>315</sup> On the Contrary, the old Directive 90/313 does not contain any such provision, thus leaving the matter entirely to member states to decide.

Consequently, it has been shown that at supranational level, it is not considered important whether the request itself is oral or written, as long as refusals are in writing whenever written requests are involved. It seems difficult to understand this approach, since it would have been simpler to say that all refusals have to be in writing, so as to avoid differences between oral and written requests. The requirement for written refusals is understandable since it might be useful to have a written answer so as to be informed of the reasons for refusal and to be able to challenge them on appeal. When a refusal is given orally an appeal might be difficult to be brought against it, since the existence of the refusal and the reasons of it might be hard to prove since *idem est aut non esse aut non probari*.<sup>316</sup>

The new Regulations do not expressly provide for written requests, neither do they disallow oral requests to be made. This was also the case under the previous regulations. This would indicate that oral requests could be made under the 2004 Regulations.<sup>317</sup> On the contrary, s. 8 of the FOIA 2000 provides that requests have to be in writing, state the name of the applicant and an address for correspondence and describe the information requested. The same section also provides that a request is to be treated as made in writing where the text of the request is transmitted by electronic means, is legible and is capable of being used for subsequent reference (thus it is not just a scrap of paper). The contrast between these over-detailed provisions and the

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<sup>315</sup> At art. 4 par. 5.

<sup>316</sup> What does not exist and what cannot be proven are the same.

<sup>317</sup> This is made explicit in the Draft Code of Practice, which mentions that oral requests are acceptable under the Regulations. See above n. 309, in Part II.



silence of the regulations is striking but is necessary to ensure the correct application of the UK's international and EC obligations.

In any case, even if oral requests are acceptable under the 2004 Regulations, it is difficult to believe that oral requests will be made in great numbers due to the fact that public authorities might insist on receiving written requests in accordance with the FOIA, as it might be difficult to ascertain, before the request is looked upon in detail, whether the information requested has to be disclosed under the FOIA or the regulations. However, there might be some cases in which the regulations are undoubtedly applicable and so oral requests could be made without any difficulties.

### **c) The contents of the request to information**

The Aarhus Convention,<sup>318</sup> identically to the new<sup>319</sup> and the previous<sup>320</sup> Environmental Information Directive, provides that any applicant is not obliged to state the reason the information is wanted, or to which use he intends to put it. The initial proposal for the 2003 Directive also contained a provision according to which, although it was unnecessary for an applicant to state the reasons for his request, he was able to do so. In such a case, public authorities would have been required to make reasonable efforts to provide the information in time for it to be available for a specific use.<sup>321</sup> This reflects the fact that sometimes, even if time-limits for the provision of information are respected, information might still be provided too late for it to be useful in specific administrative proceedings that take place into short time periods (such as public enquiries and consultations etc). Unfortunately, the 2003 Directive in an effort to stick as closely as possible to the wording of Aarhus, does not contain that provision and merely mentions that the applicant is not obliged to state the reason the information is requested.

Interestingly, this seems also to be the case under any UK statutory provision that grants a right to access information, since according to Elias J., "*if a person has a right to inspect, the motive with which he exercises that right is irrelevant*".<sup>322</sup>

Furthermore, a request should not be formulated in a too general manner since this can be a reason for rejection.<sup>323</sup> The definition as to what is too general is not given in the Convention nor the Directives. Thus, it is a matter left to either the implementing legislators to decide or the courts.

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<sup>318</sup> Art. 4 par. 1(a).

<sup>319</sup> Art.3 par. 1.

<sup>320</sup> Under art. 3 par. 1 of Directive 90/313/EEC, public authorities were required to make available information relating to the environment to any natural or legal person at his request and without his having to "prove" an interest. The word "prove" having lead to some difficulties, it was replaced with the word "state" in the 2003 Directive. See the Proposal for a Directive of the European Parliament and of the Council on public access to environmental information, COM 2000 402 final, OJ C 337, 28/11/2000, p. 156.

<sup>321</sup> Art. 3(3) of the initial proposal provided that: 'If the applicant states that he is requesting information for a specific purpose, the public authority concerned shall make reasonable efforts to make available such information within such time-period as is necessary to enable the applicant to fulfil that purpose'. Ibid.

The implementing new Regulations,<sup>324</sup> similarly to the position before,<sup>325</sup> also provide that requests ought not to be too general in which case they might be rejected. However, what can be reasonably considered as a too general request is left undefined and thus it will be for each public authority to decide.<sup>326</sup>

In line with the 2003 Directive, the 2004 Regulations do not expressly provide for other details that have to be included in the requests. On the contrary, s. 8 of the FOIA 2000 provides that requests also have to state the name of the applicant and an address for correspondence in order that the request is dealt with in accordance with the provisions of the Act.

#### **d) Time-limits**

There are two different sorts of time-limits: time-limits concerning the provision of information, and time-limits for refusals. In all of the instruments examined herein their requirements are identical, in the sense that the periods of time for refusal or disclosure are identical, though there is no need for them necessarily to be the same.

The Aarhus Convention requires as a principle that public bodies provide the information, or either refuse any request, “*as soon as possible*”<sup>327</sup>. It also sets a maximum time limit of one month for normal requests and for voluminous and at the same time complex requests<sup>328</sup> it allows an extension of up to two months. The Convention, however, does not define when the clock starts ticking, but says only after the request has been “*submitted*”. The details of when a request is deemed to have been submitted (this is important for requests remotely sent by postal or electronic means) or how the period is to be measured (i.e. are bank holidays and weekends to be taken into account or not), are left to national legislators. Any use of the provisions permitting an extension of time has to be justified by reasons given to the applicant as soon as possible and at the latest at the end of the first month. The new Directive 2003/4 exactly mirrors these provisions.

On the contrary, Directive 90/313 also provided that public authorities were to provide information requested in principle as soon as possible, and that in any case public authorities were to “respond” until a maximum period of two months.<sup>329</sup> Interestingly, the Directive did not provide

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<sup>322</sup> *The Queen on the Application of HTV Limited v. Bristol City Council* [2004] EWHC 1219, at par. 59. This case concerns section 15 of the Audit Commission Act 1998, which grants a right to any “interested person” to inspect and make copies of audit accounts and related documents of Local Authorities.

<sup>323</sup> Art. 4 par. 3(c) of the Aarhus Convention and art. 3(4) of Directive 90/313EEC, and art. 4(1)(c) of Directive 2003/4/EC.

<sup>324</sup> Reg. 12(4)(c).

<sup>325</sup> Reg. 3(3) of the Environmental Information Regulations 1992 and also s. 1(3) of the FOIA 2000.

<sup>326</sup> However, the Draft Code of Practice, does provide some guidance on that and mentions that the applicant cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants. See above n. 309, at par. 11.

<sup>327</sup> Art. 4, par. 2 for provision of information; par. 7 for refusals.

<sup>328</sup> The wording of the Convention is “*unless the volume and the complexity of the information justify an extension*”, thus indicating these two conditions are cumulative for the extension to be justified.

<sup>329</sup> Art. 3, par. 4.

for any extension of this time limit in complex cases, the two-months limit being deemed as sufficient in all matters. In the withdrawn ECJ case of *Commission v. Germany*,<sup>330</sup> the Commission brought an action against Germany arguing that the use of word “respond” in the first sentence of Article 3(4) must be interpreted as including either the communication of requested information or the notification of a refusal. The Commission bases its interpretation on the efficiency of the whole system. It argued that if authorities were merely required to give interim answers within the two-month period, stating that access to the information would be granted at a later date, the system would not be effective. This interpretation seems to be correct, and compatible with a purposive interpretation of the Directive, though unfortunately the case was removed from the register, probably because the adoption of the new Directive was imminent and resolved this issue. Even though this case was withdrawn, it demonstrates that public authorities are not to give interim answers and that time limits are to be strictly abided by.

The 1992 regulations specified that requests should be responded to as soon as possible and no more than two months after the request was made.<sup>331</sup> The new regulations also provide at reg. 7 that requests are to be dealt as soon as possible and set the time limit for refusals as well as supply of environmental information to 20 working days after the request has been received, even if the new Directive allows for one month.<sup>332</sup> The Government decided to use the 20 days formula, as in the FOIA, for the sake of simplicity. Also it should be noted that the 2004 Regulations (as with the FOIA) provide that where the provision of information or the refusal will take longer than 20 days, the public authority must inform the applicant of this within 20 working days.<sup>333</sup> The actual decision as to whether or not to grant access may take longer than 20 working days in cases where the complexity or the amount of information justifies that, but in any case this time cannot be longer than 40 days. It seems that this might be a breach of the Aarhus Convention and the new Directive, which both provide, as analysed above, that time-limits can be extended to two months if both the complexity and the volume of information justifies that extension and not just one of this two alternatives as permitted by the new regulations.<sup>334</sup> In any case, the 2004 Regulations do not indicate in any detail in which cases the complexity or the volume of information might justify a refusal, but leave that to what each public authority considers is ‘reasonable’.<sup>335</sup> Surprisingly, even

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<sup>330</sup> See above n. 125.

<sup>331</sup> Reg. 3(2)(b).

<sup>332</sup> Reg. 5(2).

<sup>333</sup> Working days are not defined by the Regulations themselves, but s. 10(6) of the Freedom of Information Act 2000 defines them as ‘any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.’ This interpretation is also binding under the Regulations which have been made under powers conferred to the Secretary of State by this same Act, since according to section 11 of the Interpretation Act 1978 “Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act”. In any case, reg. 2(1) of the 2004 Regulations mentions that a ‘working day’ has the same meaning as in the FOIA 2000.

<sup>334</sup> This different position adopted by the Regulations, even if in breach of the Directive as more restrictive for access to information, can be explained by the fact that sometimes there could be very complex requests even if they concern only a small amount of information.

<sup>335</sup> At. Reg. 7(1).

the Draft Code of Practice does not mention anything more detailed, as it merely indicates that *'Authorities may find it helpful to formulate a policy about how to apply the provision on making a time extension.'*<sup>336</sup>

A further issue is what if an extended period of time is only needed concerning a small number of the information requested. Should the remainder be disclosed in the shorter period of time? The answer seems to be yes, since such an approach would be compatible with the purpose of the Directive, to open up as much as possible the files of public bodies.

A final issue, is that according to reg. 9(4) of the 2004 Regulations, when the request is deemed too general and the public authority asks for further particulars in relation to it (it has 20 days to do that), then the 20 day time-limit to provide the information or issue a refusal (which is also extendable to 40 days on the terms examined before) starts over when these further particulars are received by the demanding public body.

#### **e) Costs**

This is an important issue, since prohibitive costs can render any right to information ineffective in practice. Also, providing for free access to information on the one hand might lead to huge costs for public authorities and ultimately for taxpayers, and on the other hand might deprive public bodies from information of great financial or commercial value that could have been charged at market value price thus preventing them of making potential benefits.<sup>337</sup>

The Convention merely provides that any charge for the 'supplying' of information cannot exceed a 'reasonable amount'.<sup>338</sup> States are not under an obligation to charge, though if they decide to do so, the Convention imposes procedural requirements obliging public authorities to provide a schedule for charges. These schedules must include (i) cost of charges; (ii) criteria for when charges may be levied or waived and (iii) criteria for when the supply of information is conditional on the advance payment of a charge. This indicates that the Convention allows disclosure of information to be conditional on payment in advance. However, the Convention does not indicate if charges can be levied merely for inspections of documents, though it can be considered that charging for such inspections is not reasonable. This issue has been answered, as we shall see, by Directive 2003/4.

The old Directive was very laconic on the issue of charging and only provided that member states were free to impose or not a "reasonable" charge for supplying information.<sup>339</sup> The 1992 regulations were also very brief and provided that public authorities were free to charge costs

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<sup>336</sup> See above n. 309, at par. 17.

<sup>337</sup> For instance the Chief Executive of the Ordnance Survey has stated that the Regulations "could result in the rights of Ordnance Survey in its maps being seriously and unreasonably prejudiced, with equally serious adverse consequences for its business. The very future existence of Ordnance Survey in a capacity capable of maintaining the nation's map database would be jeopardised". Cited by Peter Roderick, see above n. 313, at p. 271-272.

<sup>338</sup> Art. 4 par. 8.

reasonably attributable to the supply of information and also to make the supply of any information conditional on the payment of such a charge.<sup>340</sup> These vague provisions have been heavily criticised because they allowed for costs to be a possible barrier to effective access to information.<sup>341</sup> For instance, as Hallo indicates,<sup>342</sup> Directive 90/313 does not explicitly rule out the possibility of charging for the mere search of information by public authorities. The European Court of Justice has been interpreting these provisions on charges (as the entire Directive) in a way leading to increased openness.<sup>343</sup> In *Commission v. Federal Republic of Germany*<sup>344</sup> the Court ruled that the term 'reasonable fees' for the purposes of Article 5 of the Directive 90/313 must be understood as meaning that Member States are not authorised to charge the entire amount of the costs actually incurred in conducting an information search.<sup>345</sup> Also, the ECJ ruled that a charge made where a request for information is refused, cannot be described as reasonable, since in such a case no information has in fact been supplied. The ECJ clearly ruled that charges can be reasonably levied only for the supply of information and 'not for the administrative tasks connected with a request for information'.<sup>346</sup> The most important finding of the ECJ however, is the way in which all provisions of the Directive (including the term of 'reasonable charges') must be interpreted. The Court indicates that '*the purpose of the directive, which is to guarantee freedom of access to information on the environment and to avoid any obstacles to that freedom, precludes any interpretation which is liable to dissuade those wishing to obtain information from making a request to that effect*'.<sup>347</sup> This purposive approach and method of interpretation has to be adopted by national courts and legislators and is still relevant for the construction of the new 2003 Directive. If this purposive interpretation is applied to the phrase 'reasonable costs', this means, according to the court, that any interpretation which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected.<sup>348</sup>

The new 2003 Directive in its article 5 (albeit repeating the same formula that public authorities may make reasonable charges for supplying information) is very detailed on some

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<sup>339</sup> Art. 5.

<sup>340</sup> Reg. 3(4)(1).

<sup>341</sup> See *inter alia* Bakkenist, above n. 311, at p. 39. Also as a research has pointed out, charging provisions for the provision of the same quantity and type of information by different public authorities can vary considerably and sometimes exorbitant charges can be made. See J. Rowan-Robinson et al., *Public access to Environmental Information: a means to what end?*, [1996] JEL 19, at p. 34-35.

<sup>342</sup> See Hallo, above n. 306, at p. 16.

<sup>343</sup> Also in *Commission v. the Kingdom of Spain*, an action filed on 21 May 1999 (case C-189/99, OJ 1999/C 226/26) but later withdrawn from the register (OJ C 118, 21/04/2001 p. 28), the Commission argued the failure of transposition into Spanish law of Directive 90/313 because there were no specific provisions in Spanish law concerning charging for the provision of environmental information and providing that these charges may not exceed a reasonable cost.

<sup>344</sup> Judgement of the European Court of Justice (Sixth Chamber) of 9 September 1999 in Case C-217/97: *Commission of the European Communities v Federal Republic of Germany*, OJ C 352, 04/12/1999 p. 3

<sup>345</sup> Par. 48 of the judgement: '... the term "reasonable" for the purposes of Article 5 of the directive must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search'.

<sup>346</sup> *Ibid.* at par. 57 and 59.

<sup>347</sup> *Ibid.* at par. 58.

points aiming at resolving some of these issues. First, it clarifies that inspections of information by members of the public at the offices of public authorities are free of charge. There is also free access to public registers established under article 3(5) of the directive. These are not the equivalent of public registers established under British law which contain environmental information.<sup>349</sup> They are registers not containing *stricto sensu* environmental information, but information aiming at assisting the public with its requests: lists of public authorities and registers, or lists of the environmental information held by public authorities or other information points. This demonstrates the importance for the effectiveness of the right to access information to allow for free and easy access to data indicating where the information sought can be found. Second, the Directive also repeats the provisions of the Aarhus Convention, that it is a prerequisite for any levy of charges to have previously published and circulated a schedule of charges detailing their level and the circumstances in which they are levied or waived. This obligation to clarify in a schedule how charges are to be calculated counterbalances the uncertainty of the phrase “reasonable charges”, since in any case for charges to be levied they have to be known beforehand. It is interesting to mention that during the adoption stages of the new directive the European parliament had proposed to replace this phrase with the unambiguous one “actual costs of reproduction”. However, the UK government opposed this amendment considering that being able to levy charges for other services than reproduction costs facilitates greater access to environmental information through the provision of customer services such as research.<sup>350</sup> This view is totally unconvincing since article 3 of the Directive provides for a duty to provide advice and assistance to the public in accessing information. The government was more concerned about passing as much as possible of the costs of providing information to the enquirers, than of facilitating greater access without cost being a potential barrier. Finally, the 2003 Directive, explicitly allows for charges to be payable in advance.<sup>351</sup>

The new 2004 Regulations, at regulation 8, mirror the above-mentioned provisions of the new Directive. However, they do not explicitly provide that unless a schedule detailing charges is made available, no ‘reasonable charges’ may be levied, but only mention that public authorities ‘shall’ publish such a Schedule. This seems to be a potential breach of the 2003 Directive, which

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<sup>348</sup> *Ibid.* at par. 47.

<sup>349</sup> These registers and the provisions and policy on the costs of accessing information existing on them are examined elsewhere in this work. See the relevant chapter on registers.

<sup>350</sup> See on these, *New Draft Environmental Information Regulations: Public Consultation*, DEFRA, July 2002, p. 7. available from <http://www.defra.gov.uk>

<sup>351</sup> Recital 18 of the 2003 Directive provides that ‘... Instances where advance payment will be required **should be limited**. In particular cases, where public authorities make available environmental information on a commercial basis, and where this is necessary in order to guarantee the continuation of collecting and publishing such information, a market-based charge is considered to be reasonable; an advance payment may be required’ (our emphasis). This should be contrasted with the initial proposal of article 5(1) of the Directive which contained an explicit prohibition of all advance payments: ‘The supply of any information shall not be made subject to the advance payment of a charge’ (see above n. 111).

makes the levy of fees conditional on the existence of such a Schedule of Charges.<sup>352</sup> Also, when a charging scheme is in force, the provision of information might be made conditional to the payment, thus allowing public authorities to delay disclosure until the full amount requested is paid.

There are however three important differences between the charging scheme adopted by the new Regulations with the one adopted by the FOIA. First, the Act provides that the level of charges is to be uniformly set by Fees Regulations<sup>353</sup> made by the Secretary of State (now the Lord Chancellor). On the contrary the new environmental information regulations provide that what is reasonable is to be set by each public authority, thus permitting diverging practices, as existing under the previous regulations. However, the new regulations provide for some mechanisms that might remedy these divergences if they appear, even if it should be accepted that what is reasonable could be interpreted differently by various authorities. Fees can be uniformly set by the Code of Practice made by the Secretary of State under reg. 16. Also, if some authorities were to charge unreasonable amounts in violation of the Regulations, the Information Commissioner has the power to issue an enforcement notice indicating how charges should be applied.<sup>354</sup> However, the Commissioner can only issue such notices if the regulations have been breached and not if the Codes of Practice have not been complied with, since the latter are not binding for public authorities. Hence, the commissioner could not intervene if charges were higher than what suggested by the Codes of Practice, but still 'reasonable'. In such instances, the Information Commissioner could only issue 'practice recommendations', which are not mandatory for public authorities.<sup>355</sup> Still, the Codes of Practices could serve as a basis on which reasonableness of costs could be assessed by the Commissioner thus preventing great variations in charging schemes, especially since the Commissioner has to be consulted by the Lord Chancellor before he issues them.

Second, section 12 of the FOIA exempts public authorities from the duty to provide information if the cost of complying with such a request would exceed an appropriate limit set by the Fees Regulations.<sup>356</sup> This exemption does not exist in the environmental information regulations, since both Aarhus and the new Directive do not contain such a provision.

A final question that arises is what happens in practice if a person having requested environmental information under the regulations omits to pay and the time limit for answer lapses. Is the public authority bound to provide the information requested since they have a duty to do that

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<sup>352</sup> Neither the Draft Code of Practice mentions that the existence of such a Schedule is compulsory for public authorities wishing to charge an applicant. On the contrary, they merely mention that '*Where a public authority proposes to make a charge, a schedule of charges **should** be made available (including, e.g. a price list for publications, or the charge per unit of work which will be incurred to meet a request).*' (our emphasis) See above n. 309, at par. 20.

<sup>353</sup> See the draft *Freedom of Information (Fees and Appropriate Limit) Regulations* made under s. 9(3) of the FOIA 2000, available from the Lord Chancellor's website at <http://www.lcd.gov.uk/foi/dftfees.pdf>

<sup>354</sup> On the powers of the Commissioner see below.

<sup>355</sup> See on these, below part d) The Information Commissioner

<sup>356</sup> Actually set at £550 by reg. 6.

in the prescribed time limits? The logical answer would be that where required fees have not been paid then the public authority is not bound to disclose the information requested but should inform the applicant that the information is ready to be collected or sent as soon as the fees are paid. This interpretation is consistent with the fact that a failure to answer a request (either with a written refusal or with disclosure) amounts to a breach of the regulations. Reg. 8(5) solves this issue by mentioning that once the applicant is notified of the charges, he has to pay them in 60 working days. If this period of time lapses without payment, then his request is void and he has to reapply.<sup>357</sup>

#### **f) The form in which information is disclosed**

First of all, it should be examined whether it is possible for applicants to choose in which form they would like to receive any requested information (such as inspections on site, paper copies, electronic disks, or remote electronic access), or if it is a matter solely left to public authorities to decide.

Both the 1992 Regulations and Directive 90/313, did not expressly mention anything about the form in which information is to be disclosed, probably because this was being considered as a technical detail of secondary importance, left for member states and public authorities to decide. However, the newest legal instruments do contain some provisions on the issue.

The Aarhus Convention and in identical terms Directive 2003/4 provide that in principle, members of the public may request information in a specific form and the public authority must honour the request for such specific form.<sup>358</sup> This indicates that the Convention obliges states not to exclude certain types of forms of communication but to allow the public to choose. This could be very onerous on public authorities by allowing the applicant to request some unusual or expensive forms. So, the Convention and the new Directive mention two exceptions to this requirement. First, the public authority may decide to communicate information using another form than the one requested if it is 'reasonable'. What is reasonable is not defined anywhere in the Convention and it is a term indefinitely flexible, depending upon individual interpretation. Second, the public authority is not required to give the information in the form requested if it is already "*publicly available in another form*", such as published on a public internet web-site or in a published leaflet. A difficulty arises as to the interpretation of the term "*publicly available in another form*". This term should be interpreted in conjunction with the Convention's requirement that access to information should be effective in practice.<sup>359</sup> Thus, "*publicly available*" would mean that the information is easily accessible to the member of the public requesting it, and "*another form*" would mean that the amount of available information in the publicly available form, is of same

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<sup>357</sup> See the Draft Code of Practice, above n. 309, in par. 20.

<sup>358</sup> Aarhus, art 4 par 1. Directive 2003/4/EC, art. 3(4). Directive 90/313EEC does not provide that applicants may request information in a specific form.

<sup>359</sup> At art. 3. See *Stec et al.*, above n. 97, at page 54.



amount than in the form requested (i.e. that what is publicly available is not merely a summary). This would also indicate that electronic information which is in a format that requires the use of special commercial software to be read by computers should be provided in a different format, which could easily be read using standard home-computers and not requiring the purchase of specific professional computer equipment or software.

Identically, the 2004 Environmental Information Regulations indicate that members of the public may request that information be communicated in a specific form<sup>360</sup> and so it has to be indicated which form is preferred by the applicant. As we have seen, the public authority must in principle honour the request for a specific form but for the two exceptions already mentioned above (unreasonableness and information publicly available and accessible in another form).

The importance of the exception to communicate information already publicly available in another form and, as the 2004 Regulations add, 'easily accessible'<sup>361</sup> can be seen by linking it with the requirement of article 3(4) of the 2003 Directive<sup>362</sup> which indicates that public authorities should 'make all reasonable efforts' to make available environmental information through electronic telecommunications networks, i.e. the internet. If the requested information is freely accessible through the internet, then there is no duty for public authorities to provide it in another form. So we can imagine a distant future, where all information would ideally be accessible through the internet, then there won't be either applicants nor applications since everything will be accessible on screen. However, the Directive does not make the organisation of availability through electronic channels a legal duty for public authorities, but rather a goal to achieve without any legal consequences if they fail to do it. Thus, this might never be totally achieved, without the prospect of legal challenges from aggrieved people.

#### **g) The form and content of refusals – partial refusals**

What should refusals indicate, and whether they can be made orally or in writing is an important issue, because oral refusals can lead to difficulties in appeals since it might be difficult to prove when did the refusal take place and what were the exact reasons of it. This is also the case for refusals not containing reasons for the refusal.

The old Directive 90/313 indicated in its article 3(4) that reasons for refusals were to be given, but did not provide for written refusals, so they could be in oral form. However, the 1992

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<sup>360</sup> Reg. 6(1).

<sup>361</sup> At Reg. 6(1)(b).

<sup>362</sup> This is the equivalent of art. 5 of the Aarhus Convention. See the relevant discussion on electronic registers containing environmental information in the Chapter on *Registers*.

regulations provided at reg. 3(2)(c) that not only must reasons for refusals be given but that refusals had to be in writing,<sup>363</sup> thus resolving this issue.

Both Aarhus and the new 2003 directive are very protective of applicants since they provide that refusals have to be in writing whenever the request was in writing or the applicant requested it that way.<sup>364</sup> Thus, oral refusals are still possible in the case of oral requests when the applicant did not request a written answer. Interestingly, an electronic refusal (probably meaning via electronic mail) is considered as equivalent to a written refusal by the Directive. Refusals have to contain two things: first, as with the previous Directive, the reasons for the refusal, and second, and this is a new requirement, the refusal must indicate information on the appeals mechanisms that exist in order to contest the refusal. This last requirement is important so as to inform applicants of available appeal procedures and in a way indirectly invite them to use them. Also, as stated in the *Birmingham Northern relief road* case, the reasons that are mentioned in the refusal decision have to be sufficient and as such cannot be considered a mere repetition of the wording of one of the exemptions. Thus, the specific circumstances have to be mentioned in some detail. Sullivan J. mentioned that the aim of the provision indicating that reasons have to be indicated '*is to enable an individual who is refused information to ascertain whether the refusal is well founded in fact and law, or whether it is susceptible to challenge. That purpose is not fulfilled by the bare assertion that the Agreement is confidential under a particular regulation. It should be possible to provide some, albeit brief, explanation as to why the information sought is confidential, without breaching that confidentiality*'.<sup>365</sup>

Also, if the refusal is due to the fact that the application was made to a public authority not holding the information requested, then the refusal can be one of two things. First, if the public authority does not know which other authority might hold the information requested, then no further action is needed (apart from a promptly written refusal explaining this fact). Second, if on the contrary the authority does know which authority might hold the requested information, then the authority can either transfer the request to that authority and inform the applicant of that transfer, or can inform the applicant of which public authority might hold what he requests.<sup>366</sup> It seems that the time limit for replying to the applicant starts ticking again from the beginning when the transferred demand is received by the competent public authority, since there is no specific provision in Aarhus or the Directive indicating that this is not the case and both these texts indicate that time limits start on the date when the request is received.

All these requirements for refusals (written refusals,<sup>367</sup> the mention of reasons<sup>368</sup> and appeal possibilities,<sup>369</sup> transfers to the competent authority<sup>370</sup>) appear in the 2004 environmental

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<sup>363</sup> This also applied for refusals made under other statutory provisions, such as statutory registers, according to reg. 5(c).

<sup>364</sup> Aarhus art. 4(7) ; Directive 2003/4/EC art. 4(5) and art. 3(4).

<sup>365</sup> [1999] Env. L.R. 447, at p. 469. This requirement is also explicitly mentioned in the Draft Code of Practice, at par. 46. See above n. 309.

<sup>366</sup> Aarhus art. 4(5) ; Directive 2003/4/EC art. 4(1)(a).

<sup>367</sup> Reg. 14(1).

information regulations in the same manner as above. The regulations are somewhat more detailed and only add two details to the above mentioned mechanisms. First, they indicate that when a request is transferred from one public authority to another holding the information requested, then the time limits for answer by the second authority starts on the day on which the request is received by that authority.<sup>371</sup> Second, concerning the transfer of requests, the Draft Code of Practice provides that requests are not to be transferred to another authority if the applicant has stated in his requests that there should be no transfer.<sup>372</sup> It is difficult to foresee in which cases an applicant will make such a request, since what he is after is access to information, thus the policy of this provision is hard to conceive.

It is clear that if a public authority fails to provide adequate reasons for the refusal, then this means that it has acted *ultra vires* and thus the refusal is invalidated, as both the 2003 Directive and Aarhus seem to make the provision of reasons a substantive requirement of the right to access information. However, the question arises of whether a failure to mention appeal possibilities, would also make the refusal invalid, even if written reasons are provided. A strict interpretation of this requirement in conjunction with the spirit of the Directive and Aarhus could indicate that such a procedural failure would be enough to invalidate the refusal. However, we believe that there can be a different approach which would equally safeguard the right to an effective remedy as guaranteed by article 6 of the ECHR, but would also prevent a decision correct in substance to be invalidated because of a mere procedural error. It could be argued that a refusal which does not mention the possible appeal procedures would not be automatically considered as invalid, but that an appeal against such a refusal, would never be dismissed as brought out of time. Thus, the rights of appeal would never be lost.<sup>373</sup>

A further question that arises is the question of implied refusals. This is important because in some legal systems (like France<sup>374</sup> or Greece<sup>375</sup>) there is an administrative law principle which

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<sup>368</sup> Reg. 14(3). It should be noted that in English law, there is no general duty for administrative bodies to give reasons for their decisions, but there are classes of cases where such a duty arises either under a statute or under the common law. See on this point Sedley J. in the case of *R v Higher Education Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242 at 263.

<sup>369</sup> Reg. 14(5).

<sup>370</sup> Reg. 10.

<sup>371</sup> Reg. 14(2). This is not expressly mentioned in Aarhus nor the 2003 Directive, but can be safely concluded from their provisions on time-limits, as mentioned before.

<sup>372</sup> See the Code of Practice, above n. 309, at par. 27.

<sup>373</sup> See for a similar interpretation of the equivalent provisions of the FOIA 2000, Macdonald, below n. 578, at pp. 127-128.

<sup>374</sup> See René Chapus, *Droit Administratif Général*, ed. Montchrestien, Paris 2001 (in French). This period is in general two months. However, especially for refusals to provide access to information held by public bodies, it is set to one month by Article 2 of French Decree No 88-465, which provides that failure by the competent authority to reply within one month to a request to supply administrative documents is to be deemed to constitute a refusal. See the ECJ case of *Commission v. France*. Also, there seems to have been a similar situation in Spain, as in *Commission v. the Kingdom of Spain*, an action later withdrawn from the register (See above n. 343), the Commission argued the failure of transposition into Spanish law of Directive 90/313 because the relevant Spanish statute recognised silence on the part of public authorities as being sufficient to be an implied rejection of a request for information.

<sup>375</sup> See E. Spiliotopoulos, *Droit Administratif Hellénique*, ed. Librairie générale de droit et de jurisprudence, Paris 1991 (in French).

provides that whenever a request is made to a public authority and a set period of time lapses without an answer, then this is considered as an implied refusal. Would such a principle be acceptable under Aarhus or the new Directive? Even if implied refusals were permissible under the 1990 Directive if reasons were nevertheless communicated in a two-month time limit, as accepted by the ECJ in the case of *Commission v. France*, it seems that such a practice would now be in breach of the written refusals and reasons requirements of Aarhus and the 2003 Directive.<sup>376</sup> There is no such issue in British law, where first, there is no such a principle and second, both the 1992 and the new 2004 Regulations expressly provide for written refusals.

Lastly, when not all of the requested information falls under one of the exemptions to disclosure, then the refusal must be partial and the remainder of the information must be communicated. This requirement of partial communication (or partial refusals) explicitly exists in the 1990 Directive, the 1992 Regulations, the Aarhus Convention, the 2003 Directive and the 2004 Regulations.<sup>377</sup> This is a very important requirement, since the ECJ has held twice, in the cases of *Commission v. Germany* and of *Commission v. France*, that the obligation to supply information in part has to be guaranteed in national law in a manner sufficiently clear and precise to ensure legal certainty and to enable persons who may submit a request for information to know the full extent of their rights. Thus, this has to be undertaken by explicit statutory provisions to that extent.<sup>378</sup>

#### **h) Practical considerations of access.**

Matters that at first sight seem trivial like adequate reading conditions and copying facilities are important since they can enable or prevent the exercise of the right of access or at least

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<sup>376</sup> Under Directive 90/313 according to the interpretation given to the reasons requirement and the two-month time limit by the ECJ in the case of *Commission v. France* at par. 111: ‘... it must be held that, in contrast to what the Commission claims, the fiction by which the failure of the authorities to reply is deemed to constitute an implied refusal cannot, as such, be considered incompatible with the requirements of Directive 90/313 on the sole ground that a tacit refusal by definition does not include any reasons. Moreover, as Community law currently stands, the wording of that directive does not provide sufficient justification for the alleged necessity that the refusal be accompanied by the reasons for it’. The Court found, however, that France was in breach of the Directive’s requirement to provide reasons since in the case of implied refusals of requests for information relating to the environment, there was no legal requirement for public authorities to provide automatically the reasons for the refusals and at the latest within two months of the submission of the initial request. The Court reached this decision by interpreting Article 3(4) of the 1990 directive as requiring public authorities to provide automatically the reasons for refusing a request for information without the applicant having to submit a request for that purpose, even if, where the authorities fail to reply, those reasons are notified to the applicant at a later date. Also, the Court seems to suggest that the position can only be different under the new 2003 Directive (see par. 106).

<sup>377</sup> Article 3(2) of Directive 90/313; Article 4 par. 4 of Directive 2003/4; Reg. 12(10) of the Environmental Information Regulations 2004.

<sup>378</sup> The ECJ found that both Germany and France had violated this requirement by failing to expressly provide in their national laws that information were to be disclosed in part where possible. See *Commission v. Germany* at paragraphs. 33, 34 and 35 and *Commission v. France* at paragraphs 66, 67 and 68.

restrict the exercise of the right. As Bakkenist indicates '*such matters as lighting, seating and noise levels should ideally be considered and provided to make perusal of documents tolerable*'.<sup>379</sup>

Both the 1990 Directive and the 1992 regulations did not mention anything about such practical considerations. However, both the Aarhus Convention and the new Directive innovate by containing such provisions. This is surprising since one would expect such provisions not to be found in supra national legal instruments, since they are technical details, but rather to be left for states to regulate. This indicates that practical considerations of access are not seen by the European legislator as mere technicalities but as an important aspect of the right of access.

The new 2003 Directive and the Aarhus Convention similarly provide that member states shall ensure that the practical arrangements are arranged by member states so as to ensure the effective and transparent exercise of the right of access to environmental information.<sup>380</sup> The same provisions also mention some examples of such practical arrangements, as the designation of information officers, the establishment and maintenance of facilities for the examination of the information required and even mention the possibility of creating 'information points' where registers or lists of the information held by public authorities could be available. It is also mentioned that member states shall ensure citizens know the rights they enjoy under the Directive and that public authorities 'to an appropriate extent'<sup>381</sup> provide information, guidance and advice in accessing environmental information.

Interestingly, even if these matters were not seen as technical details by the drafters of Aarhus and the Directive, the British government does not appear to consider them important as it does not repeat all of these provisions in the regulations and consequently leaves them for the Secretary of State to include in the Code of Practice he can make under reg. 16. The problem is that the Code of Practice is not legally binding. However, it has been suggested that complete failure to take this Code into account, would constitute an error in law and thus the adoption of an alternative approach would have to be justified.<sup>382</sup>

In any case, the regulations do expressly include one of these provisions: the requirement to provide advice and assistance to persons who propose to make or have made requests for information, which is even called a 'duty' of public authorities.<sup>383</sup> The same regulation also provides that when a request is too general then the public authority has to ask the applicant in 20

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<sup>379</sup> See Bakkenist, above n. 311, at p. 75.

<sup>380</sup> Aarhus art. 5(2); Directive 2003/4/EC art. 3 par. 5(c).

<sup>381</sup> This limitation appears only in the Directive at art. 5, but can also logically be implied from the text of Aarhus.

<sup>382</sup> According to Macdonald, see below n. 578, at p. 131. This suggestion is based on the Court of Appeal case of *De Falco, Silvestri v Crawley BC* (1980) QB 460, concerning the Code of Guidance adopted under the (then applicable) Housing (Homeless Persons) Act 1977. In this case it was held that although this Code should not be regarded as a binding statute, the council had to have regard to the code, since section 12 of the Act provided that housing authorities "shall have regard" to it. However, the court held that having done so, they could depart from it if they thought fit. This case might be distinguished from the situation under the FOIA 2000, since there is no equivalent to this s. 12 in the FOIA that directs the public authorities to have regard to the Lord Chancellor's Codes of Practice.

<sup>383</sup> Reg. 9(1).

working days after the request is made to specify the request and assist him.<sup>384</sup> It is unclear what the extent of such a duty is, since it only applies so far as it is reasonable, this last term being indefinitely flexible and vague. In any case the regulations do provide an indication of the extent of this duty,<sup>385</sup> by mentioning that a public authority shall have been taken to have complied with this duty if it has conformed to the provisions on advice and assistance present in the Code of Practice (mentioned above). The vagueness of this ‘duty’, will probably strip from any serious legal consequences the breach of it, since it will be difficult to assess when will there be a breach of it.

#### **i) Limitations on the subsequent use of disclosed information**

A legitimate question that arises is once information has been disclosed in application of the environmental information regime, to which use that information can be put. None of the legal instruments that provide for the environmental information regime give an answer to this question.<sup>386</sup> This is explainable since their aim is to protect the environment through the widest dissemination possible of information. Therefore a requirement that information which has been disclosed under the environmental information regime, would have to be kept secret, would undermine the whole rationale of the system, since if the use of information was to be restricted, then it couldn’t be used as a means to achieve the protection of the environment, or at least its usefulness to that end would be greatly undermined. Also, if the use of disclosed information was to be restricted, this could be against the principle that information is to be disclosed without the applicant having to state reasons why the information is needed, since public authorities might be tempted to ask to which use will the information be put, which would be an indirect question on the reasons for the request. In other words, asking to which use will disclosed information be put, is almost equal to asking why is the request being made. It seems that scholars have not yet dealt with that issue. However, in the case of *The Queen on the Application of HTV Limited v. Bristol City Council*,<sup>387</sup> which concerned section 15 of the Audit Commission Act 1998, a provision that grants to any “person interested” the right to inspect and receive copies of local authorities’ accounts and related documents, Elias J. held that since this statute did not limit the purpose for which the information could be used, it followed that there was no basis on which the court could properly impose limitations on the claimant but that information had to be used lawfully. Thus, if this precedent is applied to the environmental information regime, it follows that public bodies cannot withhold information because they feel that it will be used for an unlawful purpose. For instance, we could imagine the case where someone asks a local planning authority for copies of plans accompanying a planning application. It seems that the local authority could not refuse to provide

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<sup>384</sup> Reg. 9(2).

<sup>385</sup> Reg. 9(3).

<sup>386</sup> Neither does the FOIA 2000.

<sup>387</sup> [2004] EWHC 1219.

them, even if it had reasons to suspect that the copies would be used in a manner contrary to copyright laws, for example in order to design identical buildings.

Still, there exist other legal rules that can limit the subsequent use of information. These are copyright rules and rules protecting privacy and confidentiality.

As far as copyright restrictions are concerned, it should be noted that if information sought qualifies for copyright protection,<sup>388</sup> then the normal restrictions on its use (copying, transmitting, broadcasting etc) apply. In oversimplified terms, this would mean that copyrighted information, even if disclosed under the access to environmental information regime, could be copied only for purposes of private study and reference and not for further dissemination to the public. However, s. 47 of the Copyright, Designs and Patents Act 1988 provides three exceptions to allow for the copying of material that is available for public inspection, in order to facilitate the use of such material and promote access to it.<sup>389</sup>

The first exception relates to material which is open to public inspection pursuant to a statutory requirement or which is on a statutory register. Under this exception, any copyright in the material as a literary work is not infringed by the copying by the person being under a duty to provide it for public inspection of so much of the material as contains factual information, and does not involve the issuing of copies to the public. A statutory requirement is defined as a requirement imposed by a provision made by or under an enactment and thus includes both the Environmental Information Regulations and the Freedom of Information Act 2000. Also, statutory registers are defined as registers maintained in pursuance of a statutory requirement, and thus include all registers examined in this work.

The second exception is confined to material open to public inspection pursuant to a statutory requirement. Provided that the person being under a duty to provide it has given their authority, copyright in any work will not be infringed by the copying or issuing to the public of copies if this is for the purpose of enabling the material to be inspected at a more convenient time or place, or if this otherwise facilitates the exercise of any right for the purpose of which the statutory requirement of availability for inspection is imposed. This undoubtedly applies to requests, which ask for copies of the information to be provided, since in most cases involving environmental information the holder would have no choice as he would be required by law to disclose it. This is important, since the copyright owner cannot ask for a copyright fee to be paid

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<sup>388</sup> Not all works can qualify for copyright protection, see Part I, ch. IX, of the Copyright, Designs and Patents Act 1988. Also under s. 163 of the same Act, any work made by an officer or a servant of the Crown under his duties, qualifies for extended copyright protection referred as 'Crown Copyright'. Moreover, under s. 165 of the same Act works made by or under the direction or control of either House of Parliament are protected by special 'Parliamentary copyright', but commissioned works are excluded from it. On all copyright matters referred herein see for more details *Copinger and Skone James on Copyright*, Sweet and Maxwell, London: 1998. Specifically on Crown Copyright of official information see the still relevant to some extent article of Sol Picciotto 'Towards Open Access to British Official Documents' [1996] 2 *The Journal of Information, Law and Technology*, at <http://elj.warwick.ac.uk/jilt/leginfo/2picciot/default.htm>

<sup>389</sup> As analysed by *Copinger and Skone James*, op. cit., at Ch. 9, 6, C, 9-54. Till now, there have been no Court decisions involving this section. These three exceptions are provided for by s. 47 and ss. 1, 2 and 3 of the Copyright, Designs and Patents Act 1988, respectively.

and thus cannot block disclosure on this ground. However, if this exception is construed *a contrario*, it explicitly excludes the right to make further copies of the obtained information, since this would not facilitate the exercise of the right to access environmental information provided for by the Regulations.

The third and the most important, to our view, exception, relates like the first one both to material which is open to public inspection pursuant to a statutory requirement and material which is on a statutory register. If such material '*contains information about matters of general scientific, technical, commercial or economic interest, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of disseminating that information*'.<sup>390</sup> This indicates that when information is of general interest to the public (but only scientific, technical, commercial or economic) then the information can be freely copied so as to disseminate it, provided the person being under a duty to provide it gives its authority, and thus not the copyright owner. This provision is fundamental, since it permits for further copies of the obtained information to be made regardless of a refusal of the copyright owner, if the public authority that holds that information gives its authority. In this case the authority would have a discretion. However, it is unclear whether the permission given under these copyright provisions is deemed granted when a request to disclose environmental information is granted, or whether there is a need of a separate decision for copyrighted material, apart from the decision to disclose. If a purposive interpretation is made, it would seem that the decision to disclose under the Environmental Information Regulations equals to an authorisation to further copy the information under s.47(3) of the Copyright Act 1988, since a different interpretation would limit access to information in a way not expressly provided for in the Directive.

An interesting technical detail is that when copies of maps are concerned the second and third exceptions mentioned above, only apply to copies which have been previously marked with a copyright warning. Similarly, when copies of plans or drawings are concerned the second exception mentioned above (but not the third too as with copies of maps),<sup>391</sup> only applies to copies which have been marked with a copyright warning. In both cases, the warning is similar and indicates that no further copies of the copy are to be made without the prior permission of the copyright owner.<sup>392</sup> The rationale of these provisions is presumably to warn other persons that the

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<sup>390</sup> At s. 47(3). 'Appropriate person' is defined by ss. 6 as 'the person required to make the material open to public inspection or, as the case may be, the person maintaining the register'.

<sup>391</sup> This difference of treatment between copies of plans and drawings and copies of maps is simply inexplicable. See the Copyright (Material Open to Public Inspection) (Marking of Copies of Plans and Drawings) Order 1990 (SI 1990/1427) and the Copyright (Material Open to Public Inspection) (Marking of Copies of Maps) Order 1989 (SI 1989/1099). All these orders have been adopted under s. 47(5) of the Copyright, Designs and Patents Act 1988, which provides that the Secretary of State may provide that these three exceptions are only to apply to copies marked in a specified manner. There is no information on the degree of compliance of public authorities with these technicalities, even though it seems important that they are abided by, since otherwise there is a breach of copyright since these exceptions do not apply if the warning is not affixed on such copies.

<sup>392</sup> Ibid. The warning is: 'This copy has been made by or with the authority of [insert the name of the person required to make the map, plan or drawing open to public inspection] pursuant to section 47 of the Copyright,



material is protected by copyright, however it is unclear why they only apply to maps, plans and drawings and not to any copyrighted material. It can be contended that these provisions have been rendered *de facto* obsolete, since now one can access maps, plans and drawing present on electronic registers and can make as many copies as he likes.<sup>393</sup>

However, these provisions limit the possibilities of the reuse of copyrighted information to private use and only permit wider dissemination of information when it is in the general interest and the public authority consents to such dissemination. The question of the re-use of accessible information is crucial and is an issue underlying every freedom of information regime. At present, the free reproduction of all official information is not allowed.<sup>394</sup> The EC has adopted a Directive on the re-use and commercial exploitation of public sector documents.<sup>395</sup> This directive, which has to be implemented by member states by the 1<sup>st</sup> July 2005, aims at establishing a minimum set of rules governing the commercial and non-commercial exploitation of existing documents held by public sector bodies of the Member States which are generally accessible under current freedom of information rules. Generally speaking, the Directive maintains the discretion of member states and public bodies to decide whether to allow the re-use of information obtained through information regimes. The principle that is laid down is that if public bodies decide to allow the reuse of disclosed information, they must do so on the same terms to every person who asks to re-use it. Also, exclusive arrangements for the exploitation of public sector information between public bodies and other persons are prohibited. The directive also sets out a 20 days unified time-limit for dealing with requests and provides that charges for allowing re-use have to be published and can only consist of the cost of producing and disseminating the information together with a reasonable return on investment.

As far as the law relating to the protection of confidentiality is concerned, it should be noted that these issues have been dealt in the relevant chapter on human rights. Also, it should be noted that the Regulations (like the FOIA) do protect confidentiality, since they include exemptions to communications on such grounds. However, the new Regulations (in pursuance of the requirements of Aarhus and the 2003 Directive) provide for information to be disclosed even if it is confidential under some circumstances, mainly if the information concerns emissions or the public interest in disclosure outweighs confidentiality concerns. Could it be argued that even if the initial

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Designs and Patents Act 1988. Unless that Act provides a relevant exception to copyright, the copy must not be copied without the prior permission of the copyright owner'.

<sup>393</sup> See for an example the electronic planning register of the London Borough of Wandsworth, which holds in electronic form all planning applications and all related documents and drawings online and accessible from virtually anywhere at anytime. Their website address is:

<http://www.wandsworth.gov.uk/Home/EnvironmentandTransport/PlanningService/default.htm>

<sup>394</sup> See one of the rare articles dealing with the legal and policy issues of the re-use of disclosed information held by public bodies, Stephen Saxby 'Information Access Policy And Crown Copyright Regulation In The Electronic Age - Which Way Forward?' [1998] 6(1) *International Journal of Law and IT* 1. See also the HMSO Guidance Note No. 19 - *Freedom of Information Publication Schemes*, available at:

[http://www.hmso.gov.uk/copyright/guidance/gn\\_19.htm](http://www.hmso.gov.uk/copyright/guidance/gn_19.htm)

<sup>395</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ L 345 , 31/12/2003 p. 90.

disclosure is not a breach of confidentiality (if correctly done according to the procedures prescribed by the Regulations), that there would be a breach of confidentiality if that particular information was further circulated by the person that requested it and obtained it? The answer seems to be no, since according to the common law of confidentiality there is no breach of confidence if there is disclosure of information already in the public domain.<sup>396</sup> Information publicly available through freedom of information mechanisms should be deemed as such. A different interpretation would be against the spirit of Aarhus and the Directive, which aim to facilitate access and dissemination of environmental information, by removing legal barriers preventing the free flow of it. However, the rules on copyright would still have to be abided by.

### **3) Limitations on information which can be accessed.**

It is logical that not every bit of information may be accessed, since there are other interests to be considered apart from protecting the environment, such as the correct performance of duties by public bodies and protection of important secrets of the state and privacy. So, all freedom of information regimes, both general ones and environmental ones, contain exceptions as to the information that can be accessed. These exceptions can be categorised into two broad categories depending on the particular interest they try to protect: the efficient operation of administrative bodies or the protection of some important secrets. Most of these exemptions are accompanied by a public interest test which has to be applied before information is excluded from communication.

We shall compare the way each exemption appears in Aarhus, the new Directive and the new 2004 Regulations and also reference will be made to the equivalent provisions of the 1992 Regulations and the FOIA 2000 whenever interesting comparisons can be made. It should be noted that member-states cannot add to or even widen the scope of the exemptions present in the Directive. That would constitute a clear breach of the Directive, since as the ECJ has ruled in the case of *Commission v France*, member-states cannot add to the restrictive list of exemptions provided by the Directive, and transposing legislation should only provide for exemptions listed in the Directive.<sup>397</sup> The issue in that particular decision concerned the general exemption provided in

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<sup>396</sup> See Patrick Birkinshaw, below n. 623, at p. 51 et seq.

<sup>397</sup> The ECJ stated at par. 59 to 61 that: '... the last indent of the first paragraph of Article 6 of [the French law on general freedom of information] Law No 78-753 also authorises public authorities to refuse to allow consultation of or to provide an administrative document whose dissemination would prejudice, generally, secrets protected by legislation. Such a ground for refusal, which is not mentioned in the exhaustive list of exceptions in the first subparagraph of Article 3(2) of Directive 90/313, therefore clearly exceeds the scope of those exceptions. Moreover, the ground for refusal in question merely makes reference to legislation, with no further details. As the Commission rightly maintains, that ground is worded in such a general manner that it is not clear which cases are being referred to - other than those in the preceding indents of the first paragraph of Article 6, which already cover all the exceptions listed in Article 3(2) of Directive 90/313 - so

the general French freedom of Information legislation that a request could be refused if disclosure would be a prejudice to secrets protected by law, without providing for any list of such secrets.<sup>398</sup>

### **a) Exceptions aiming at protecting the correct operation of public bodies.**

First, we shall start by examining the exceptions to the right to information that aim to protect the correct and efficient operation of public authorities and are present in the Aarhus Convention, the 2003 Directive and the new Regulations. It should be noted that all of these exceptions, as the usage of the phrase ‘may be refused’ suggests, are not mandatory, and national legislators and public bodies are granted discretion as to implement them or not.

#### **i) Information not being-held by the public authority receiving a request.**

The first subparagraph of the Aarhus Convention excludes from communication information which the public authority does not hold. This should be read in conjunction with article 4, paragraph 5, which makes it a duty for a public authority, which receives a request for information it does not hold, to either inform the applicant in its refusal of which other authority might hold the demanded information, or to transfer the request to the correct authority and notify the applicant of this transfer. The 2003 Directive contains an identical provision, as well as the new Regulations.<sup>399</sup>

Interestingly, the 1990 Directive and the 1992 Regulations did not provide for such an exception. However, since the right to access information only applies to information held by or on behalf of public authorities, it can be logically concluded that there was and there still is not a need for a specific exception to this regard. The fact that such an exception is mentioned in the most recent legislative instruments demonstrates an effort of improving clarity and certainty, which does not modify the position existing before.

#### **ii) Unreasonable or too general requests to information**

All the legislative instruments on access to environmental information provide in equivalent terms that a refusal is possible for requests formulated in a too general manner or which are ‘manifestly unreasonable’.<sup>400</sup> These two exemptions will be examined together as they are related, since a too general request that does not allow public authorities to understand what is

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that that ground for refusal is likely to create legal uncertainty by failing to ensure that public authorities will apply it in accordance with the spirit of the directive’.

<sup>398</sup> On more details see the relevant chapter on the French system of access to environmental information.

<sup>399</sup> Article 4(1)(a) of the 2003 Directive; Reg. 12(4)(a).

<sup>400</sup> Aarhus art. 4(3)(b); 2003/4/EC Directive art. 4(1)(b) and (c); 2004 Regulations reg. 12(4)(b) and 12(4)(c).

sought could be deemed unreasonable. This is also the only potential limitation to the right of access based on reasons personal to the enquirer.

These two terms ('unreasonable' and 'too general') are not defined in the Convention and if they were to be interpreted in too wide a manner this could severely limit any right of access. While the application and definition of these terms is left to national legislators by the relevant international instruments and to public authorities by the Regulations, it can be contended that interpretations that extremely limit the right to access i.e. by requiring that a request describes in detail which specific documents are asked for, contravenes the underlying principle which is to guarantee as much freedom of information as possible. In other words, the presumption should be in favour of providing the information.<sup>401</sup>

Moreover, this provision should be counterbalanced with the provisions requiring that guidance has to be provided to the public seeking information. The 2003 Directive, expressly provides that in refusing a request formulated in a too general manner, the provisions of article 3(3) have to be taken into account. This article provides that when a too general request is made, public authorities must as soon as possible and at the latest within one month, ask the applicant to specify his request and assist him in doing so. This, if taken alone, would suggest that the possibility to refuse a request as too general only arises when the applicant has previously been warned his request is too general and he has been given assistance in making it more precise. However, the same provision also mentions that public authorities may nevertheless refuse the request as too general '*where they deem it appropriate*'.<sup>402</sup> This last phrase, if interpreted correctly in a sense that does not annihilate the obligation to ask the applicant to specify his too general request, seems to indicate that there should be two categories of too general requests. The first one is requests that are simply formulated in a general manner and which the public authority cannot refuse to entertain before having asked the applicant to give more details and assisting him under article 3(3). The second category, are requests which are so general that there is no use in asking the applicant to specify his request and the public authority deems it appropriate they can be refused immediately. In both cases, it will be a matter of judgement on a case by case basis. An alternative interpretation could be that it is always a precondition of refusal that the public authority has already warned the applicant that his request is too general. This is the position adopted in the 2004 Regulations, which only allow this exception to be used if the duty of advice and assistance has been complied with.<sup>403</sup>

As far as manifestly unreasonable requests are concerned, it is more difficult to distinguish which requests are manifestly unreasonable and can be rejected and which are simply unreasonable

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<sup>401</sup> This is also the view adopted by the Government in its Draft Code of Practice, see above n. 326.

<sup>402</sup> Art. 4(1)(c) of the 2003 Directive provides that: 'Member States may provide for a request for environmental information to be refused if: ... (c) the request is formulated in a too general manner, taking into account article 3(3)' and art. 3(3) provides that 'If a request is formulated in too general a manner, the public authority shall as soon as possible, and at the latest within the timeframe laid down in paragraph 2(a), ask the applicant to specify the request and shall assist the applicant in doing so, e.g. by providing information on the use of the public registers referred to in paragraph 5(c). The public authorities may, where they deem it appropriate, refuse the request under Article 4(1)(c)'.

(but not manifestly) and thus can be honoured. This is a matter of degree, best dealt on a case by case basis. However, an indication of what could be considered as manifestly unreasonable requests can be provided by the definition given to vexatious legal proceedings in the case of *Attorney General v Barker*.<sup>404</sup> In this case Lord Bingham of Cornhill stated that '*The hallmark of a vexatious proceeding is in my judgement that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant*'. In the light of this opinion, we believe that manifestly unreasonable requests should be the ones that intend to subject the public authority to inconvenience, harassment and waste of time and resources, when it is undeniable that the applicant has no real expectation to know what he is asking for.<sup>405</sup> Also, could be considered as manifestly unreasonable, all requests that are repetitive or substantially similar to previous ones and are not made at a reasonable interval and ask for the same information, as provided by s. 16(2) of the FOIA.

However, it is submitted that the reasonableness of a request should depend on the enquirer and not on administrative resources of the body which receives the request. The 1992 regulations also contained an exception for manifestly unreasonable requests<sup>406</sup> and the Government's Guidance had interpreted this as including financial and resource factors relating to the body providing the information.<sup>407</sup> This interpretation is inconsistent not only with the FOIA (which does not mention unreasonable requests but only vexatious or repeated ones), but also with the spirit of the Directive. Thus, a restrictive interpretation of this exemption should mean that the reasonableness of a request cannot depend on the special administrative difficulties of a particular authority in honouring it. However, there will be cases where on an overall objective test, the request is so burdensome to any authority that it would have to be refused as manifestly unreasonable.

### **iii) Unfinished documents**

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<sup>403</sup> See Reg. 12(4)(c).

<sup>404</sup> [2000] Fam. Law 400. This case concerned an application by the Attorney General to make a civil proceedings order under the Supreme Court Act 1981 s. 42(1) against the defendant who had initiated 20 actions over a three month period and so had instituted vexatious civil proceedings without any justifiable ground in law, and most of those actions had been struck out.

<sup>405</sup> This interpretation is consistent with the interpretation made by Stanley of 'Vexatious requests' that under s. 14(1) of the Freedom of Information Act 2000 can be refused. He mentions that: '*the hallmark of the vexatious request, it is suggested, is that the applicant has no real expectation or desire to know the substance of the information, but is making the request for some other purpose*'. See Stanley, above n. 608, at p. 36-23.

<sup>406</sup> At reg. 3(3) and in the 1990 Directive at art. 3(3).

<sup>407</sup> The Guidance also lists examples of manifestly unreasonable requests, when the amount of information sought is excessive, when extensive scans of historic files prove necessary, or when significant processing of information is necessary before it can be released, see above n. 269, at par. 42.

Supply of unfinished documents or any other record, is also exempt under the environmental information regimes. More specifically, the Aarhus Convention provides that public authorities may refuse to disclose 'materials in the course of completion' after taking into account the interest served by disclosure.<sup>408</sup> The 2003 Directive, in similar terms provides that such material can be withheld, together with 'unfinished documents or data', adding an obligation for authorities when refusing to disclose information under this exemption, to state the authority responsible for preparing the material and an estimate of the time needed for completion.<sup>409</sup> The new 2004 Regulations transpose in identical terms this requirement, stating that unfinished documents or records may not be disclosed when in all of the circumstances of the case, the public interest to refuse the request outweighs the public interest to disclose.<sup>410</sup> The new 2004 Regulations transpose the requirement that public authorities have to advise the applicant of the possible time for completion at reg. 14(4). This requirement is important, since it impliedly indicates that information on incomplete projects which have been stopped has to be disclosed, since no date for their completion can be indicated.

The term of 'materials in the course of completion' is difficult to define. In *Stec et al.*,<sup>411</sup> it is suggested that this refers to documents which are in the process of being actively worked on by the public authority and that will have more work done on them in a reasonable time-frame. The authors base this analysis on the fact that the Convention has moved away from the equivalent provision of Directive 90/313/EEC which was 'unfinished documents' thus demonstrating a will to only include unfinished documents that are still actively being worked upon. However, the Environmental Information Regulations 1992 in regulation 4(2)(d) had transposed the Directive's term 'unfinished documents' as 'document or other record which is still in the course of completion', which is a wording almost similar to the Convention's terms. The English case of *Maile v. Wigan Metropolitan Borough Council*<sup>412</sup> is interesting in this aspect since Eady J. held that

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<sup>408</sup> At art. 4(3)(c).

<sup>409</sup> At art. 4(1)(d) and (e). Interestingly, the 2003 Directive does not mention, as in the Aarhus Convention, that when refusing to disclose unfinished documents, the public interest to disclose has to be accounted for. This seems to be an omission. It is art. 4(3)(c) of the Convention which mentions that unfinished documents and internal communications are exempt and provides that the public interest has to be taken into account for both of these exemptions. However, this article was transposed in the 2003 Directive by splitting its provisions into two subsections, art. 4(1)(d) and (e), but the requirement to take the public interest into account was only included in the second of this subsection concerning internal communications.

<sup>410</sup> At reg. 12(4)(d): 'the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data'.

<sup>411</sup> See above n. 97, at p. 58.

<sup>412</sup> *Maile v. Wigan Metropolitan Borough Council* [2001] Env. L.R. 11. The case concerned a request to access a database of potentially contaminated sites compiled in order to fulfil at sometime in the future the Council's obligation of 'remediation' as laid down in s. 78 of the Environmental Protection Act 1990. The Court also found that "any deliberations as to how the Council and its officers should prepare for fulfilling the anticipated obligations of 'remediation' needs to be conducted in confidence", and so it considered it also fell under the exception to communication provided by reg. 4(2)(c) on matters which would affect the confidentiality of deliberations of any relevant person. This view has also been criticised by Harwood (see below) as a too-broad interpretation of the confidentiality of deliberations exemption, since almost all information held by councils is relevant to the exercise of some power or other. He adds that 'the wide drawing of "deliberations" does not accord with the obligation to interpret domestic law "as far as possible,

an incomplete database containing a list of potentially contaminated sites was exempt from disclosure under regulation 4(2)(d) of the Environmental Information Regulations 1992, even if development of the database had been halted. The judge held that: *'the fact that an operation may have been put, as it were, "on ice" at a preliminary stage does not mean that it should therefore be regarded as having been completed'*<sup>413</sup> The problematic underlying issue in this case was that since the database was incomplete, the local authority contended that its disclosure would result in release of information which could be misleading to the public, as analysed before. The approach taken by the court in this issue has been heavily criticised by Richard Harwood<sup>414</sup> since a database of potentially contaminated sites will always be incomplete and not entirely accurate and so under this ruling it should have to remain eternally inaccessible to the public. We can only agree with such an interpretation that the exception of 'materials in the course of completion' cannot be construed as encompassing materials whose 'completion' has been halted (either temporarily or permanently), since it would be an interpretation contrary to the aim of access to environmental information regimes which is that, wherever possible, information should be provided.

The difficulty however, is distinguishing information that is not incomplete or whose process of completion has been halted. Thus, this could lead to abuse by public authorities which could consider that some information is continuously in the course of completion, as to never disclose it. The exemption in the Regulations is far wider than the equivalent found in the FOIA 2000 at s. 22. This section only exempts information, which is in the course of publication at a later date, if it is reasonable that the information should not be disclosed until publication. Examples of such cases include information relating to research projects which it would be inappropriate to publish until the project had been completed, or statistical information which is usually published to a specific timetable.<sup>415</sup> This is one of the few examples where the FOIA is more liberal than the Regulations on a specific point.

#### **iv) Internal communications**

Any materials concerning internal communications are also exempt from disclosure. This is not a new exemption, since it was present in the 1990 Directive and the 1992 Regulations, and has been repeated in the 2003 Directive and the 2004 Regulations.<sup>416</sup> Neither of the two Directive

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*in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter" (Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A. [1990] ECR I-4135)'.*

<sup>413</sup> Ibid. at pp. 207-208.

<sup>414</sup> [2001] JPL 193, at p. 196. The commentator stresses that "the principle that greater openness would help protect the environment was not one shared by the local authority or the High Court."

<sup>415</sup> As mentioned in the *Explanatory Notes* to the Freedom of Information Act 2000 under s. 222, at p. 16. Available from <http://www.hmso.gov.uk/acts/en/00en36-a.htm>

<sup>416</sup> Art. 3(3) of the 1990 Directive; Art. 4(1)(e) of the 2003 Directive; Reg. 4(2)(d) of the 1992 Regulations; Reg. 12(4)(e) of the 2004 Regulations. It should be noted that the 1992 Regulations originally referred in reg. 4(2)(c) to 'information relating to ... the contents of any internal communications of a body corporate or other undertaking or organisation'. This having been criticised as illegitimately extending this exemption from internal communications of public bodies to any internal communications (See Bakkenist, above n. 311,

specify whose internal communications are to be protected, though the Aarhus Convention<sup>417</sup> specifies it is those of public authorities. This would seem to be the obvious interpretation.

The Aarhus Convention specifies that this exemption only applies when national law or 'customary practice' specifically provide for such an exemption. Concerning customary practice, the use of the word 'customary' in addition to the word 'practice', when the sole word practice would suffice, seems to suggest that it has to be a long-established practice considered as mandatory. Such practice might be embodied in quasi-legal rules such as Codes of Conduct or Circulars. Such an interpretation is in conformity with the French version of the Convention, which uses the single word of '*coutume*' and means custom. In any case, the practical implications of this limitation seem minimal at least in the EC, where the 1990 Directive has long been providing for such an exception.

The definition of 'internal communications' also poses problems since the boundaries of this term are unclear and none of the above mentioned international and British legislative instruments define it. Only the 1992 Government's Guidance indicated that this exemption could apply to Information relating to Ministerial and MP's correspondence,<sup>418</sup> letters to and from members of the public, information passed between officials in the course of their duties,<sup>419</sup> internal minutes and submissions to Ministers and MP.<sup>420</sup> *Stec et al.*<sup>421</sup> mention that this exception in some countries is intended to protect the personal opinions of governmental personnel. They also add that once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an 'internal communication'. The basis of this interpretation is not explained, though it seems quite logical due to the fact that exemptions have to be construed narrowly so as to not empty the right to access environmental information of its substance. The argument is presumably that an internal, private communication, becomes public if given to a member of the public

Both the Convention and the new Directive expressly subject this exemption to the limitation that the public interest served by the disclosure has to be taken into account when exercising it, a counterbalance which did not previously exist. The new Regulations implement this requirement by indicating that this exemption can only be applied if the public interest in secrecy outweighs the public interest in disclosure. However, there is a policy issue on whether internal

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at p. 106) was amended by the Environmental Information (Amendment) Regulations 1998 to '*any internal communication of a relevant person*', where relevant persons are only public bodies caught under the Regulations. The new Regulations mention '*internal communications within a public authority*'.

<sup>417</sup> At art. 4(3)(c).

<sup>418</sup> Such letters appears to be covered, depending on the circumstances, by either parliamentary privilege or qualified privilege in the law of defamation. See on these Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, Penguin Books, 8<sup>th</sup> edition: 1998, pp. 316-323.

<sup>419</sup> This refers to the old tradition of secrecy in Britain which was coupled with 'a deep-seated belief that any exposure of the process of departmental decision-making would tend to cause trouble and reduce administrative efficiency', *ibid.* at p. 205. However, since the coming into force of the FOIA 2000 this is gradually changing.

<sup>420</sup> See the Guidance, above n. 269, at par. 52.

<sup>421</sup> See above n. 97, at p. 58.



communications of a public body should be deemed private. It seems that as well as any information on the environment has to be disclosed to the public, internal communications should be also included, subject to the same lists of exemptions.

This exemption can be criticised, because it applies regardless of the type of information in question. Bakkenist<sup>422</sup> had suggested in 1994 that it would have been preferable if this exemption would only apply to matters of opinion and advice. We feel that today, at least in Britain, this exemption should have been omitted altogether, since the FOIA 2000 on the one hand does not contain such an exemption,<sup>423</sup> and on the other hand section 35(4) provides that in making a decision to disclose under the Act, *'regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking'*.

### **b) Exceptions aiming at protecting important secrets**

Apart from the above-mentioned technical set of exemptions to communication, there are also other exceptions, which aim to protect important secrets relating either to the public or the private sphere of affairs.

Such exemptions are contained in the Aarhus Convention in paragraph 4 of article 4 which provides that for the exemptions to apply, the disclosure **must** result in a negative impact to the interest the exemption tries to protect. The wording used is 'if disclosure would adversely affect' which should be contrasted with the usage of the word 'may' in the previous paragraph on technical exemptions. Both the 2003 Directive and the new Regulations adopt these two categories of exemptions: the ones that 'may' be applied by public authorities (examined before) and the ones that still 'may' be invoked by public authorities but only 'if disclosure would adversely affect' the interest served by secrecy.<sup>424</sup>

We shall therefore examine herein the second set of exemptions to disclosure of environmental information, which apply when disclosure would adversely affect the interest served by the exemption.

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<sup>422</sup> See Bakkenist, above n. 311, at p. 105.

<sup>423</sup> The closest exemption to be found in the FOIA 2000 is the one present at s. 36 which exempts information whose disclosure would or would be likely to prejudice the effective conduct of public affairs, in the reasonable opinion of a qualified person. Subsection 5 contains a list of persons which are qualified for this purpose and provides that Ministers may delegate this responsibility to particular authorities or officers. In any, case this limitation intends to make sure that this decision is taken at a fairly high level and thus exercise parsimoniously. This exemption seems to be more restrictive than the one concerning internal communications found in the Regulations.

### **i) Confidentiality of proceedings of public authorities**

Any information, which would adversely affect the confidentiality of proceedings of public authorities, is also exempt from disclosure. This is similar to the exemption on internal communications though it only applies to confidential proceedings and thus not any proceedings whatsoever. It is not a new exemption, since it was present in the 1990 Directive and the 1992 Regulations.

The new element, apart from the fact that this exemption only applies if release would adversely affect the confidentiality of proceedings, is that confidentiality has to be established by law. This condition is present both in the Aarhus Convention and the 2003 Directive,<sup>425</sup> which provides that information affecting the confidentiality of proceedings of public authorities is exempt information, if such confidentiality is provided for under national law. The term 'proceedings' is not defined though it should be interpreted restrictively, since otherwise, as Harwood has pointed out, almost any information held by public authorities relates to its proceedings.<sup>426</sup> Thus, a possible narrow interpretation of 'proceedings of public authorities' would be that these are proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence.<sup>427</sup> Also, it should be noted that this exemption must be provided for under national law, thus indicating that national law must clearly indicate which particular proceedings are concerned and cannot merely repeat the general terms of the Convention. This interpretation stems from the fact that since all of the Convention and of the Directive have to be implemented by national laws, these words did not need to have been expressly included in this particular exemption, if the intention was not to indicate that national law must provide with certainty which specific proceedings are covered.

To this extent, the 2004 Regulations provide<sup>428</sup> that a public authority may refuse a request where the interest in disclosure would be outweighed by the confidentiality of the deliberations of any public authority being adversely affected by disclosure. This is more liberal than the previous regulations which did not include such a balance test and did not mention the requirement that the confidentiality of proceedings has to be 'provided for by law'. Only proceedings that are already confidential following an explicit enactment or the common law are to be protected under this exemption and not any proceedings which public authorities arbitrarily consider should be kept confidential. Such legislative provisions do exist in English law,<sup>429</sup> but referring to them in such

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<sup>424</sup> This second category of exemptions that only apply if disclosure would adversely affect the interest protected by the exemption, are to be found in par. 2 of art 4 of the 2003 Directive and in reg. 12 (5) of the 2004 Regulations.

<sup>425</sup> Art. 4 par. 4 of Aarhus; art. 4(2)(a) of the 2003 Directive.

<sup>426</sup> See above n. 412.

<sup>427</sup> As suggested by *Stec et al.*, see above n. 97, at p. 58.

<sup>428</sup> At reg. 12(5)(d).

<sup>429</sup> For instance, as long as meetings of local council, and some other health authorities, are concerned, under the Local Government Act 1972, as amended, the public can access committee meetings and related paper and background papers, but not when such meetings are closed to the public following s. 100A of the Act because this would involve release of confidential information. Generally speaking, confidential information

general terms by the Regulations, does not delimit with certainty which proceedings are confidential and which are not and thus leaves it totally to public authorities to decide. This exemption is so general in its terms that is even more restrictive than the equivalent exception found at s. 30 of the FOIA 2000 on investigations and proceedings conducted by public authorities. This section, generally speaking, exempts as a class, any information concerning criminal investigations or criminal proceedings, and information relating to the obtaining of information from informers. It also includes information relating to investigations into whether circumstances exist or may arise justifying regulatory action under any enactment, regulatory investigations relating to unfitness or incompetence of company directors, investigation of persons in regulated professions or who carry out activities which require a licence, investigations into accidents, action relating to charity management, action relating to health and safety. Finally, is exempted all information concerning civil proceedings which arise from such investigations. Even if the above delimitation of which proceedings are deemed exempt, may seem almost all-inclusive, at least it has the clarity of specifying which proceedings of public authorities are to be covered by secrecy and thus it does not refer to an almost catchall provision of '*confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law*' which could include almost anything.

In any case, it can be contended that a construction of the Regulations in conformity with EC law, would require that for the confidentiality of proceedings exemption to apply, this confidentiality would have to be set out under a precise enactment or be a clear common law rule. It could be suggested that the aforementioned provisions of the FOIA could be used as such a legal basis. Otherwise, this exemption could lead to vast amounts of information being withheld.

This danger can be demonstrated in a recent case which involved the Environmental Information Regulations 1992. In *R. v. The Secretary of State for the Environment Transport and Regions Ex p. Anthony Marson*,<sup>430</sup> the High Court ruled that a refusal to disclose the issues that the Secretary of State had taken into consideration before taking the decision that an Environmental Impact Assessment was not necessary, are to be considered confidential information relating to confidential deliberations and internal communications and as such are not to be disclosed.<sup>431</sup> Jowitt J. distinguished between the determination (which had to be disclosed) and the briefing documents which did not and indicated that '*The Secretary of State is not required by the regulations to open up his files so as to make available the advice he has received from his own officers and documents*

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is defined in section 100A(2) of the Act and is also listed in Schedule 12A to the act. For more details on this enactment and for other examples, see Birkinshaw, *Government and Information – The law relating to Access, Disclosure and Regulation*, op. cit.

<sup>430</sup> 23 March 1998, CO/911/98 (unreported application for leave, available from <http://www.casetrack.com>). This case was appealed but the point concerning the 1992 Regulations was not raised in front of the Court of Appeal, see [1998] JPL 869.

<sup>431</sup> The Court did not expressly indicate whether information was confidential on grounds of it being internal communications or related to confidential deliberations, but merely referred to regulation 4 of the 1992 regulations which contained both of these exemptions (before the 1998 amendments). However, the judgement seems to impliedly refer to matters relating to confidential deliberations.

*which record his own thinking about the matter leading up to his actual decision*'. This case was decided under the 1992 regulations and so now the balance test between disclosure and secrecy would have had to be applied before any refusal of disclosure under this exemption. Also, now such advice should have to be expressly categorised as confidential under a specific enactment and thus this finding seems to be of little importance under the new regulations.

## **ii) State secrets**

### **1) The Scope of the exemption: international relations, defence, national security, public safety**

Both the 2003 Directive and the Aarhus Convention,<sup>432</sup> exempt from disclosure information whose disclosure would adversely prejudice international relations, public safety and national defence. These terms, which are left undefined both in Aarhus, the Directive and also in the 1992 and 2004 Regulations,<sup>433</sup> aim to protect the heart of governmental work: state secrets.<sup>434</sup> These terms are unsurprisingly left undefined and are problematic since due to their vagueness, they give a high-degree of discretion to public officials to designate information as secret, and thus can substantially undermine the aim of greater transparency.<sup>435</sup> It also raises the important question as to who is to determine whether disclosure will cause adverse prejudice, the public authorities or the courts. The wording "would adversely prejudice" suggests that it would be ultimately for the courts to decide.

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<sup>432</sup> At article 4(4)(b) of the Aarhus Convention; art. 4(2)(b) of the 2003 Directive

<sup>433</sup> However, it is possible to understand the content of these terms by reference to s. 1 of the Security Service Act 1989: '(1) There shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State. (2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means. (3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands. (4) It shall also be the function of the Service to act in support of the activities of police forces, the National Criminal Intelligence Service, the National Crime Squad and other law enforcement agencies in the prevention and detection of serious crime [...]'

<sup>434</sup> It is interesting to note that some countries have decided that environmental information cannot be limited even by state secrets. See *Stec et al.*, above n. 97, at p. 59. Article 50 par 2. Of the Ukrainian Constitution of 1996 provides that: "Everyone is guaranteed the right of free access to information about the environmental situation, the quality of food and consumer goods, and also the right to disseminate such information. No one shall make such information secret". Source: the Ukraine's parliament website: <http://www.rada.gov.ua/konst/CONENGL.HTM>

<sup>435</sup> See on this point *Doors to Democracy: A Pan-European Assessment of Current trends and Practices in Public Participation in Environmental Matters*, The Regional Environmental Center for Central and Eastern Europe: Hungary 1998, Chapter 1: Access to Environmental Information (by Jeremy Wates), at p. 23. Also available online at <http://www.rec.org/REC/Publications/List.html>

A similar approach seems to have been taken in the case of *R. v. British Coal Corporation ex parte Istock Building Products Limited*.<sup>436</sup> Although it was argued by the public authority, that the information relating to the dumping in 1947 of naval ammunition secretly by night down mineshafts, was information relating to matters affecting national defence or public security, the Court decided to examine whether this was the case and found that there was no evidence to suggest the dumping of munitions in mineshafts in 1947 was a matter which affected National Defence or Public Security in 1994. This was supported by the fact that the Ministry of Defence had not raised any issue in relation to National Defence or Public Security when consulted. Consequently, the Court rejected the argument that such information was exempt. This case was decided under the original 1992 Regulations, which provided that information relating to matters affecting international relations, national defence or public security could be treated as confidential.<sup>437</sup> This exemption was amended in 1998 and would only apply where disclosure would affect international relations, national defence and public security,<sup>438</sup> where of course deference is given by Courts for such matters.

This is also the position under the new 2004 Regulations, which provide similarly to the 1998 Regulations that a public authority may refuse a request where disclosure of information ‘would adversely affect international relations, defence, national security or public safety’ and disclosure would not be in the public interest.<sup>439</sup> In addition, reg. 12(6) contains a novel provision according to which a public authority does not even have to confirm whether it holds or not the information requested, if this confirmation or denial would by itself lead in the disclosure of information and this disclosure would not be in the public interest and would adversely affect international relations, defence, national security or public safety. To put it simply, this regulation allows a public authority to refuse to acknowledge whether it holds information related to national security matters, when what is confidential is also whether this information exists or not and who holds it. This type of answer to a request to information is not provided at all neither in the 2003 Directive nor in Aarhus, but the Government considers it is ‘implicit’ given the nature of this area of confidentiality.<sup>440</sup> Although the Government’s position seems to be arguable, we do not see how this ‘neither confirm nor deny response’<sup>441</sup> can be compatible with the duty to provide reasons. If a public authority does not even have to confirm or deny it holds the information requested, how can it be obliged to provide detailed reasons for its answer without at least impliedly indicating whether it holds the information or not?

Generally speaking, the FOIA 2000 does exempt from disclosure, subject to a harm test, information whose disclosure could prejudice national security, defence or international

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<sup>436</sup> Analysed above, see n. 196.

<sup>437</sup> Regulation 4(2)(a) of the Environmental Information Regulations 1992.

<sup>438</sup> Regulation 4(2)(a) of the Environmental Information Regulations 1992 as amended by the Environmental Information (Amendment) Regulations 1998.

<sup>439</sup> At reg. 12(5)(a) of the 2004 Regulations.

<sup>440</sup> See the UK Government’s Explanatory Memorandum, above n. 133, at par. 4 part ix.

<sup>441</sup> As the Government calls it. *Id.*

relations.<sup>442</sup> It also exempts, as a class exemption and thus not subject to a harm test information directly or indirectly supplied by, or relating to certain bodies dealing with security matters.<sup>443</sup> These provisions can be said to be similar with the equivalent ones of the Regulations with the exception that in the later all exemptions are subject to a harm test.

Also, section 2 of the Intelligence Services Act 1994, which applies to the Secret Intelligence Service (MI5, MI6 and the Government Communication Headquarters), states that these services have a duty not to disclose any information at all, except for the proper discharge of their functions, the interests of national security, the prevention or detection of serious crime, or in the purpose of criminal proceedings.<sup>444</sup> The Environmental Information Regulations 1992, even if they existed at the time of passage of this Act, are not included as a lawful authority for disclosing information. There seems to be an inconsistency here, because under the new Regulations there can be no blanket exemption (as in the FOIA 2000 or the Intelligence Services Act 1994), but in all cases a balance test has to be exercised, which would involve at least indicating whether the information sought exists or not, since a reasoned balance test could not be exercised on inexistent information. Even if the Regulations which stem from EC law undoubtedly supersede these provisions of the Intelligence Service Act 1994, it can be doubted if this could have any practical effects, due to the ever-lasting tradition of total opacity and secrecy in these areas.<sup>445</sup> In any case, as the Government has suggested, it seems unlikely that there will be many instances where environmental information not only would relate to national security or international relations' issues but would also be held by the Secret Security Services.<sup>446</sup>

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<sup>442</sup> See s. 24, 26 and 27 of the FOIA 2000.

<sup>443</sup> See s. 23 of the FOIA 2000. These bodies are various Governmental and military bodies dealing with security matters like the Security Service, the Secret Intelligence Service etc, all listed in subsection 3.

<sup>444</sup> Intelligence Services Act 1994, s. 2(2) and 2(3): '(2) The Chief of the Intelligence Service shall be responsible for the efficiency of that Service and it shall be his duty to ensure-- (a) that there are arrangements for securing that no information is obtained by the Intelligence Service except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary-- (i) for that purpose; (ii) in the interests of national security; (iii) for the purpose of the prevention or detection of serious crime; or (iv) for the purpose of any criminal proceedings; and (b) that the Intelligence Service does not take any action to further the interests of any United Kingdom political party.

(3) Without prejudice to the generality of subsection (2)(a) above, the disclosure of information shall be regarded as necessary for the proper discharge of the functions of the Intelligence Service if it consists of-- (a) the disclosure of records subject to and in accordance with the Public Records Act 1958; or (b) the disclosure, subject to and in accordance with arrangements approved by the Secretary of State, of information to the Comptroller and Auditor General for the purposes of his functions'.

<sup>445</sup> For a more detailed historical and political analysis of this issue, see Patrick Birkinshaw, *Reforming the Secret State*, Open University Press, Milton Keynes 1990. Also, generally speaking the Official Secrets Act 1989 prevents disclosure by making it a criminal offence all disclosures by any person of information relating to security, international relations and defence without lawful authority. Concerning civil servants, section 7 of the Act provides that disclosure is made with lawful authority if it 'is made in accordance with his official duty'. This seems to indicate that if disclosure is made in application of the Environmental Information Regulations, then disclosure is lawful and no criminal offence is committed, since in a democratic state, the most important and fundamental official duty is to abide by the rule of law.

<sup>446</sup> The Government in its 1992 Guidance, suggested, that it would be unlikely that there were going to be many cases of environmental information whose release could compromise public order. See the Guidance, above n. 269, at par. 48. This statement, in our view, could be extended to national security and international relations.

Additionally, apart from the above specific provisions, it should be noted that in the event of 1) serious internal disturbances affecting the maintenance of law and order, 2) war, 3) serious international tensions constituting a threat of war, or 4) in order for an EC state to carry out obligations it has accepted for the purpose of maintaining peace and international security, article 297 of the EC Treaty provides<sup>447</sup> that states can take measures derogating to the Treaty and thus to any EC legislation made under it, such as the Environmental Information Directive. Similarly, article 296 EC provides that no provision of the Treaty can oblige a member-state to supply information 'the disclosure of which it considers contrary to the essential interests of its security' and that any necessary measure can be taken for the protection of the essential interests of security connected with the production of or trade in arms, munitions and war material. These exemptions apply to EC law as a whole since they are provided for in the Treaties and exist so as to accommodate extreme crisis situations. Thus theoretically, they could be directly invoked by member-states so as to avoid providing any information whatsoever and to disapply the Environmental Information Directive when extreme matters affecting national security arise.

## 2) National Security Ministerial certificates

It cannot be overlooked that reg. 15 of the 2004 Regulations provides that a certificate signed by a Minister of the Crown<sup>448</sup> is conclusive proof that the disclosure of the requested information would adversely affect national security and would not be in the public interest. The issue of such certificate prevents the Commissioner from dealing with the matter<sup>449</sup> and therefore the Commissioner or any person whose request for information is affected by the issue of the certificate may directly appeal to the Information Tribunal against the certificate. Also, if a public authority claims in any proceedings under the FOIA or the 2004 Regulations that certain information is covered by a national security certificate, any other party to the proceedings may appeal to the Tribunal on the grounds that the certificate does not apply to that information. In these cases, the Information Tribunal applies a special procedure in consideration of the fact that security

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<sup>447</sup> Art 297 of the EC Treaty: 'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'. A special procedure is provided under article 298 for cases of improper use of this general exemption clause. On these issues see Martin Trybus, 'Defence: at the borderline between Community and Member State competence', paper presented at the W. G. Hart Legal Workshop 2003 EC Law for the 21<sup>st</sup> Century: Rethinking the New Legal Order, 25-27 June 2003, I.A.L.S. London.

<sup>448</sup> A Minister of the Crown is defined in reg. 15(6) by reference to s. 25(3) of the FOIA, which only confers this power to a Minister who is a member of the Cabinet or to the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland.

<sup>449</sup> According to reg. 18(5).

issues are at stake.<sup>450</sup> In general, the Tribunal may allow the appeal and quash the certificate if it finds, that applying the principles of judicial review only, the Minister did not act reasonably in issuing the certificate.<sup>451</sup> The Information Tribunal in cases involving the similar provisions of the Data Protection Act 1998, has held that the principles of judicial review to be applied are the ones applied by the courts, which include the impact of the individuals rights under the European Convention on Human Rights and the concept of proportionality and also that the intensity of the review is guaranteed by the twin requirements that the limitation of convention rights is necessary in a democratic society, in the sense of meeting a pressing social need and the question whether the interference is really proportionate to the legitimate aim being pursued. However, the Tribunal has also acknowledged that in the context of national security judges and tribunals traditionally defer more to the executive view and so the Tribunal '*must apply judicial review principles in a manner appropriate to the national security context: no less, but no more*'.<sup>452</sup> These appeal mechanisms seem to be in breach of the Directive and Aarhus, because these instruments do not provide that there can be a limitation of rights of appeal in cases of national security,<sup>453</sup> and on the contrary provide that a judicial procedure has to be available in addition to an administrative procedure. When a national security certificate is issued, the Information Commissioner is prevented to deal with the matter and thus, there is no administrative procedure in this case, in breach of EC and international law.

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<sup>450</sup> Special procedural rules apply for such appeals under section 60 of the FOIA 2000, according to s. 61 of the Act which refers to the special procedure under Schedule 6 to the Data Protection Act 1998.

<sup>451</sup> According to the relevant provisions on national security appeals under s. 60 of the FOIA 2000, to which reg. 18(9) of the 2004 Environmental Information Regulations explicitly refers.

<sup>452</sup> See the first case of the Tribunal involving a national security certificate (but made under the equivalent provisions of s. 28 of the Data Protection Act 1998) *Baker v Secretary of State for the Home Department* [2001] UKHR 1275, at paras. 57 to 76. In all of the subsequent cases (all dealt under the equivalent provisions of the Data Protection Act 1998), this restrictive view of the powers of the Tribunal in cases of National Security has been upheld. See the case of *Tony Gosling v Secretary of State for The Home Department*, 1 august 2003, unreported, at paras. 33 to 48; and the case of *Peter Hitchens v Secretary of State for The Home Department*, 4 August 2003, unreported, at paras. 35 to 50. All these cases are available on the Department of Constitutional affairs website at: <http://www.dca.gov.uk/foi/inftrib.htm>

To sum up these cases, in the *Baker* case the Information Tribunal quashed a Ministerial Certificate issued under s. 28 of the Data Protection Act 1998 because this certificate imposed a blanket exemption on all information held by the Security Services, regardless of whether a potential issue of national security arose on a case by case basis, allowing for no differentiation between the acquisition of information and its disclosure, to which different issues of national security risk could apply. Since, there was no justification for such an all encompassing provision the certificate was considered as unreasonable and was quashed. The Secretary of State in conformity with that decision, issued a new Certificate which individuates the different functions of the Security Service and specifies the extent to which each is said to require exemption from the Data Protection Act 1998 for the purposes of safeguarding national security, in a manner that is intended to be proportionate to the perceived risk to national security if particular provisions on disclosure of the Data Protection Act were applied to each category of data specified in the Certificate. The Security Service is also given discretion to decide in each case whether disclosure is prohibited on national security grounds. The Tribunal in the subsequent cases of *Gosling* and *Hitchens* clearly indicates that once the Security Service has exercised its discretion, their decision is unchallengeable either before the Tribunal or before the Courts. In par. 50 of the *Hitchens* decision, the Information Tribunal indicated that '*The Data Protection Act, in our view, does not provide any means of challenging the Security Services' decision, either before this Tribunal or before the Courts*'.

<sup>453</sup> See the relevant discussion on what rights of appeal are imposed by the 2003 Directive and the Aarhus Convention, below at part 4) Appeal and review procedures.



It should be noted that this power of Ministers to issue national security certificates bypassing the competence of the Information Commissioner is wider in the FOIA than in the 2004 Regulations, since in the FOIA such certificates can also be issued for information which either relates to bodies dealing with security matters or is required to safeguard national security.<sup>454</sup> The importance of this should not be overlooked, since it might allow disclosure of environmental information related to military or other sensitive activities such as nuclear and biological weapons, which could have been unobtainable under the 2000 Act. Thus, when environmental information is concerned the claim made in 2003 by Wadham and Modi that ‘*There is a long way to go before freedom of information becomes a reality in the United Kingdom. Unfortunately the claim of national security remains a trump card in the hands of the executive, a card that is not subjected to any real independent assessment and little control by the courts*’<sup>455</sup> has to be qualified.

### **iii) Judicial and analogous criminal or disciplinary proceedings**

The Aarhus Convention, identically to the 2003 Directive and the new Regulations<sup>456</sup> provides that information whose disclosure would adversely affect either the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature, can be withheld. These provisions contain three specific exemptions to communication of information related to judicial proceedings.

The first, is information concerning the ‘course of justice.’ This term is unsurprisingly left undefined even if it is a very vague one. It can be contended that it refers to actual judicial proceedings only, otherwise the course of justice could not be prejudiced.<sup>457</sup> Thus, this exception, if analysed narrowly, means that information cannot be excluded only because in the past it was part of court proceedings. The 1990 Directive and similarly the 1992 Regulations<sup>458</sup> were less liberal since they excluded all information affecting matters which have been *sub judice* both at present or in the past. This is also the position adopted by the FOIA 2000, which contains an absolute

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<sup>454</sup> According to s. 60(2) of the FOIA 2000. However, reg. 18(9)(b) of the Environmental Information Regulations 2004 provides that this provision shall be omitted regarding environmental information.

<sup>455</sup> John Wadham, Kavita Modi, *National security and open government in the United Kingdom*, paper delivered at the *National Security and Open Government: Striking the right balance* symposium, organised on May 5&6 2003 in Washington, D.C. by the Campbell Public Affairs Institute and the Justice Initiative Open Society Institute, available from <http://www.maxwell.syr.edu/campbell/opengov/index.html>

<sup>456</sup> Aarhus Convention: article 4, par. 4, 3<sup>rd</sup> subparagraph; 2003 Directive art. 4(2)(c); 2004 Regulations reg. 12(5)(b).

<sup>457</sup> According to *Stec et al.*, above n. 97, at p. 59.

<sup>458</sup> The 1990 Directive at art. 3(2) provided that a request for information may be refused where it affects ‘matters which are, or have been, sub judice, or under inquiry (including disciplinary inquiries), or which are the subject of preliminary investigation proceedings’. This was transposed in reg. 4(2)(b) of the 1992 Regulations as a possibility for public authorities to disclose ‘information relating to, or to anything which is or has been the subject-matter of, any legal or other proceedings (whether actual or prospective)’. However this was considered as too broad and was later changed by the amending 1998 regulations to information whose disclosure ‘would affect matters which are, or have been, an issue in any legal proceedings or in any

exemption for all information relating to proceedings.<sup>459</sup> This could be stretched as including present, past and pending proceedings. This is another example of the more liberal nature of the Environmental Information regime.

The second is information which would adversely affect the ability of a person to receive a fair trial. It can be safely contended that the notion of a fair trial should not be restricted to Court proceedings, but also to all other assimilated proceedings including disciplinary, civil and administrative proceedings, in the same way as article 6 of the ECHR has been construed as to cover such proceedings. The notion of a fair trial can be said to be more important than the provision of environmental information aiming at protecting the environment. For instance, this could include information that if disclosed might influence the decision of a popular jury. In any case, after the proceedings are over, communication should take place, as analysed above.

Thirdly, information is exempt from disclosure if it would adversely affect the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature. Only criminal and disciplinary proceedings are covered, so information about civil or administrative investigations by public authorities would not be covered under this exemption.<sup>460</sup> This is extremely important in the UK, where public inquiries are commonly used, especially in planning and environmental law, before some decisions are made (e.g. planning appeals to the Secretary of State).<sup>461</sup> An interesting question is whether information relating to enforcement proceedings which are not strictly speaking criminal in nature are covered. Such an example could be planning enforcement, since enforcement notices are not of a criminal nature, at least before the concerned individual is prosecuted for failure to comply with them.<sup>462</sup> The answer seems to be yes, since this provision also aims at protecting individuals from potentially harmful disclosures. This is consistent with the interpretation given to this exception in the *Mecklenburg* case, where it was ruled that the exemption covers proceedings which will '*inevitably lead to the imposition of a penalty if the offence (administrative or criminal) is established*' and that therefore '*preliminary investigation*

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enquiry (including any disciplinary enquiry), or are the subject-matter of any investigation undertaken with a view to any such proceedings or enquiry.'

<sup>459</sup> At section 32 of the FOIA 2000. According to Stanley, the rationale for such a blanket exemption is that since there already exist comprehensive rules governing access to Court records, this system is to be left untouched. See above, n. 608, at p. 36-43.

<sup>460</sup> This was not the case under the 1992 Regulations, which provided at reg. 5 that 'In this regulation "legal or other proceedings" includes any disciplinary proceedings, the proceedings at any local or other public inquiry and the proceedings at any hearing conducted by a person appointed under any enactment for the purpose of affording an opportunity to persons to make representations or objections with respect to any matter'. This far-reaching provision covered all types of enquiries was criticised as being contrary to the spirit of public inquiries in the UK which is to allow access to information and was subsequently repealed in 1998. On a critic, see Bakkenist, above n. 311, at p. 107.

<sup>461</sup> For a brief description of the system of planning public enquiries, see Bell and McGillivray, below n. 593, at pp. 335-6. Also see between many other examples the Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2002 (SI 1223/2002); the Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 (SI 2685/2002); the Town and Country Planning (Enforcement) (Inquiries Procedure) (England) Rules 2002 (SI 2686/2002).

<sup>462</sup> According to section 171A(1) of the Town and Country Planning Act 1990. Also see on this point M. Purdue – E. Young – J. Rowan-Robinson, *Planning Law and Procedure*, Butterworths, 1989, Chapter 12 The Enforcement of Planning Control.

*proceedings must refer to the stage immediately prior to the judicial proceedings of the enquiry*'.<sup>463</sup> However, since a harm test has to be applied, disclosure of this type of information should only be withheld if it could reasonably be expected to interfere with the enforcement proceedings (or if it would jeopardise the individual's concerned right to a fair trial, as seen above). As the ECJ ruled in the *Mecklenburg* case, the exemption on intending proceedings (as with all exemptions) '*may not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure*'<sup>464</sup>.

A further question that arises is relative to prospective legal proceedings. The 1992 regulations expressly referred to them as covered under this exemption. The new Regulations do not do so expressly, but mention the need to protect the 'ability of a public authority to conduct an enquiry of a criminal or disciplinary nature', which clearly covers prospective proceedings. What can constitute prospective legal proceedings was considered in the *Ibstock* case and it was found that there cannot be prospective legal proceedings from the mere existence of a planning application, since the planning application may be granted or may be refused without an appeal and thus there is not yet a prospective appeal when a planning application is made. In this case the planning application had not even been determined. This seems to indicate that prospective proceedings are covered, but there should be some degree of certainty of them being initiated and not just a possibility. This interpretation is consistent with the findings of the *Mecklenburg* case, which concerned the disclosure of a statement of views on a bypass road scheme submitted by a countryside protection authority, in the course of planning permission proceedings. The ECJ ruled that preliminary investigative procedures<sup>465</sup> do include administrative procedures merely preparing the way for an administrative measure, but only if these procedures '*immediately precede[s] a contentious or quasi-contentious procedure and arises from the need to obtain proof or to investigate a matter prior to the opening of the actual procedure*'.<sup>466</sup> Macrory has interpreted this as indicating that in the UK, ordinary public inquiries, in opposition to legal enquiries leading to judicial implications, are not included under the terms of the exemption.<sup>467</sup>

The interpretation reached by the ECJ in the *Mecklenburg* decision was confirmed in the *Commission v Germany* case, in which the ECJ applied the above *Mecklenburg* ruling and found that the German law transposing the Regulations and providing that all administrative procedures

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<sup>463</sup> At par. 27 of the judgement. This is also problematic with some of the notices that are served by local and other public authorities requiring the recipient to undertake some specific actions, otherwise he could be prosecuted, like planning enforcement notices. In such case, the recipient can still comply with the notice and thus avoid prosecution. So, these proceedings are not covered by the exemption, as they will not 'inevitably' lead to the committal of an offence and the imposition of a penalty.

<sup>464</sup> At par. 25 of the judgement.

<sup>465</sup> Although this term is not any more used in the new Directive and Regulations, the way in which it was interpreted by the ECJ is important since it also shows how this exemption, taken as a whole, has to be construed.

<sup>466</sup> At par. 30.

<sup>467</sup> See the commentary by Richard Macrory on the *Mecklenburg* decision, 283 *The ENDS Report*, 8/1998, 45.

were covered altogether, exceeded the scope of the Directive's exemption on preliminary investigation proceedings.

#### **iv) Commercial and industrial confidentiality.**

Both the Aarhus Convention, the 2003 Directive and the new Regulations,<sup>468</sup> exempt information whose disclosure would adversely affect commercial or industrial confidentiality. However, since this might encompass a great amount of important data, the scope of this exemption is narrowed by the limitations that a) national law (or Community law) must expressly protect the confidentiality of that information, and b) the confidentiality must protect a legitimate economic interest. This last condition clearly indicates that not all commercially confidential information is included, but only if it fulfils an economic aim, which has to be legitimate and not merely trivial.<sup>469</sup> The 2003 Directive provides two examples of such types of interest: statistical confidentiality and tax secrets. Also, the confidentiality of commercial or industrial information must be protected in national or community law.<sup>470</sup> This seems to indicate that for this exemption to apply there must be a specific provision of national or EC law that considers the information in question to be confidential, otherwise the reference to national law or Community law would not make any sense. The English courts have had the opportunity, under the 1992 Regulations, to examine the extent of the scope of this exemption in the case of the *Birmingham Northern Relief road*, examined before. The findings of the Court are still relevant to some extent, since the new position is very similar to the position under the previous Directive and Regulations.<sup>471</sup> The main difference is that now for the exemption to apply, a legitimate economic interest has to be protected by it and confidentiality has to be provided by law.

In our view, there are some important points raised in this case that are still applicable today. First, it is necessary to follow the approach taken by the court in interpreting the commercial confidentiality exemption found in the then 1990 Regulations. The Court stated that the Regulations did not require information to be treated as confidential merely because the parties have agreed that it should not be disclosed. Thus, an agreement between a public authority and the provider of some information that it should be treated as confidential cannot, by itself, prevent disclosure. However, the Court indicated that the existence of such an agreement was relevant for the applicability of the exemption and ruled that for the exemption to apply, the information in

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<sup>468</sup> Aarhus Convention: article 4, par. 4, (d); 2003 Directive: article 4(2)(d); 2004 Regulations reg. 12(5)(e).

<sup>469</sup> This is consistent with the aim of this exemption: to protect the secrets of businesses. On the policy issues relating to the need to protect secret environmental information relating to private businesses from disclosure, see Donald Stever, *The Private Sector's need for Environmental Secrecy: Product Regulation and the Secrecy of Proprietary Information*, [1993] 2 *New York Environmental Law Journal* 224.

<sup>470</sup> 2003 Directive art. 4(2)(d): '2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect: [...]d) the confidentiality of commercial or industrial information where such confidentiality is **provided for by national or Community law** to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy'. (our emphasis)

question must be both capable of being treated as confidential according to the Regulations and the parties must have agreed that it should be so treated, so that its disclosure would involve a breach of agreement. The Court also concluded that a blanket exemption concerning commercially confidential documents could not be justified as being proportionate to the objective of ensuring freedom of access to environmental information, whilst protecting commercial and industrial confidentiality. The court also acknowledged that it was common sense that a commercial document and, in particular, a contract (between a public body and a private company), would contain commercially confidential information. The Court was concerned with a compensation provision indicating that the private company would be entitled to compensation if the public body subsequently decided not to proceed with the project. Sullivan J. ruled that *'even if one adopts a very restrictive view of what information is to be regarded as confidential in a commercial agreement, a compensation provision of that kind is, in my view, a paradigm of information to which commercial confidentiality attaches'*.<sup>472</sup>

All of the above seem to indicate that for the commercial confidentiality exemption to apply, the commercially affected person should clearly indicate which information should be confidential, either when providing the information or when consulted on the issue at a later date. This is consistent with the approach adopted in the 1992 Governmental Guidance on the issue (characterised by Sullivan J. as setting out *'a sensible approach to a practical problem'*<sup>473</sup>) which indicate that in the case of information received from a third party under contract or statute, there should be two ways of proceeding, either to classify information when it is received or to classify it when access is first requested. In both cases it is for the provider to justify which parts and for which reasons have to be treated as confidential and for how long, either when he provided the information or when he is consulted after a request to disclose has been made.

Moreover, the Draft Code of Practice provides that public authorities should reject, where possible, confidentiality clauses in contracts and that in any event they should not agree to hold information *'in confidence'* that is not in fact confidential. Also, it is provided that any acceptance of confidential provisions in contracts must be for good reasons and capable of being justified to the Information Commissioner.<sup>474</sup>

A final point that is important to make, is that if the new Regulations and the 2003 Directive are compared to the FOIA 2000 concerning the exemption on commercial confidentiality, it is clear that the former are more liberal since they allow for greater access. More specifically, section 43(2) of the 2000 Act, provides that *'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)'*. This exemption is clearly very broad and is not limited as the equivalent provisions found in the Regulations and discussed above. Also, even if both in the

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<sup>471</sup> 1990 Directive art. 3, par. 2 fourth indent; 1992 Regulations reg. 4(3)(e).

<sup>472</sup> [1999] Env. L.R. 447, at p. 478.

<sup>473</sup> Ibid.

Regulations and in the FOIA 2000 a harm test has to be applied when applying this exemption, as we shall see more in details further on, under the 2004 Regulations when the information concerns emissions and is relevant for the protection of the environment, then the balance test cannot be applied but the information has to be disclosed regardless of any commercial or industrial confidentiality concerns.

#### **v) Intellectual property.**

Two separate issues have to be distinguished. First, whether disclosure of copyrighted or otherwise patented information under the Regulations can constitute copyright infringement, and second whether information already disclosed under the Regulations can be further copied and circulated legally. These issues, involving section 47 of the Copyright, Designs and Patents Act 1988, have already been dealt and thus we shall concentrate on a description of the relevant provisions contained in the specific legal instruments providing for a right to access environmental information.<sup>475</sup>

The Aarhus Convention identically to the 2003 Directive and the new Regulations provide that information adversely affecting intellectual property rights is exempt from disclosure.<sup>476</sup> A lot of information deposited in public authorities' files is protected by intellectual property laws, which make any unauthorised use or duplication a criminal offence. For instance, all drawings made by architects are intellectually protected and thus cannot be copied, however this should not mean that they should not be communicated.<sup>477</sup>

Intellectual property rights are already protected in a sense through the exemption dealing with commercial secrets, since such information can be of economic and commercial significance to its copyright owners. However, intellectual property rights can also protect non-commercial information (such as drawings or texts with no commercial significance), but since a harm test has to be applied when exercising this exemption, this type of information should not be able to outweigh the interest in disclosure. Consequently, it seems that the inclusion of such an exemption is redundant and unnecessary duplicates the commercial secrets one. This is also the position under the FOIA 2000, which does not contain a specific exemption on intellectual property rights (this term is totally absent in the Act) and thus these matters are left to be protected by section 43 which exempts from disclosure information on trade secrets or prejudicial to the commercial interests of

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<sup>474</sup> See the Draft Code of Practice, above n. 309, at paras. 38, 39, 40 and 43.

<sup>475</sup> See above, i) Limitations on the subsequent use of disclosed information

<sup>476</sup> Aarhus Convention: article 4, par. 4, (e); 2003 Directive: article 4(2)(e); 2004 Regulations reg. 12(5)(c).

<sup>477</sup> These drawings as forming part of planning permissions are part of planning registers and have to be disclosed. See the relevant chapter on registers.

any person. The interrelation between intellectual property and commercial confidentiality can be demonstrated by the position adopted by the 1992 Regulations, which mentioned that information which would affect the confidentiality of matters relating to commercial or industrial confidentiality, including intellectual property, could be withheld.

Thus, both in the 1992 Regulations and the FOIA 2000, intellectual property rights are only protected in relation to commercial or industrial confidentiality, and not independently. Thus, the protection in these instruments is more limited than in the present Directive and Regulations. This means that the current provisions on environmental information are more restrictive to that extent. However, the current provisions should be interpreted in conformity with the equivalent provisions of the FOIA 2000, so that disclosure under the intellectual property exemption should only be refused when trade secrets or commercial interests are jeopardised by communication of information. In any case, it can be contended that since both the 2003 Directive and the 2004 Regulations contain specific provisions protecting commercial interests, these could have sufficed and the UK regulations could have omitted to transpose this exception. This would have also had the added advantage of simplicity, since it would have aligned the new Regulations with the FOIA 2000.

#### **vi) Personal data confidentiality.**

As under the 1990 Directive and the 1992 Regulations,<sup>478</sup> the Aarhus Convention, the 2003 Directive and the new Regulations,<sup>479</sup> all provide that information whose disclosure would adversely affect the confidentiality of personal data or files relating to a natural person who has not consented to disclosure, may be withheld. Moreover, the 2003 Directive, following the Aarhus Convention, has added that the confidentiality of personal information must be protected in national or community law.<sup>480</sup> This seems to indicate that for this exemption to apply, there must be a specific provision of national or EC law that considers the personal information in question to be confidential, otherwise the reference to national law or Community law would not make any sense. Such provisions do exist in EC law and the 2003 Directive expressly includes such an example.<sup>481</sup>

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<sup>478</sup> 1990 Directive art. 3, par. 2 fifth indent; 1992 Regulations reg. 4(3)(b).

<sup>479</sup> Aarhus article 4, par. 4(f); 2003 Directive art. 4(2)(f); 2004 Regulations reg. 5(3), reg. 12(3) and reg. 13. There is also a difference with the equivalent provisions of the 1990 Directive and 1992 regulations that while previously the words 'would affect' was used, in these new instruments it has been replaced by the phrase 'would adversely affect' thus favouring even more disclosure of information.

<sup>480</sup> 2003 Directive art. 4(2)(f): '2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect: [...] the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, **where such confidentiality is provided for by national or Community law**'. (our emphasis)

<sup>481</sup> The last indent of art. 4(2) of the 2003 Directive states that: 'Within this framework, and for the purposes of the application of subparagraph (f), Member States shall ensure that the requirements of Directive

The Information Directive indicates that for the application of the personal data confidentiality exemption, Directive 95/46 that protects individuals from processing of personal information,<sup>482</sup> shall be taken into consideration and applied. This Directive has been transposed into UK law by the Data Protection Act 1998, which also contains provisions prohibiting the disclosure of personal data to a third party without the consent of the individual concerned.<sup>483</sup> The main difference with the previous regimes is that under the 1992 Regulations this was a mandatory exemption, and public authorities had to refuse disclosure of information affecting personal data confidentiality in all cases, whether under the new 2003 Directive this would not be possible as a balance test has to be applied.

The 2004 Regulations, similarly to the FOIA, create a very complicated mechanism for the disclosure of personal data. First, under reg. 5(3) if the applicant making the request for information requests personal information relating to himself, then this information is totally unavailable under the Regulations. The right to know whether this information is held, and if so to have access to it, is covered instead by the provisions of the Data Protection Act 1998. This is identical to what is provided in s. 40(1) of the FOIA, which exempts, as an absolute exemption, personal information relating to the applicant that requests it and thus, he cannot use the FOIA to access this information but the Data Protection Act 1998 only. However, there seems to be some inconsistency with the 2003 Directive in this regulation, since any reference to a public interest test is totally omitted, whereas the Directive mentions that the public interest test has to be applied to all exemptions, including the personal data confidentiality one. The 2003 Directive mentions that the public interest test has to be applied '*in every particular case*'<sup>484</sup> and there can be no doubts that member states cannot derogate to this principle.

Also, reg. 12(3) exempts from disclosure personal information relating to a third party, if its disclosure would contravene the Data Protection Act 1998 or if that information would have been exempt from disclosure under that Act.<sup>485</sup> Personal information to which the relevant provisions of the Data Protection Act 1998 Act do not apply, is treated for these purposes as if they did.

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95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are complied with'.

<sup>482</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ of the EC, L 281 , 23/11/1995 p. 31.

<sup>483</sup> E.g. for sensitive personal data (such as racial or ethnic origin, political opinions, religious beliefs or other beliefs of a similar nature, membership of a trade union, physical or mental health or condition, sexual life, the commission or alleged commission of any offence, proceedings for any offence committed or alleged to have been committed, the disposal of such proceedings or the sentence of any court in such proceedings), disclosure to third parties without the consent of the individual concerned is prohibited by Sch. 3 to the Data Protection Act 1998.

<sup>484</sup> Art. 4 par. 2 of the 2003 Directive.

<sup>485</sup> According to reg. 12(3) of the 2004 Regulations 'To the extent that the information requested includes personal data of which the applicant is not the data subject, those data shall not be disclosed otherwise than in accordance with regulation 13'.



Reg. 2(2) of the Environmental Information Regulations 2004 define the terms of 'data' and 'personal data' by reference to the Data Protection Act 1998,<sup>486</sup> which defines in section 1(1) 'personal data' as

... data which relate to a living individual who can be identified--

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely

to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of

the intentions of the data controller or any other person in respect of the individual<sup>487</sup>

The 2004 Regulations extend this definition to any personal data held on manual files, even if they are not covered by the Data Protection Act 1998.<sup>488</sup> This does not seem incompatible with the principle that exemptions to the right of access are to be interpreted restrictively, since this exemption aims to protect the right of privacy, which as analysed elsewhere is a fundamental human right and has started to be recognised in English law.<sup>489</sup>

In any case, reg. 13(2)(3) provides that when responding to a request to access information which would involve the disclosure of personal information about a third party, that information is

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<sup>486</sup> As amended numerous times. Generally speaking this Act provides that any public or private person processing personal data must comply with the eight enforceable principles of good practice which consist of personal data being fairly and lawfully processed, processed for limited purposes, adequate, relevant and not excessive, accurate, not kept longer than necessary, processed in accordance with the data subject's rights, secure, and not transferred to countries without adequate data protection. Not all personal data falls within the scope of the Act since its provisions only apply to automatically processed data (computerised data) and data, forming part of a relevant non-computerised filing system (manual data). Also the Act grants to the person concerned by the data, right to access it and have it corrected if inaccurate and a right to compensation to an individual who suffers damage, or damage and distress, as the result of any contravention of the requirements of the Act. For a detailed analysis of the Act and the numerous pieces of subordinate legislation made under it, see David Bainbridge, *Data Protection Law*, CLT Professional Publishing, 2000. Also see the *Data Protection Act 1998 - Legal Guidance*, version 1, published by the Information Commissioner, 2001, available from <http://www.informationcommissioner.gov.uk/>

<sup>487</sup> 'Data' is defined in the same section as: "... information which-

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68".

According to the landmark case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746, data will relate to a living individual if it "is information that affects [someone's] privacy, whether in his personal or family life, business or professional capacity ... The information should have the [individual] as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest".

<sup>488</sup> According to reg. 13(12)(b) of the 2004 Regulations. Not all manual data is covered under the Data Protection Act 1998. Generally speaking is only covered data held on a relevant filing system which is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible. For an in-depth analysis of what sort of manual data is covered see, Helen Barnard, 'Data Protection Act 1998-manual data' [2002] 152 *New Law Journal* 7036, 925. In *Durant v Financial Services Authority* [2003] EWCA Civ 1746 the Court of Appeal held that manual files are data "only if they are of sufficient sophistication to provide the same or similar ready accessibility as a computerised file system".

<sup>489</sup> See between many others, Rhona Smith, 'Is There A Right To-Privacy?' [2002] *Human Rights & UK Practice* 3.1, 11.

exempt from disclosure if its disclosure would be exempt under any exemption found in Part IV of the Data Protection Act 1998,<sup>490</sup> and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Similarly, reg. 13(2)(2) provides that when responding to a request to access information which would involve the disclosure of personal information about a third party, that information is exempt from disclosure if its disclosure would contravene any of the data protection principles. These eight data protection principles can be found in Schedule 1 to the Data Protection Act 1998 which provides that personal data shall be processed fairly and lawfully; that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes; that personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed; that personal data shall be accurate and, where necessary, kept up to date; that personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes; that personal data shall be processed in accordance with the rights of data subjects under the Data Protection Act; that appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and that personal data shall not be transferred to a country or territory outside the European Economic Area, unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data. This provision implements art. 4(2) of the 2003 Directive which refers to compliance with Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. In this regulation too, there seems to be some inconsistency with the 2003 Directive, since any reference to a public interest test is totally omitted.

Also, the same regulation provides that if the third party who is concerned by this personal data has given notice to the public authority under section 10 of the Data Protection Act 1998 that the release of those data is causing or is likely to cause substantial damage or substantial distress to him or to another, or that he would not have a right to know about the information relating to himself or a right of access to it, then the public body concerned is required to apply the balance test and consider whether release of the information would be in the public interest.

Interestingly, reg. 13(5) mentions that public authorities do not even have to confirm or deny whether the requested information exists or is held by them, if giving this information would contravene any of the data protection principles or would be covered by one of the exemptions of Part IV of the Data Protection Act 1998. Again, this provision is clearly in breach of the 2003 Directive, since any reference to a public interest test is totally omitted.

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<sup>490</sup> Part IV of the Data Protection Act 1998 contains no less than 12 sections each containing various exemptions, such as national security, the prevention or detection of crime, regulatory functions, danger to an

The reason for these breaches of the 2003 Directive as far as the personal data confidentiality exemption is concerned, seems to be the effort of the Government to align the Environmental Information regulations 2004 as closely as possible with the FOIA 2000. However, it was overseen that under the FOIA personal data confidentiality is an absolute exemption not subject to any harm test, whereas in the 2003 Directive all exemptions are subject to a public interest test. This solution demonstrates how the right to information can supersede, in some cases, the right to protection of personal information, but the 2004 Regulations do not seem to accept this idea.

One last point to note, is that this exception on personal data which aims to protect the privacy of third parties, does not apply to artificial legal persons, since the 2004 Regulations speak about personal information relating to a 'data subject'<sup>491</sup> which is defined in s. 1 of the Data Protection Act 1998 as an 'individual' who is the subject of personal data. Similarly, art. 4(2)(f) of the 2003 Directive refers to a 'natural person' only. This seems to be contrary to the ECtHR's jurisprudence in the case of *Stés Colas Est and others v. France*,<sup>492</sup> in which the ECtHR held that it can be possible under certain circumstances to recognise the right to a home to artificial legal persons.<sup>493</sup> This finding is though of little practical significance, since it seems that their rights would still be protected under the commercial confidentiality exemption.

#### **vii) Information voluntarily provided by third parties**

The Aarhus Convention, similarly to the 2003 Directive,<sup>494</sup> exempts information whose disclosure would adversely affect the interests or the protection of any person who has provided the information without being obliged to do so and does not consent to the release. The Convention does not define what is a 'third party' (the 2003 Directive speaks about 'any person') and when is he under a legal obligation to provide information. The overall context would indicate that a 'third party' is any legal person (either artificial or natural) who is not a public authority and thus owes no duty to the public to provide information. This interpretation is consistent with the fact that public authorities have to provide any information they hold as well as information they have produced themselves.<sup>495</sup>

The issue of when is there a legal obligation for a third party to provide information seems quite straightforward. However, what if a public authority had the legal powers to require that

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individual's physical or mental health, armed forces, honours and legal professional privilege. None of these exemptions is subject to a public interest test.

<sup>491</sup> At reg. 2(2), which refer to the definition of this term found in the Data Protection Act 1998.

<sup>492</sup> *Stés Colas Est and others v. France*, 16 April 2002, App. No. 37971/97.

<sup>493</sup> See the relevant discussion in the chapter on Human Rights: A, ii, (d) The problem of artificial legal persons and the right to environmental information.

<sup>494</sup> Aarhus article 4, par. 4(g); 2003 Directive art. 4(2)(g). The only difference is that whether Aarhus only speaks about the 'interests of a third party', the Directive speaks about 'the interests or protection of any person' who supplied information voluntarily. The Directive merely includes an example of a person's interests, its protection, and thus does not add anything not already encompassed in Aarhus.

certain information be reported to it, but had not exercised them, because that information was already being reported to it on a voluntary basis? Since exemptions have to be construed narrowly in a way favouring disclosure, it seems that this exemption applies only when public authorities have not the legal power to oblige certain information to be reported to them, irrespective of the fact whether this power was used when gathering the information in question.<sup>496</sup> This is in any case the view adopted in the 2004 Regulations which explicitly consider that if the person that provided the information could have been put under an obligation to supply it, then this exemption does not apply.<sup>497</sup> The same regulations also add that this exemption does not apply if the person supplied this information in circumstances which enable the public person to disclose it in compliance with some other, than the regulations, enactment. This refers to other statutory provisions providing for access to certain specific information, such as registers which may contain, apart from the information that a person is bound to disclose, information voluntarily provided by third parties. An example of this is the planning register, which contains between other, applications for planning permission. Some developers, in support of their application might decide to give voluntarily more information than what is legally required for the application to be examined, so as to help planners reach a decision. Thus, such information is not covered by this exemption, even if voluntarily provided.

It is interesting to note that this exemption is quite liberal, since when the person concerned has consented to disclosure, this exemption does not apply. Also, since the balance test has to be applied, this indicates that there could be some cases where the public interest in disclosure would lead for this type of information to be disclosed regardless of the refusal of the concerned person to give his consent.

The rationale for such an exemption on voluntarily provided information is that it would 'inhibit the present open and constructive discussions between environmental control authorities and industry and the gathering of information on which environmental studies are based'.<sup>498</sup> This has been heavily criticised by Birtles,<sup>499</sup> due to the long-existing criticisms about the close and far too friendly relationships between environmental regulators and polluters. He feels that this exception could exclude enormous quantities of environmental information which affected people should have a right to know. He also adds that it is difficult to see how the honest exchange of

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<sup>495</sup> See above, Which information is covered?.

<sup>496</sup> See on this point *Stec et al.*, above n. 97, at p. 61.

<sup>497</sup> Reg. 12(5)(f) provides that: '... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect — [...]

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority,

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it, and

(iii) has not consented to its disclosure;'

<sup>498</sup> According to the 1992 Governmental Guidance, see above n. 269, at par. 67.

<sup>499</sup> See William Birtles, 'A right to know: the Environmental Information Regulations 1992', [1993] JPL 615, at p. 619. It has also been criticised by Bakkenist on similar grounds, see Bakkenist, *op. cit.* At p. 86-88.

information and views between Government and industry can be inhibited by the publication of that kind of information, and concludes by contending that ‘this exception smacks of the old law of Crown privilege which was frequently used to cover up the incompetence of ministers and civil servants’. All these criticisms were indeed justified in the context of the 1992 Regulations and the 1990 Directive, which applied to **any** information voluntarily supplied and not to any information whose disclosure would adversely affect the **interests** of the person that supplied it voluntarily. Also, this was a mandatory exemption under the 1992 Regulations when now a balance test has to be applied before disclosure is refused. In contrast, Hallo<sup>500</sup> would have welcomed an exception for information voluntarily supplied that would have expressly provided for the protection of “whistleblowers” and thus would have allowed people aware of environmentally damaging activities to report them to the authorities without fear of their identity being revealed.<sup>501</sup>

However, this exemption still excludes, unnecessarily, more information than is ideally necessary, since it is still drafted in very general and imprecise terms by comparison to the FOIA. To that extent, the equivalent provision of the FOIA 2000, even if it is an absolute exemption and thus gives no discretion to public authorities to disclose by applying the balance test, is more precise. Section 41 of the 2000 Act requires that disclosure of the information should constitute an ‘actionable breach of confidence’ so as to be exempt from disclosure. This means that the person who gave the information could bring an action in court for breach of confidence if it was released and could apply for an injunction to stop the release of information under the specific common law rules on breach of confidence. It should be noted that even if it is an absolute exemption, the common law of breach of confidence allows communication of confidential data, if that is in the public interest.<sup>502</sup> Thus the general exception found in the new regulations, could have been framed in regard to this section of the 2000 Act, which is more liberal to this extent.

#### **viii) Information prejudicial to the environment**

Finally and most importantly, both the Convention, the 2003 Directive and the new Regulations, exempt from disclosure any information whose disclosure would adversely affect the

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<sup>500</sup> See Hallo, above n. 201, at p. 9.

<sup>501</sup> Such provisions already exist in UK employment law and were introduced by the Public Interest Disclosure Act 1998. This Act encourages employees to raise concerns about malpractice in the workplace through protecting whistleblowers from dismissal and victimisation. Only disclosures that relate to specified types of malpractice may qualify for protection under the Act. These include *inter alia* dangers to health, safety and the environment and the cover-up of any such malpractice. For details see Yvonne Cripps, *The Legal Implications of Disclosure in the Public Interest – An Analysis of Prohibitions and Protections with Particular Reference to Employers and Employees*, Sweet and Maxwell, London, 2nd ed 1994. However, this Act does not protect a whistleblower’s identity to be withheld from disclosure by public bodies.

<sup>502</sup> See on the common law of breach of confidence, the recent case of *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

environment to which the information relates.<sup>503</sup> The Convention and the 2003 Directive also mention an example of such type of information: the location or breeding sites of rare species, probably so as to prevent poachers from hunting them down.<sup>504</sup> Other such examples can be found in the 1992 governmental guidance such as information about the location of nesting sites, rare habitats or endangered or protected species, information about possible Sites of Special Scientific Interest until a formal notice is served and in general whenever making information available prematurely could run the risk of pre-emptive damage being caused to the site before it was protected.<sup>505</sup> This could include information about which buildings could potentially be listed, so owners could 'modify' them so that there would not be any more grounds for listing. This exemptions safeguards the major aim of freedom of environmental information legislation, environmental protection, by allowing public authorities to take harm to the environment into consideration, when releasing information. Interestingly, the 1992 Regulations classified this exemption as a mandatory one, making it an obligation for public authorities to withheld that kind of information.<sup>506</sup>

The FOIA 2000 does not contain at all any such exemption. The rationale of this exemption is, undoubtedly, to protect the environment by preventing releases of information that could be harmful to it. The drafters of the FOIA did not see the environment as an important factor so as to justify a separate protective exemption. On the contrary, the environmental information regime, aims at protecting the environment, so it is logical (and necessary) to contain such an exclusion. Otherwise, if such harmful information could be accessed, it would undermine the essential goal environmental information regimes aim to achieve in the first place: the protection of the environment.

An important point that arises is whether the FOIA 2000 could be used to get such information? When information cannot be accessed under the Regulations, then the FOIA becomes applicable since, even if section 39 exempts from disclosure under the 2000 Act environmental information, this is not an absolute exemption. Thus, a balancing test will be required under the FOIA where the requested information falls under the Regulations. This leaves the room for the request to succeed when the public interests in balance favours disclosure. However, in practice, it is doubtful whether information not accessible under the Regulations could be made accessible under this provision of the FOIA, since a balancing test would have already taken place in

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<sup>503</sup> Aarhus article 4, par. 4(h); 2003 Directive art. 4(2)(h); 2004 Regulations reg. 12(5)(g).

<sup>504</sup> See also par. 6 of art. 15 of Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 61, 03/03/1997 p. 1, which mentions that "*In accordance with Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, the Commission shall take appropriate measures to protect the confidentiality of information obtained in implementation of this Regulation*".

<sup>505</sup> See the Guidance, above n. 269, at par. 70.

<sup>506</sup> According to the 1992 Regulations reg. 4(3)(d): 'For the purposes of these Regulations information must be treated as confidential if, and only if, in the case of any request made to a relevant person under regulation 3 above— [...] (d) the disclosure of the information in response to that request would, in the circumstances, increase the likelihood of damage to the environment affecting anything to which the information relates'. This transposed art. 3, par. 2 seventh indent of the 1990 Directive.

pursuance of the Regulations and if the interest in favour of disclosure **could** outweigh the interest in favour of secrecy, then disclosure would have already taken place! Also, section 39(3) of the 2000 Act provides that the exemption found in section 39(1) on environmental information, does not limit the generality of section 21(1) of the Act, which creates an absolute exemption in relation to information reasonably accessible to the applicant by other means. Thus when the environmental information regulations are applicable, there are two exemptions that prevent environmental information becoming accessible under the FOIA: the exemption relating to environmental information and the one relating to information accessible to the applicant by other means as are the regulations.

### **c) Taking the public interest into account: the exercise of a harm test.**

All of the aforementioned exemptions to disclosure are not to be applied in an absolute manner, since the legal instruments under scrutiny provide that public authorities have to exercise discretion in assessing whether disclosure should occur or not. Discretion is exercised through a harm test, taking into consideration the competing interests favouring disclosure and secrecy.<sup>507</sup> In all cases a balance test has to be applied, except when the balancing has already been exercised by the legislator either in favour of disclosure, as it is in the current environmental information regimes when emissions are concerned, or against disclosure as it was in the 1992 Regulations or is the case in the FOIA 2000.

#### **i) The harm test between the competing interests of secrecy and environmental protection.**

In the Aarhus Convention, the 2003 Directive and the new Regulations, in most cases where an exemption applies, public authorities are always granted discretion to disclose though the test to apply varies depending on the exemption considered.

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<sup>507</sup> Secrecy has to be avoided not only because extensive use of exemptions would empty the right of access of any content, but also because secrecy can only be best protected when it is not unduly invoked: *'I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained'* Stewart, J., Concurring Opinion in the U.S. Supreme Court case of *New York Times Co. v. United States*, 403 U.S. 713 (1971), at p. 729.

As we have seen, the Convention and the 2003 Directive provide for two sets of exceptions: one concerning matters that are important for the correct operation of public bodies and one concerning important state and private secrets.

Concerning the first set of exemptions (on information not-held by the public authority, too general or unreasonable requests, unfinished documents and internal communications), in the Aarhus Convention only the exemption on unfinished documents and internal communications has to be balanced against the public interest in disclosure. This position has been made more liberal in the 2003 Directive where a balance test has to be applied in relation to all exemptions. The new 2004 Regulations stick to the position under the Directive and provide that for the application of all exemptions the public interest test has to be applied.

Concerning the second set of exemptions (relating to confidentiality of proceedings, state secrets, judicial proceedings, commercial confidentiality, intellectual property, personal data confidentiality, information voluntarily provided by third parties, and information prejudicial to the environment) a balance test between the public interest served by disclosure and the interest served by the refusal has also to be applied in all cases where these exemptions are applicable.

It is unclear how the balancing exercise will have to be applied and which thresholds would have to apply. The only indication given in the 2003 Directive<sup>508</sup> is that all of the exemptions have to be interpreted in a restrictive way. This is not something new, since this principle of restrictive interpretation of exemptions had been previously expressed in both the ECJ and UK case law, even if not expressly mentioned in the 1990 Directive or 1992 Regulations.<sup>509</sup> The Aarhus Convention does also mention that the exemptions have to be interpreted restrictively, but only refers to the second set of exemptions and not to all of them as in the Directive, which thus goes further than Aarhus.<sup>510</sup> The 2004 Regulations on their part, simply do not expressly mention that exemptions have to be interpreted in a restrictive way. However, this should not be taken as a failure to transpose this requirement. On the contrary, this requirement has been transposed by a provision going further than the principle of restrictive interpretation. This is possible since even if member-states are precluded from transposing the directive in a less liberal way i.e. by adding exemptions not present in the Directive, they are free to make its provisions more liberal in national law by favouring disclosure. The new Regulations create a presumption in favour of openness whenever any exemption is involved, and such a mechanism is undoubtedly going farther than the

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<sup>508</sup> At par. 2 of art. 4 of the 2003 Directive it is mentioned that: 'The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.'

<sup>509</sup> Such a statement can be found in all ECJ cases applying the 1990 Directive and it was also impliedly accepted by Sullivan J. in the *Birmingham Northern Relief road* case, op. cit. at p. 477.

<sup>510</sup> Par. 4 of article 4 of the Aarhus Convention containing the second set of exemption mentions that: 'The aforementioned 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.'



inclusion of a basic and vague indication that exemptions are to be interpreted restrictively. More specifically, regulation 12(2) mentions that for the application of exemptions present in the second set of exemptions ‘*A public authority shall apply a presumption in favour of disclosure.*’ This presumption is not an absolute one since it could be rebutted, though the clear intention of the drafters is that there should be irrefutable arguments justifying such a rebuttal. This provision is the unique example where the UK system is more liberal than the 2003 Directive and Aarhus. Such a legally binding presumption in favour of openness is something unheard in any UK legislative instrument to date and it certainly is a giant step ahead of the FOIA 2000 which even if it contains a presumption, as analysed before, it is a presumption against disclosure when national security information is involved.

Another important question, is what does the public interest served by disclosure is supposed to refer to, since it is a term left undefined in all the legislative instruments examined herein. This is left for public authorities to decide on a case by case basis. This is sensible since such a balancing exercise would be easier to be appreciated on a case by case basis. The existence of a balance test, however, in a way contradicts the fact that information has to be disclosed without any interest having to be proven, since in cases where some of the requested information might be exempt and thus the balance test would have to be applied, the applicant would have to prove that his interest in obtaining the information is superior to the confidentiality requirement.

A final point that is important to mention, is the scope of the judicial review that English courts would exercise on such a balancing exercise. The case of the *Birmingham Northern relief road* provides an answer to this issue concerning the discretion given to public authorities in deciding whether an information falling into one of the exemptions should be disclosed or not. Sullivan J. unambiguously ruled that the balance test operated by public authorities when deciding to release or not information that could be withheld under a non-mandatory exemption ‘*is a discretionary decision, reviewable only on Wednesbury grounds*’.<sup>511</sup> This is problematic due to the restricted scope of Wednesbury judicial review, though the scope of judicial review would today be increased when human right issues are involved as analysed elsewhere in this work.<sup>512</sup> In any case,

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<sup>511</sup> Id. at p. 467.

<sup>512</sup> Also according to Maurice Kay J. in *R. (on the application of Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 583, ‘In my judgment, the greater intensity of review which is required by the proportionality test does not arise in domestic law where there is no engagement of a Convention right and no fundamental right is in play. The test remains Wednesbury. There is no room for a proportionality challenge in the present case. It is important that proportionality is confined to its proper role and is not allowed to run amok as the “unruly horse” of the new era’ at par. 47. This approach denying proportionality challenges in reviews based solely on national law is contrary to the speech of Lord Slynn of Hadley in *R. (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 (at par. 51) ‘I consider that even without reference to the Human Rights Act 1998 the time has come to recognise this principle [i.e. proportionality] is part of English Administrative Law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing.’ Maurice Kay J. interpreted this phrase as only referring to proportionality in the context of Convention rights, though this has been criticised by Purdue as being certainly contestable. See Michael Purdue, *The policy on the expansion of airports in the South East of England and the Medway decision*, Current topics (March), [2003] JPL 269, at p. 270. Also, although in the

the review powers of the Information Commissioner and the Information Tribunal are not limited and enjoy full jurisdiction on any matters arising under the Environmental Information Regulations, as analysed in more details further on.

**ii) The emphasis put on emissions: the balance has already been struck by the legislator**

Even if it is unclear how the balance test between the competing interests of disclosure and secrecy should be applied, the Aarhus Convention does provide a guideline on how the public interest test should be operated, by requiring public authorities to consider the fact whether requested information relates to emissions. This indicates that the balance of competing interests should in most cases lean towards disclosure, whenever emissions are involved.

Moreover, the Convention expressly adds that if commercially confidential information relates to emissions and is relevant for the protection of the environment, it shall be disclosed. For *Stec et al.*<sup>513</sup> this exception is explained by the idea that information about emissions loses its proprietary character once the emissions enter the public environment. The term of emissions is left undefined in the Convention but has been defined in the IPPC Directive as ‘*the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land*’.<sup>514</sup> This special status for emissions is directly in conflict with the provisions of the Environmental Protection Act 1990 on public registers of emissions<sup>515</sup> for which the Act provides that some types of information might be excluded from disclosure to the public due to commercial confidentiality issues, even though they are included on the registers.

These provisions are undoubtedly very liberal in allowing people to access information on pollution, which can be a very important human right if that pollution can affect someone’s health and family life as demonstrated in the *Guerra* case.<sup>516</sup> The 2003 Directive adopts an even more liberal approach since it provides that when information relates to emissions, not only the exemption on commercial confidentiality cannot prevent disclosure (as in Aarhus), but neither the exemptions on confidentiality of proceedings of public authorities, personal data confidentiality,

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case of *R. (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473 the Court of Appeal held that the Wednesbury test still survives and it is the correct test to apply in cases not involving ECHR rights or EC law, it was also indicated that ‘The Wednesbury test is moving closer to proportionality and in some cases it is not possible to see any daylight between the two tests’. More generally, see Hilson Chris, *The Europeanisation of English Administrative Law: Judicial Review and Convergence*, 9 [2003] 1 *European Public Law* 125.

<sup>513</sup> See above n. 97, at p. 60.

<sup>514</sup> Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control OJ of the EC, L 257, 10/10/1996 p. 2, at art. 2. Par. 5.

<sup>515</sup> See the relevant chapter on registers, part I, 2, ii) *The nature of information contained on registers*.

<sup>516</sup> Analysed in detail in Chapter 3 on Human Rights and Environmental Information.

information voluntarily provided by third parties, and information prejudicial to the environment.<sup>517</sup> So, when these exemptions are concerned it can be said that the community legislator has undertaken in advance the balance test between competing interests and has decided that under no circumstances, information on emissions can be withheld on the basis of these exemptions. This demonstrates the importance given by the European legislator to the right of people to access information on pollution, since the 2003 Directive, which in general sticks closely to the wording of Aarhus, in this occasion went way beyond it and provided for far more liberal provisions.

The new 2004 Regulations do not stick to the position in the 2003 Directive and provide<sup>518</sup> that information on emissions can only override the exemptions on commercial confidentiality, on confidentiality of proceedings of public authorities, on information voluntarily provided by third parties, and on information prejudicial to the environment, but not the exemption on personal data confidentiality provided by the 2003 Directive. This approach is contrary to the express wording of the Directive and since it is a less liberal one than in the Directive as it favours secrecy, is in clear breach of EC law. The Government in an effort to align as much as possible the 2004 Regulations with the FOIA regime, probably omitted this essential detail: that when information on emissions is concerned, then this information cannot be kept secret even for personal data confidentiality issues.

### **iii) Comparison of the new 2004 Regulations with the previous position under the 1992 Regulations and the present position under the Freedom of Information Act 2000**

The aforementioned provisions are definitely more liberal than the categorisation of exceptions to disclosure operated under the 1992 regulations and under the FOIA 2000, since they both contain mandatory exemptions to communication, which have completely disappeared from the Environmental Information Regulations 2004, as analysed before.

The 1992 Regulations provided two categories of exemptions: information that was capable of being treated as confidential (discretionary exemptions) and information that must be treated as confidential (mandatory exemptions). In Regulation 4(2) were listed cases of discretionary exemptions (relating to state secrets, legal proceedings, confidentiality of deliberations, unfinished documents, internal communications and commercial confidentiality) and in regulation 4(3) cases of mandatory exemptions to disclosure (on disclosure which would contravene any statutory provision or would be a breach of agreement, personal information, information voluntarily supplied by third parties and information whose disclosure could harm the environment). When mandatory exemptions were applicable, public authorities were under a duty

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<sup>517</sup> At art. 4 par. 2 of the 2003 Directive.

<sup>518</sup> At reg. 12(8).

not to disclose any information and no discretion whatsoever was granted to them to apply a balance test. It has been suggested, that providing for mandatory exemptions went far beyond what was allowed by the 1990 Directive, which only spoke about refusals to disclose when disclosure would affect certain interests and did not provide for mandatory exclusions.<sup>519</sup> However, in the case of *Commission v. France*, (mentioned above) the French legislation which was considered, did contain some mandatory exclusions, and the Commission did not raise this point, thus probably indicating that the Directive grants discretion to member-states to establish the exclusions present in the Directive as mandatory as long as they do not add to this list any other grounds for disclosure not present in the Directive. In any case, we believe that the wording of the 1990 Directive clearly granted discretion to member-states to include mandatory exemptions into national law. Art. 3(2) of the 1990 Directive provided that: ‘Member states may provide for a request for such information to be refused where it affects...’ some of the interests protected by the exemptions. It seems overstretched, as Bakkenist seems to be doing, to read in the usage of the phrase ‘where it affects’ that no mandatory exclusions can be provided in national legislation. This is also the position adopted in the case of the *Birmingham Northern Relief Road* case, where it was argued that the 1992 Regulations had incorrectly transposed the 1990 Directive, since it was considered that it was disproportionate with the aim of the Directive to provide for mandatory exemptions and not leave any room for discretion. Sullivan J. ruled that the 1992 Regulations by distinguishing between information which is capable of being treated as confidential and information which must be so treated, incorporated a measure of flexibility and this was a proportionate response to the Directive requirements. This justification is an elliptic one, though it seems to be in conformity with the wording of the 1990 Directive and so is correct.<sup>520</sup>

Similarly, the FOIA 2000 also provides that for some categories of information, public authorities have no discretion to disclose but have to refuse the request. Section 2 of the FOIA 2000 distinguishes the exemptions to disclosure into two categories: absolute exemptions and exemptions where the public interest in disclosure has to be weighted against the public interest in secrecy. Absolute exemptions cover, broadly speaking information accessible to the applicant by other means; information supplied by, or relating to, bodies dealing with security matters; court records; parliamentary privilege; information which can prejudice to effective conduct of public affairs by the House of Lords or the Commons; personal information; information provided in confidence and information prohibited from disclosure by an enactment or whose disclosure would constitute contempt of court.<sup>521</sup> All other exemptions are discretionary ones and public authorities have to apply a balance test before refusing disclosure under them.

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<sup>519</sup> See inter alia Bakkenist, above n. 311, at p. 83.

<sup>520</sup> Also, Lee and Abbot indicate that under the 1990 Environmental Information Directive member states are under no explicit obligation to provide for a balance test between competing interests. Maria Lee and Carolyn Abbot, ‘The Usual Suspects? Public Participation under the Aarhus convention?’ [2003] M.L.R. 80, at p. 90.

<sup>521</sup> For more details, see Birkinshaw, op. cit.

Consequently, in the FOIA and the 2004 Regulations, a similar balance test is used. However, the regulations make this harm test relevant to all exemptions to disclosure, whereas the FOIA provides for some mandatory exemptions. In these cases in the FOIA 2000, it can be said that the balance test has already been struck in favour of secrecy by the legislator. Also, the FOIA does not contain a presumption in favour of disclosure, neither does it provide that disclosure cannot be refused when emissions are concerned. On the contrary, when the balance test is applied under the FOIA, any prejudice is sufficient to prevent disclosure, as there is no requirement for the prejudice to be serious, significant or substantial. Thus, it can be safely concluded that the new Regulations are far more liberal than the FOIA 2000. When the Government initiated the public consultation on the Regulations, it announced that it would try as far as possible to align the Regulations to the FOIA 2000. However, it seems that it is the FOIA that needs now to be modified in view of the more liberal provisions of the Regulations. Paraphrasing the Government, 'there is no need to treat environmental information in any respect more favourably than other information'.<sup>522</sup>

#### 4) Appeal and review procedures.

The question that arises here is what appeal or review procedures or both, are open to people requesting access to environmental information and either receive no answer at all or receive a dissatisfactory answer. Preliminarily, the difference between appeal and review has to be made clear, since it is important to determine which of these two different proceedings exist when difficulties concerning disclosure of environmental information arise. There are mainly two fundamental differences between appeal and review proceedings.<sup>523</sup>

The first difference concerns the power of the courts. In appeals proceedings the court has the power to **substitute** its decision for that of the body appealed from. On the contrary, in review proceedings, the court can normally only quash the decision and direct the body that took the original decision to reconsider the matter either from the beginning of the decision making process or only in accordance with the findings of the court.<sup>524</sup>

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<sup>522</sup> The stated aim of the Government in drafting the new Environmental Information Regulations is: 'In addition to meeting our obligations under the Aarhus Convention and draft Directive we have taken the approach that access to environmental information must be on at least an equal footing with those aspects of access to information available under the FOIA which are not addressed by the Convention or draft Directive. There is no case for treating environmental information in any respect less favourably than other information. To make it easier and more practical for public authorities to adopt streamlined procedures for supplying the information on request we have also aimed to minimise the number of areas where differences may arise between FOIA and EIR. However, where a refusal is contemplated the public authority will need to consider the exceptions under the appropriate regime'. See the New draft Environmental Information Regulations: Public consultation, DEFRA, July 2002, at paragraph 3.4.

<sup>523</sup> See Peter Cane, *An Introduction to Administrative Law*, Clarendon Press, 3rd edition: Oxford 1996, pp. 8-9.

<sup>524</sup> However, CPR 54.19 introduces a new power for the Court to make the fresh decision itself, but only when no purpose would be served in remitting the decision back.

The second difference concerns the extent of the court's jurisdiction. In appeal proceedings, the court will re-examine the merits of the decision, thus will exercise afresh the discretionary powers that the body which made the original decision exercised in the first place. On the contrary, in review proceedings the court will only examine the legality of the decision and will not re-examine the merits of the initial decision. Judicial review proceedings are review proceedings and usually proceedings before administrative tribunals are appeal proceedings.

It is fundamentally important to understand the difference between these two terms, since the EC information Directive and the Aarhus Convention do not make it clear which of these two procedures (or both) are intended when they provide for re-examination procedures by Courts or other independent bodies.

The different procedures available in British law shall also be examined in detail. It shall also be examined whether third-parties (these would be people whose interests would be affected if requested information was to be disclosed) have any rights to appeal against a decision to disclose and thus prevent the circulation of information that would affect any of their interests such as privacy or commercial secrecy.

Finally, we shall also examine whether criminal law is of any relevance when access to environmental information rules are at stake.

### **a) Possible procedures: is there a choice between a judicial or an administrative procedure?**

The first question to ask is whether there is a choice between various re-examination procedures for the applicant to choose from and what obligations are imposed by **supranational legal instruments** in this regard.

#### **i) The Aarhus Convention**

The Aarhus Convention gives states parties a choice between adopting judicial or administrative re-examination procedures.<sup>525</sup> Such procedures have to be implemented whenever the applicant considers that the response received is inadequate or when he believes that the request was otherwise not dealt with in accordance with the relevant provisions establishing access to environmental information. The Convention makes compulsory for parties to establish by law at least one appeal procedure, though they can freely choose which one. However, if a judicial re-examination procedure is provided, then parties have also the obligation to provide for an alternative mechanism for “reconsideration” which has to be “expeditious” and “inexpensive”. This requirement aims to remedy the greatest disadvantages of using the courts system, namely delays

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<sup>525</sup> All provisions on appeal procedures concerning the right to access environmental information can be found at paragraph 1 of article 9.

and costs.<sup>526</sup> As long as three requirements are met, inexpensiveness, expeditiousness and establishment by law, any administrative procedure is acceptable under the Convention. This could be a re-examination by an administrative tribunal, by a higher public authority, by an Ombudsman or even possibly by the same authority.

There is a controversy, however, on whether the Convention allows for administrative “reconsideration” to be carried out by the same public authority that made the initial decision, or if it should be another administrative body or tribunal. *Stec et al.* interpret this provision as allowing the “reconsideration” to be carried out by the same body in order to ensure its accuracy.<sup>527</sup> However, Wilsher<sup>528</sup> argues that since sub-paragraph 3 of paragraph 1 of article 9 provides that final decisions (by a judicial or administrative body) should be binding on the public authority holding the information, reconsideration by the same public authority has to be excluded, since a body cannot be said to truly bind itself as a matter of law. Thus, he thinks that administrative review proceedings can only be performed by another public authority than the one which made the decision. However, this is a misinterpretation of the wording of this sub-paragraph which speaks about “final decisions”. Only such decisions have to be binding, thus a party is free to provide for a reconsideration by the same body that made the decision as long as it provides for another re-examination procedure at a higher level (either administrative or judicial) which would have to be binding. The above interpretation presumes that ‘reconsideration’ looks at merits, while “re-examination” seems to be a matter of law.

As long as the form (oral or written) of the outcome of any judicial or administrative appeal procedure is concerned, the Convention seems to leave it to the national legislators to decide. It only imposes that if the appeal fails, reasons for refusals shall be stated in writing.

#### **ii) The 2003 Environmental Information Directive.**

Directive 90/313/EEC provided in its article 4 that people facing refusals or delays in accessing environmental information could ask for a “*judicial or administrative review of the decision in accordance with the relevant national legal system*”. This provision clearly left the choice to each member-state to choose between administrative or judicial or even both reconsideration proceedings.

The 2003 directive, heavily inspired from the equivalent provisions of Aarhus, provides that member states are to provide **both** for an administrative and a judicial reconsideration procedure. In its article 6, paragraph 1, it is provided that members of the public have to be able to challenge the acts or the omissions of the public authority concerned either by applying to the same or to a different public authority for reconsideration, or by applying to an independent and impartial body. On top of these possibilities, paragraph 2 of the same article provides that members of the public have access to a review procedure before either a court of law or another independent and

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<sup>526</sup> See D. Wilsher, above n. 304, at p. 687.

<sup>527</sup> See *Stec et al.*, above n. 97, at p. 127.

impartial body established by law. Paragraph 3 also provides that final decisions made under paragraph 2 shall be binding on the public authority holding the information and that when any appeals (either judicial or administrative) are refused, reasons shall be stated in writing. These provisions even if more detailed than in the 1990 Directive, have, correctly, been criticised by Hallo as omitting to include sanctions for improper refusals and procedural details on relevant court proceedings such as provisions on cost-recovery.<sup>529</sup>

## **b) The scope of the re-examination procedures.**

The most difficult question that has to be answered when re-examination procedures are concerned, is the extent of the jurisdiction of the reviewing body: can the reviewing body or court examine the merits of the decision and if so can it substitute its decision to the original one? Thus have re-examination procedures to be appeals, in the sense described above, or mere reviews?

### **i) The Aarhus Convention**

As far as the Aarhus Convention is concerned, when it mentions in its article 9 paragraph 1 judicial proceedings, the Convention speaks about “*a review procedure before a court of law*”. Concerning administrative proceedings the Convention speaks about “*reconsideration by a public authority or review by an independent and impartial body other than a court of law*”. From these wordings it is not clear whether what is meant is an appeal or a review, as we have defined these terms at the beginning. Thus, since article 22 of the convention provides that both the English, the French and the Russian text of the convention are equally authentic, these versions shall be examined. . Concerning administrative proceedings, the French version of the Convention speaks about “*un recours devant une instance judiciaire*”. This is in conformity with the English version, thus it does not indicate the extent of the review powers of the court of law. Concerning administrative proceedings the Convention speaks about “*du réexamen de la demande par une autorité publique ou de son examen par un organe indépendant et impartial autre qu'une instance judiciaire*”. This is somehow different from the English version, since the French text speaks about a re-examination (“*réexamen*”) when the English texts mentions “reconsideration”, and examination (“*examen*”) instead of “review” in the English version. The use of the words review and *recours* when judicial proceedings are concerned, seems to indicate that a review limited on points of law should be enough. Also the use of words review and *examen* when procedures in front of independent and impartial bodies (thus implying some sort of administrative tribunal) means that for these proceedings too, a review limited on points of law should be enough. On the contrary, the

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<sup>528</sup> See D. Wilsher, above n. 304, at p. 688.

<sup>529</sup> See above n. 201, at p. 11.



merits have to be considered when reconsideration by a public authority is involved, since the words reconsideration and *réexamen* are used.

Consequently, this seems to indicate that under Aarhus, judicial review (thus a control limited to legal grounds of challenge) carried out by an administrative tribunal or a court of law seems to be enough. Only when reconsideration has to be undertaken by a public authority other than a tribunal or a court of law, then this procedure has to review the merits. However this literal interpretation implies that the drafters of Aarhus wanted to address the problem of the scope of the reconsideration proceedings. It seems more likely that this was not intended, since otherwise it would have been clearly stated. It seems that the only aim of the drafters of article 9 was to provide for a cheap, expeditious and binding administrative reconsideration procedure, without dealing with the scope of this procedure.

In any case, article 9 of the Aarhus Convention is strangely drafted. This is presumably the result of trying to fit various legal systems. This poses problem in a common-law context (such as Britain)<sup>530</sup> where the usual judicial remedy available against decisions of public authorities (that is judicial review) is limited to matters of law and does not extend on issues of merits. On the contrary, in continental legal systems, judicial review of administrative action can sometimes go on the merits.<sup>531</sup>

### **ii) The 2003 Environmental Information Directive.**

This controversy is maintained in article 6 of the new Environmental Information Directive, which is equally strangely drafted, for the same reasons. The issue of the scope of review is not directly answered. The Directive uses the term “reconsidered” when it refers to administrative reviews,<sup>532</sup> whereas the term “reviewed” is used when appeals to courts or tribunals are referred to.<sup>533</sup> No safe conclusion can be drawn from these words but “reconsideration” would suggest merits and “review” law. Again the problem is that the Directive, as with the Aarhus Convention, is trying to cater for various legal systems and this leads to confusion and uncertainty of terminology.

### **iii) Human Rights cases**

As we analyse elsewhere in this work, under certain circumstances, a right to access environmental information might arise under the European Convention on Human Rights. In this case, where there is a fundamental right to access environmental information, the traditional limited grounds of judicial review are insufficient and have to extend to proportionality issues and thus to the merits of cases.

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<sup>530</sup> But this is equally true for Ireland, Malta and Cyprus, which are EC states with common law legal systems.

<sup>531</sup> This usually depends on the subject matter before the court. For instance, in France in cases involving civil liberties and property issues, the merits of a decision will always be considered.

<sup>532</sup> In art. 6 par. 1. The French term used is *réexaminés*.

<sup>533</sup> In art. 6 par. 1 and par. 2. The French terms used are *recours administratif* and *réexaminer*.

More specifically, the ECtHR in the recent case of *Hatton and Others v. UK*<sup>534</sup> which concerns a breach of article 8 of the European Convention of Human Rights due to disturbance caused to the family life of people living near Heathrow airport due to the noise of night flights, held that judicial review is not a sufficiently effective remedy when Convention rights are involved, due to its limited scope of review of the proportionality balance struck by public authorities. This case suggests that normal judicial review is not an effective remedy for assessing Convention rights.<sup>535</sup> Consequently, when a right to access environmental information arises under the European Convention, it seems that public authorities will have to strike a proportionate balance and this in turn can now reviewed by the courts.<sup>536</sup>

### **c) Reconsideration by the public authority to which the initial request for information was made.**

The new Environmental Information Regulations 2004 have made the choice to provide both for an administrative appeal and a judicial one, by reference to the enforcement provisions of the FOIA 2000 which apply for the purposes of the Regulations subject to some alterations.<sup>537</sup> However, the regulations make compulsory for any person that has made a request to access environmental information and thinks that the public authority has violated the Regulations, before initiating any other appeal proceedings, to make representations to the same public authority to which his initial request for information was made.<sup>538</sup> This is a kind of early reconsideration by the body that just made the initial decision.

Regulation 11 provides that public authorities to which representations are made by any person who feels that his request to access information was not dealt in accordance with the regulations, are in a duty to consider these representations. They have to decide whether they have complied with the requirements of the Regulations as soon as possible and at the latest within 40 working days from the day of the representations were made. Representations are to be made in writing and no later than 40 days after the applicant feels the public authority has failed to comply with the Regulations. The regulations also provide that the public authority concerned, when it finds that it has not complied with the requirements of the Regulations, has to indicate to the applicant what was its failure to comply and what remedy the authority has decided to take in that

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<sup>534</sup> *Hatton and Others v. the United Kingdom*, 2/10/2001, application n. 36022/97, (2003) 37 EHRR 28.

<sup>535</sup> On this point see Christopher Hancock, *Hang in the Balance*, *Estates Gazette*, 19 January 2002, p. 122. Also Michael Purdue, *Current Topics*, [2002] JPL 255.

<sup>536</sup> About the increased review of administrative decisions in cases involving human rights, going farther than the 'classic English public law concepts' of irrationality, illegality and procedural impropriety, see *R. (on the application of Daly) v. Secretary of State for the Home Department* [2001] 2 WLR 1622 and also *R. (on the application of Prolife Alliance) v BBC* [2002] EWCA Civ 297 (CA). Also Ben Pontin, *Human Rights and Judicial Review* (editorial), *ELM* 13 [2001] 5.

<sup>537</sup> According to reg. 18(3).

<sup>538</sup> According to reg. 18(1).

respect and in which time frame this remedy will be implemented.<sup>539</sup> It is not specified what this remedy shall be, but it can safely be assumed that in most cases it would be the disclosure of the requested information, which has been partially or totally withheld.

Regulation 18 makes it clear that if representations have not been made, any further appeals to the Information Commissioner are impossible.<sup>540</sup> The same regulation provides that any person who believes that the public authority, to which representations have been made, either has failed to accept within the 40 working days limit that it has not abided by the requirements of the Regulations can further appeal to the Information Commissioner. Even if the public authority has accepted that it has breached the regulations but has failed to remedy the breach then an appeal to the Commissioner is also possible.

There is also a danger of a person waiting too long before appealing to the Commissioner. The Commissioner could then dismiss his appeal on the grounds of s. 50(2)(b) of the FOIA 2000, which provides that the Commissioner can decline to consider a complaint when there has been "undue delay" in making the application to him. All this uncertainty would have been avoided if the regulations had provided for a certain time limit for making applications to the Commissioner, starting either 40 days after the public authority has answered to the representations it has received, or in cases where no answer at all has been given starting after the 40 working days period the public authority has in order to answer has lapsed. A reasonable time-period for making applications to the Commissioner could have been 40 days, the same period that is granted to people for making representations to public authorities.

A final issue that arises is whether it is very useful in practice to provide for the reconsideration of a refusal by the same body that issued it. Wouldn't the authority stand by its original decision in most cases? Thus, wouldn't this be just an unnecessary bureaucratic burden for the applicant that wants his case heard by an independent and impartial body? The Lord Chancellor's Code of Practice on the discharge of public authorities' functions under the FOIA 2000 tries to address this issue<sup>541</sup> by providing that internal complaints procedures should be clear, prompt and not unnecessarily bureaucratic and it should be possible to reverse or otherwise amend decisions previously taken. It is also provided that a person who was not a party to the original decision should handle the review, and if this is not possible (for example in a very small public authority), the circumstances should be explained to the applicant. If the initial decision was taken by someone in a position where a review cannot realistically be undertaken (for example a Minister), the Code asks the public authority to consider whether to waive the internal review procedure so that the applicant is free to approach the Commissioner directly.

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<sup>539</sup> At reg. 11(5).

<sup>540</sup> However, as we shall see further on, the Commissioner is given discretion to entertain an appeal even if the available internal review procedures have not been exhausted.

<sup>541</sup> The Draft Code of Practice on environmental information mirrors these provisions.

## d) The Information Commissioner

### i) Powers and competences of the Information Commissioner

The UK Information Commissioner is an independent authority reporting directly to the UK Parliament, which enforces and oversees the Data Protection Act 1998 and the Freedom of Information Act 2000.<sup>542</sup> In order for the Commissioner to provide an integrated and coherent approach concerning all aspects of information handling by public authorities, his supervisory role has been extended to environmental information by virtue of regulation 18 of the Environmental Information Regulations 2004. This extension of his jurisdiction was expressly provided by the Freedom of Information Act 2000, which mentions in s. 74(4)(d) that regulations made in order to implement the Aarhus Convention may in particular provide that the Information Commissioner and the Information Tribunal (on this Tribunal see *infra*) may be made competent in relation to compliance with any requirements of the regulations.

The status, capacity and tenure of the Commissioner and other miscellaneous matters on this institution are dealt with in part I of Schedule 5 to the Data Protection Act 1998. The Information Commissioner is appointed for 5 years by the Queen by letter patent but he is not a servant or an agent of the Crown.<sup>543</sup> The Information Commissioner is given several functions in order to supervise the correct application of the Regulations, which are the exact equivalent of the functions granted to the Commissioner under the Freedom of Information Act.

Firstly, under regulation 16(5) which refers to s. 47 of the FOIA, the Commissioner has a duty to promote good practice concerning the operation and the application of the Regulations. He, in particular, can make any promotional campaign with a view to disseminate to the public information about the operation and any other matters concerning the regulations. He is also granted the possibility to give advice to any person about any aspect of the Regulations, thus making him also an **advisory body**.<sup>544</sup>

Also, under regulation 16 the Secretary of State may issue a Code of Practice providing guidance to public authorities on the application of the Regulations. The Commissioner has to be

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<sup>542</sup> For a broad description of the powers of the Commissioner under the Data Protection Act, see Rowan Middleton and Christopher Rees, 'Enforcement Of, And Sanctions For Breaching, The Data Protection Act', *Privacy and Data Protection* 2.2(3). The Commissioner also oversees disclosure of Information under the Telecommunications (Data Protection and Privacy) Regulations 1999 (SI 1999/2093) as amended. He has also some minor powers in relation to the Public Records Act 1958.

<sup>543</sup> According to Par. 1(2) of Sched. 5 Part I to the Data Protection Act 1998 which indicates that: "*The Commissioner and his officers and staff are not to be regarded as servants or agents of the Crown.*"

<sup>544</sup> Also, under section 52(1) of the Data Protection Act 1998 and section 49(1) of the Freedom of Information Act 2000 the Commissioner each year has to make an annual report to the House of Commons and to the House of Lords concerning the exercise of his functions under the Regulations. He is also granted the possibility to lay other reports concerning his functions, as he thinks appropriate. The commissioner also deals in his report about access to environmental information. See for an example the *Information*

consulted before this Code is adopted or amended. This provision thus makes the Commissioner a **consultative body**. By reference to s. 48 of the FOIA, regulation 16(5) also makes the Commissioner an **enforcing body** in regard of these Codes of Practice, since it provides that the Commissioner can make recommendations to specific public authorities (“practice recommendations”) if he finds that the Codes of Practice aren’t correctly applied. Practice recommendations ought to include the steps that have to be taken so as to conform to the Codes of Practice. These recommendations are not mandatory for the public authorities, which is evident since the Codes of Practice aren’t binding legal instruments.<sup>545</sup> These provisions might seem of a technical nature, but they are very important since they demonstrate a radical change from what was in place before. Under the old Regulations, each body was free to make its own practical arrangements for the procedural details of access, when on the contrary now these details will be specified by the central government for all public authorities at all levels.

However, the Regulations are mandatory, and thus if the Commissioner considers that any public authority has failed to correctly comply with any of its obligations arising under them, he can issue a mandatory decision (an “enforcement notice”)<sup>546</sup> in which he specifies the steps that the authority has to take so that the public authority conforms to its obligations. This enforcement notice must also mention a deadline during which the authority must conform to it, and must also mention particulars of the suspensive appeal procedure available against it in front of the Information Tribunal.

Apart from these secondary powers, the most important functions of the Commissioner are his decision powers in relation to applications made to him by people having previously made requests of information to public authorities and believing their right to information has been declined. The most important aspect of these procedures is that he can **substitute** his decision for that of the public authority.

Indeed, in accordance with s. 50 of the FOIA 2000, the Commissioner may answer to such complaint by making a decision (a “decision notice”) either dismissing the complaint or specifying the steps that the public authority has to take in order to comply with the regulations (this would normally be a decision to disclose). The Commissioner may also refuse to make a decision if the applicant did not exhaust the complaint procedures offered to him by the Code of Practice enacted by the Secretary of State and also if the request is vexatious or frivolous,<sup>547</sup> has been withdrawn or abandoned, or if there has been undue delay<sup>548</sup> in making the application.

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*Commissioner’s Annual Report and Accounts for the year ending 31 March 2004*, London: The Stationery Office, 2004, HC669, available at: <http://www.official-documents.co.uk/reps/ic/index.html>

<sup>545</sup> See Stanley, above n. 608, at p. 36-65.

<sup>546</sup> Provided for by reg. 18 and s. 52 of the FOIA 2000.

<sup>547</sup> On the definition of ‘frivolous’ and ‘vexatious’ requests, see above on the reasons justifying rejection of refusals of requests to access information. The same definitions could be used as with frivolous or vexatious requests to information.

<sup>548</sup> See about a criticism of the lack of a certain specific period of time for bringing complaints, *supra*.

When a complaint has been made to the Commissioner and he considers that he needs more details from the public authority, he can issue a decision asking for further information (an “information notice”) so that the Commissioner can determine the complaint. This notice must mention a deadline for compliance, and must also mention the suspensive appeal procedures in front of the Information Tribunal. The Commissioner is free to use this procedure in order to ask any information the public authority holds even if it is exempt, so as to test whether the exemption that might be claimed by the public authority applies. Public authorities are obliged to comply with this information notice, except in respect of information covered by professional legal privileges concerning matters connected with the Regulations and proceedings arising under them.<sup>549</sup>

In addition to these powers, the Commissioner is granted powers of entry and inspection whenever a circuit judge can be persuaded that there are reasonable grounds for believing that a public authority has failed to comply with any of the requirements of the Regulations or to the requirements in a notice issued by him and also that evidence of such a failure is to be found on certain premises. Schedule 3 to the FOIA,<sup>550</sup> provides how circuit judges are to issue such warrants allowing the Commissioner using reasonable force to enter and search the premises and to inspect and seize almost any evidence<sup>551</sup> that would prove the grounds on which the warrant was issued. As analysed below, it is a criminal offence for any person to obstruct the execution of such warrants.

Finally, as analysed below, the Regulations provide by reference to the FOIA that the Commissioner’s notices are to be treated as orders of the High Court and enforced by contempt of Court proceedings.

To sum up, it is interesting to note that the Commissioner is the primary method used to enforce the Regulations and in fact forms a specialised first instance tribunal. This interpretation is consistent with the fact that the Commissioner is included in the lists of Tribunals on which the Council on Tribunals has supervisory powers concerning their constitution and working under the Tribunal and Inquiries Act 1992.<sup>552</sup> As such, the Commissioner would probably have to apply the procedural requirements of article 6 of the ECHR. In this respect, Stanley<sup>553</sup> considers that the fact that the Commissioner when making decisions concerning disclosure of controversial information, can actually issue an information notice so as to get hold of the information, might pose a problem of unfairness in human right terms since he might be unable to show the information requested to the applicant. He contends that to overcome this unfairness the Commissioner ought to seek the applicants consent before seeking information he might be unable to disclose and in any case to allow the applicant to comment on it by disclosing as much as is not exempt. However, even if

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<sup>549</sup> According to s. 51(5) of the FOIA 2000.

<sup>550</sup> To which reg. 18(4) of the 2004 Regulations refer.

<sup>551</sup> Information relating to professional legal privilege concerning matters arising under the Regulations are exempt by virtue of Schedule 3 to the FOIA 2000.

<sup>552</sup> Both the Information Tribunal and the Information Commissioner are supervised by the Council on Tribunals concerning their constitution and working, following the Tribunal and Inquiries Act 1992, as amended.

<sup>553</sup> See above n. 608, at p. 36-61.

such measures would be useful in preventing any challenges based on article 6 or natural justice principles, they would result in delays in the procedure, when the Directive speaks about an expeditious procedure. In any case they are unnecessary, since it does not appear to be a breach of the fair trial requirement for the Commissioner to access information which could not be further disclosed to the applicant as being covered by an exemption. On the contrary, the Commissioner might be better equipped to issue a fair decision if he is fully aware of the contentious information and can thus determine *in concreto* whether the public authority was right to refuse disclosure on grounds of one of the exemptions. This would seem to be a better illustration of the fair trial requirement than completely preventing the Commissioner from accessing exempt information.

### **ii) The Ministerial veto**

Under the FOIA and the 2004 Regulations there is one exception to the obligation of public authorities to comply with an enforcement or decision notice requiring them to disclose information falling under any exemption. Section 53 of the Act creates a power of veto of the Information Commissioner's enforcement and decision notices by an accountable person, normally a Minister,<sup>554</sup> justified by the fact that Ministers better understand the public interest and are accountable to Parliament for the exercise of such political judgments.<sup>555</sup> This power can be exercised through the issue of a certificate if the person issuing the certificate has on reasonable grounds formed the opinion that, in respect of the request to which the certificate relates, the authority has not failed to comply with its obligations. The effect of the certificate is that the public authority need not comply with the Commissioner's decision to disclose information, since once the Certificate is issued the Commissioner's decision '*shall cease to have effect*'.<sup>556</sup> The only safeguard that is provided, is that a copy of the certificate has to be laid before each House of Parliament, or the appropriate devolved Assembly, as soon as is practicable after it is issued, and if the Commissioner's decision was made after a complaint, the complainant has to be informed of the Certificate and be given reasons. This veto power can be exercised up to 20 working days after the Commissioner's decision or enforcement notice has been given to the public authority.<sup>557</sup> It can also be exercised 20 working days after the Information Tribunal has determined an appeal against

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<sup>554</sup> These 'accountable persons' are strictly designated by s. 53(8) as the First Minister and deputy First Minister in Northern Ireland acting jointly (for Northern Ireland authorities), the Assembly First Secretary of the National Assembly for Wales (for Welsh authorities) and a Minister of the Crown who is a member of the Cabinet, the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland (in relation to any other public authority). It has been suggested that since in this instance there is clear parliamentary intention that the concerned Minister or senior public official has to exercise personal judgement on the matter, under the *Carltona* principle (*Carltona Ltd v Commissioners of Works and Others* [1943] 2 All ER 560), further delegations of this power are not permissible. See Stanley, above n. 608, at p. 36-64.

<sup>555</sup> According to Nigel Johnson, *The Freedom of Information Act 2000*, [2001] 151 N.L.J. 1030.

<sup>556</sup> According to s. 53 of the FOIA 2000.

<sup>557</sup> According to s. 53(2) and 53(4)(a) of the FOIA 2000.

the Commissioner's decision notice or enforcement notice, or after that appeal has been withdrawn.<sup>558</sup> Thus, this last provision allows the executive to first exhaust all possible remedies and if, in the end, the Information Tribunal finds against the public authority, to bypass this judicial decision by issuing a section 53 Ministerial Certificate!

Of course, it should be noted that there is nothing in the FOIA that would prevent the Commissioner or the complainant concerned to bring an action for non-statutory judicial review of the Ministerial certificate arguing *Wednesbury* unreasonableness.<sup>559</sup> However, it is still doubtful that this veto power of Ministers would be compatible with the fair trial requirements of article 6 of the ECHR, if it was exercised after the Information Tribunal had rendered its decision, because in that case the executive would be directly interfering with a judicial decision.<sup>560</sup>

This veto power, according to the FOIA 2000, only applies for information held by Government departments, the National Assembly for Wales and any other public authority designated for this purpose by the Lord Chancellor by an order subject to affirmative approval of Parliament. Thus, under the FOIA 2000 this power of veto is limited to mainly information held by Central Government.

Although the draft 2002 Environmental Information Regulations did not contain any such limitation to the mandatory nature of the Commissioner's decisions, the Environmental Information Regulations 2004, not only contain this veto power of Ministers at reg. 18(8), but go further than the FOIA, by providing that it applies to information held by any public authority under these Regulations. This is the only example where the Regulations are less liberal than the FOIA. It is indeed hard to understand the rationale for the all-encompassing extent of this provision, especially since this veto power has been criticised as undermining the authority of the Information Commissioner and eroding public confidence in the FOIA.<sup>561</sup> Probably because the 2004 Regulations are so liberal, the Government wanted to be able to have the final decision in all cases, by having the power to bypass the Information Commissioner and the Information Tribunal. This seems to be a clear breach of art. 6 of the 2003 Directive, which provides for both an administrative

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<sup>558</sup> According to s. 53(2) and 53(4)(b) of the FOIA 2000.

<sup>559</sup> The government during the passage of the Bill through Parliament acknowledged that this power of the executive would be subject to judicial review. See *Hansard*, HL (series 5) vol 612, col 828 (20 April 2000). Lord Falconer of Thornton indicated that: "*It is important to note the limitations on this provision [...]. First, this is not a general override of the commissioner's decisions; it applies only to decisions taken under Clause 13. Secondly, the Minister must explain publicly why he has chosen to disagree with the commissioner. Thirdly, the decision is subject to judicial review and the commissioner will have the locus to seek such a review. Thus, this is not an easy provision for Ministers to use*".

<sup>560</sup> The ECtHR has interpreted article 6 par. 1 of the ECHR, which guarantees *inter alia* the right of access to a court, as also requiring the enforcement of judicial decisions. The ECtHR has stated that a right of access to the courts would be useless if the internal legal system of a contracting state permitted a final and compulsory court decision to remain without enforcement. See the ECtHR judgements of *Immobiliare Saffi v. Italy*, 28/07/1999, n. 22774/93, par. 63, *Hornsby v. Greece*, 19/03/1997, par. 40, and *Antonetto v Italy* (2003) 36 EHRR 10.

<sup>561</sup> See p. 24 of the report of the Independent Review of Government Communications, chaired by Bob Phillips, and commissioned by the government, published on January 19<sup>th</sup>, 2004, in which it is recommended that ministers should renounce the use of the ministerial veto under the Freedom of Information Act and strengthen its key provisions. The report is available from:



review and a judicial one. When this veto power is used, this veto decision would be a decision refusing access to information, which should also be subject, according to art. 6(1) of the 2003 Directive, to both a review in front of an administrative body and a judicial one, since the Minister acts as a public authority refusing to provide information under the Regulations. It could not be contended that in this situation the Minister acts as a sort of review body, as the applicant has not appealed to him and he has no right to do so under the Regulations. Consequently, in this case, because only the limited remedy of judicial review would be available, there seems to be a breach of the 2003 Directive. This breach is even more evident if, as analysed above, Ministers exercise their powers after the Information Tribunal has determined an appeal against the Commissioner's decision, in which case the decision of the judicial body that is responsible for applying the Regulations is simply overruled by the executive.

#### **e) The Information Tribunal – the National Security Appeals Panel**

The Information Tribunal, formerly the Data Protection Tribunal,<sup>562</sup> is given competence by reg. 18(8) of the Environmental Information Regulations 2004 by reference to Part V of the FOIA to hear appeals against decisions of the Commissioner made under the Regulations, in the exact same way as these appeals are possible against decisions made under the Freedom of Information Act 2000.<sup>563</sup>

Both public authorities and complainants (thus people already having made a complaint to the Commissioner as provided above) can appeal against decision notices of the Information Commissioner. On the contrary, only public authorities can appeal to the Tribunal against information or enforcement notices. This is consistent with the fact that only decision notices affect the interests of complainants to the Commissioner, since they contain the opinion of the Commissioner on whether the applicant is entitled or not to disclosure. In order to appeal, there is not any requirement to seek leave to appeal and this has been criticised by Macdonald, as being a way for public authorities to delay the disclosure of information which might prove embarrassing. He argues that the appeal procedures should be kept as simple and informal as possible.<sup>564</sup> However, a requirement of having to seek permission to appeal, would in practice go to the opposite

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<http://www.gcreview.gov.uk/news/FinalReport.pdf>

<sup>562</sup> By section 18(2) of the Freedom of Information Act 2000, the Data Protection Tribunal is now known as the Information Tribunal. Also it should be noted that the Information Tribunal and also the Information Commissioner are supervised by the Council on Tribunals concerning their constitution and working, following the Tribunal and Inquiries Act 1992, as amended. The Information Tribunal was brought into existence by the Freedom of Information Act 2000 (Commencement No. 1) Order 2001 (SI 2001/1637).

<sup>563</sup> Interestingly, in *Re Ewing* [2002] All ER (D) 350 (Dec), it was decided that the Information Tribunal does have judicial characteristics and does exercise judicial functions by means of judicial procedures (as opposed to exercising purely administrative functions), and as such it can properly be categorised as a court within the meaning of s. 42 (1A) of the Supreme Court Act 1981.

direction, as it would increase the procedural steps necessary in order to bring an appeal, as litigants would have to seek leave first, before appealing.

The grounds on which appeals are to be allowed are very wide and extend on all issues of law and very importantly on all issues of policy, since the Tribunal has power to review the exercise of discretion by the Commissioner. This means that it has full jurisdiction and the Tribunal can allow the appeal and quash the notice, dismiss the appeal or even substitute its decision to the notice of the Commissioner since it is also given power to review any relevant facts.

The relevant rules concerning the constitution and the procedure of the Tribunal are the ones made under Schedule 6 to the Data Protection Act 1998<sup>565</sup> and are the Data Protection Tribunal (Enforcement Appeals) Rules 2000.<sup>566</sup> We shall not analyse in detail these rules, though some important features of them have to be mentioned. The rules provide that appeals have to be brought within 28 days of the date on which the notice relating to the disputed decision was served on or given to the appellant, except when special circumstances justify, to the Tribunal's discretion, an extension.<sup>567</sup> They also provide that the burden of proof that the disputed decision should be upheld rests on the Commissioner only.<sup>568</sup> Moreover, they provide that, in principle, the Tribunal determines appeals with hearings, though in certain circumstances it can decide not to do so, usually when the parties waive this right.<sup>569</sup> Additionally, other miscellaneous details are dealt with such as summoning of witness etc.<sup>570</sup> Finally, it should be noted that the Information Tribunal is composed of a chairman and an equal number of members representing those who make requests for information and persons representing public authorities.<sup>571</sup> This ensures that the Tribunal is well-qualified to decide on issues dealing with access to information.

To sum up, the Tribunal deals with matters arising under the Regulations in the same manner as with matters under the Freedom of Information Act 2000. There is also a specific procedure for appeals against National Security certificates by which Ministers of the Crown can totally block disclosure, discussed before.<sup>572</sup> These appeals are heard by a separate National Security appeals panel of the Tribunal, members of which are designated and appointed especially by the Lord Chancellor to hear these appeals.<sup>573</sup>

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<sup>564</sup> See Macdonald, below n. 578, at p. 879.

<sup>565</sup> To which section 61 of the Freedom of Information Act 2000 refers for the details of proceedings in front of the Tribunal.

<sup>566</sup> The Data Protection Tribunal (Enforcement Appeals) Rules 2000 (SI 2000/189), as amended by the Information Tribunal (Enforcement Appeals) (Amendment) Rules 2002, (SI 2002/2722).

<sup>567</sup> *Ibid.*, rule 4.

<sup>568</sup> *Ibid.* rule 22.

<sup>569</sup> *Ibid.* rule 13.

<sup>570</sup> For more details, see David Bainbridge, *Data Protection Law*, CLT Professional Publishing, 2000, pp. 230-245.

<sup>571</sup> According to s. 6(6) of the Data Protection Act 1998, as amended.

<sup>572</sup> A procedure regulated by the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206. On these certificates see also above, n. 450.

<sup>573</sup> According to section 6(4) of the Data Protection Act 1998, in conjunction with Schedule 6 paragraph 2(1) of the same Act.

However, the drafter of the Regulations, so keen to provide for the exact same procedures as in the 2000 Act, overlooked one difficulty when environmental information is concerned: the issue of the award of costs.

Under its rules of procedure the Tribunal may make an order awarding costs even when the appeal has been withdrawn.<sup>574</sup> The award can be against the appellant and in favour of the Commissioner where it considers that the appeal was manifestly unreasonable, or the contrary where it considers that the Commissioner's disputed decision was manifestly unreasonable.<sup>575</sup> Also, in situations where a party has been responsible for frivolous, vexatious, improper or unreasonable action, or has failed to comply with a direction or has been responsible for delays which with diligence could have been avoided, the Tribunal can award costs against that party and in favour of the other.<sup>576</sup> These awards can be either a specified sum in respect of the costs incurred by that other party or parties in connection with the proceedings or the whole or part of such costs as taxed, except if parties reach an agreement. Rule 25(4) finally provides that costs may be taxed in the County Court according to such of the scales prescribed by the county court rules for proceedings in it, as shall be directed by the order.<sup>577</sup>

These rules might sound reasonable when the Tribunal hears appeals in cases under the Data Protection Act or the Freedom of Information Act but it can be contended that this poses problem when environmental information is concerned. As analysed above, both the Aarhus Convention and the Directive, prescribe in the same terms that administrative appeals proceedings have to be either "free of charge or inexpensive". Although the term "inexpensive" can have various meanings, its inclusion right after the phrase "free of charge" seems to indicate that the intention of the drafters of Aarhus and the Directive was to indicate that if administrative reconsideration procedures do not have to be free, they at least should be almost free of charge, so as to prevent costs being a barrier to ordinary people bringing appeal proceedings.<sup>578</sup> Thus, since the Tribunal can award costs, which can be taxed in the County Courts, this might become very expensive for unsuccessful appellants especially if the Commissioner is represented by professional counsel and can lead to a breach of the above-mentioned EC requirement of inexpensiveness.<sup>579</sup>

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<sup>574</sup> See above n. 566, Rule 25.

<sup>575</sup> Costs can also be awarded if the decision challenged in the appeal has from the time the appeal was lodged been withdrawn. See the appeal of *Mohamed al Fayed v The Secretary of State for the Home Department and the Secretary of State for Foreign and Commonwealth Affairs* [2002] dated 28/2/2002, unreported. This decision was made by the Information tribunal under the specific rules for national security appeals, however its findings, exclusively concerning costs, can be applied *mutatus mutandis* to regular appeals. Available at <http://www.dca.gov.uk/foi/alfayedfin.pdf>

<sup>576</sup> This provision is not something new, but is similar for instance to award of costs in planning appeals to the Secretary of State against refusals to grant planning permission. See Victor Moore, *A practical approach to Planning Law*, Oxford University Press, 8<sup>th</sup> edition 2002, pp. 400-401.

<sup>577</sup> The Sheriff Court in Scotland. Rule 25(5).

<sup>578</sup> Macdonald and Jones suggest that it is cost that is responsible for the small number of cases concerning the 1990 Regulations. See John Macdonald and Clive H Jones, *The Law of Freedom of Information*, Oxford University Press, 2003, at p. 505.

<sup>579</sup> As an example, £300 per hour for legal fees have been considered as "not excessive." Even if this case concerned a clinical negligence case and the judge stressed these rates should not be taken as the norm in

However, this problem might be avoided by a constructive interpretation of these rules of procedures by the Tribunal itself. Since these rules grant a discretion to the Tribunal to award costs against the individuals when appeals are “manifestly unreasonable”, the Tribunal could rule that no appeal is manifestly unreasonable when made under the Environmental Information Regulations or consistently refuse to award costs. However, such a policy-based approach would not in itself be considered a correct transposition of the inexpensive requirement of the Directive, since it’s not legally binding and certain. Also, in itself it would be illegal as being a failure to exercise the power to exercise discretion. The prospect of not only having to pay your own costs,<sup>580</sup> but also an uncertain amount for the other side’s fees, can be a real deterrent and would sabotage the aim of the Directive which is to at least open up administrative reconsideration mechanisms to everyone irrespective of their wealth.

#### **f) Judicial review proceedings**

We shall not enter into the details of judicial review proceedings, which is the judicial remedy that will have to be sought by applicants aiming at either accessing information which is denied to them or at blocking disclosure.

Judicial review proceedings can either be statutory, when expressly provided for under a statute against specific decisions provided for in the statute or non-statutory against any action or omission of public bodies. When statutory judicial review or other remedies are available, then applications for judicial review are in principle refused for non-exhaustion of alternative remedies, as judicial review is intended to be a remedy of the last or only resort.<sup>581</sup> In judicial review proceedings relating to decisions of whether disclosure should be allowed or not, it seems that the judicial review remedies that could be of any relevance would be either quashing orders or mandatory orders. It should be noted that as held in the *Birmingham Northern Relief road* case, the Court ruled that even if the reasons given for a refusal to provide information are found to be erroneous or inadequate, the Court is not bound to quash the refusal decision, but has discretion to accept different reasons and to decide whether they are justified.<sup>582</sup>

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other cases, this example is significant of the high amount of costs awarded by English courts when legal fees are finally taxed. See ‘£ 300 per hour for legal fees “not excessive”’ [2003] N.L.J. 31 January 2003, p. 116.

<sup>580</sup> It should be noted that legal aid is obtainable for appearances in tribunals or inquiries if this has either a significant wider public interest or has overwhelming importance to the person concerned and if legal representation is the only adequate way of establishing the facts and presenting the case. However, these grounds for the grant of legal aid are undoubtedly restricted. See *mutatus mutandis* Angus Murdoch, “Gypsies and planning appeals: the right to a fair and impartial hearing” [2002] JPL 1056.

<sup>581</sup> See *inter alia*, Cane above n.523, at p. 83.

<sup>582</sup> See below, 586, Sullivan J. stated: ‘Even though the reasons given are acknowledged to have been erroneous, and I would have regarded them as inadequate even if they had been correct, I do not consider that I am bound to adopt the approach in *Ermakov* and quash the Secretary of State’s decision in any event. I am entitled to have regard to the reasons now advanced in Mrs Dixon’s affidavit, and it is for me to decide

For Wilsher,<sup>583</sup> the “binding” appeal decision requirement of the Aarhus Convention poses problem to British judicial review proceedings when quashing orders are made, since for him “*quashing orders are binding only in a narrow sense*”. He contends such orders are not binding in the Convention sense, since the public authority must only go and think again and make a new decision. This argument is totally unconvincing, since although the result of a quashing order is that the public authority can reconsider the matter afresh, it cannot decide differently on matters decided in the Court’s *ratio decidendi*. For instance, if the court quashed a decision to refuse disclosure based on an incorrect application of a legal requirement, the public authority is bound by the Court’s interpretation and cannot persist on a different interpretation of what is *res judicata*.<sup>584</sup>

The Environmental Information Regulations 1992 did not expressly provide for any kind of judicial remedy and thus the only available remedy (apart from actions in tort and claims to Ombudsmen, which in any case could not legally compel public authorities to disclose information) was non-statutory judicial review.<sup>585</sup> Even though these regulations had been in place for more than a decade, their application has only lead to five judicial review cases having been litigated in the High Court and none in the Court of Sessions or the High Court of Northern Ireland.<sup>586</sup> Such a small amount of court decisions, in a period of time when there was no other enactment providing for a general right to access information,<sup>587</sup> can show one of two things. Either that the Regulations have been correctly assimilated and applied by public bodies, thus resulting in small number of disputes, or that the costs and length of bringing judicial review proceedings taken in conjunction with their uncertain nature and the prospect of having to pay unlimited costs to the defendant if the action fails, deter any potential claimants. There can be no certain answer to this question in the absence of any precise empirical research on this subject, though the vast criticism of the Regulations for only providing for judicial review proceedings seems to indicate that the second

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whether they are justified, in the light of the factual material available to the court’ [1999] Env. L.R. 447 at p. 469.

<sup>583</sup> Ibid.

<sup>584</sup> According to s 31(5) of the Supreme Court Act 1981 “If, on an application for judicial review seeking an order of certiorari, the High Court quashes the decision to which the application relates, the High Court may remit the matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court”.

<sup>585</sup> According to the UK government there was also a possibility of civil law actions, although there has never been any such cases. In any case the payment of damages could not result in a public authority being legally forced to disclose information it wanted to keep secret. See *infra*.

<sup>586</sup> These figures only cover reported cases but include applications to leave. These cases are:

*Maile v Wigan MBC* [2001] JPL 193;

*R. v Secretary of State for the Environment, Transport and the Regions Ex p. Alliance Against the Birmingham Northern Relief Road (No. 1)* [1999] JPL 231;

*R. v Tower Hamlets LBC Ex p. Tilly* [1996] Env. L.R. D23, [1996] 6(6) PELB 45;

*R. v British Coal Corp Ex p. Ibsstock Building Products Ltd* [1995] Env. L.R. 277;

*R. v. The Secretary of State for the Environment Transport and Regions Ex p. Anthony Marson*, 23 March 1998, CO/911/98 (unreported application for leave).

<sup>587</sup> Also, the regulations implicitly repeal any common law right of access to environmental information, as held by Jowitt J. in *R. v. The Secretary of State for the Environment Transport and Regions Ex p. Anthony Marson*: ‘They [the Environmental Information Regulations] take over from and replace any common law duty of disclosure which might otherwise have related to the information covered by them.’ See above, n. 586.

answer is more probable.<sup>588</sup> Also, it shouldn't be overlooked that judicial review proceedings are lengthy, and usually having to wait sometimes up to 18 months for a decision might discourage the commencing of proceedings.<sup>589</sup> This is problematic, since when a Minister exercises his veto power under s. 53 of the FOIA, as analysed before, then the only possible remedy is non-statutory judicial review.

The new Environmental Information Regulations do provide for specific grievance procedures through the Commissioner and the Tribunal. Section 59 of the FOIA provides that an appeal on points of law lies from decisions of the Tribunal to the High Court by any party to the appeal to the Tribunal.<sup>590</sup> A further appeal lies from the High Court to the Court of Appeal.

It is almost certain that when these remedies are available, then there is no non-statutory remedy of judicial review and these procedures, namely first an appeal to the Information Commissioner, then to the Information Tribunal and finally to the High Court, have to be followed. However, when the Commissioner declines to examine a complaint based on one of the grounds present in s. 50(2) (such as non-exhaustion of alternative complaints procedures, undue delay, vexatious or frivolous or withdrawn or abandoned applications), then the only way of challenging that decision would be by way of non-statutory judicial review, since these decisions are not "decision notices" and thus cannot be challenged in front of the Tribunal.<sup>591</sup>

However, since the appeal procedures provided for by the Regulations are not available to third parties aiming at blocking disclosure, the only way for them to block disclosure would be through non-statutory judicial review proceedings (apart from civil law claims discussed elsewhere). Third parties who could prove that their interests might be prejudiced by disclosure of certain information, will seem to justify the sufficient interest test necessary to bring judicial review proceedings against a decision to disclose made either by the public authority holding the information or even the Commissioner or the Tribunal, in case disclosure is only granted after an appeal against an initial refusal.

Also, an important issue is, since the Environmental Information Regulations provide for an exception to disclosure of any information whose disclosure might be prejudicial to the environment which it relates, who would justify the sufficient interest test in order to try and block disclosure on this ground? It seems that in English law, the sufficient interest test is quite relaxed for environmental interest groups that can show they have a genuine interest in the issues raised, as

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<sup>588</sup> Sometimes the costs of judicial review can be so high that they act as a real deterrent to even justified claims and seem to breach the Aarhus Convention's requirement for reasonable costs in legal proceedings. A possible solution could be that when leave is sought to bring a judicial review claim, an advance order of costs is made for any litigants not eligible for legal aid so as to limit their potential liability to pay costs. See McCracken Robert, Jones Gregory, *The Aarhus Convention*, [2003] JPL 802, at 806.

<sup>589</sup> As analysed by the anonymous commentator of *R. v. British Coal Corporation ex parte. Ibstock Building Products Limited*, in [1995] Env. L.R. 277, '... the major difficulty with such applications is the time spent in between a request and the final judgment of the Court. Such a period (up to 18 months) means that the information requested is very rarely going to be sufficiently important or urgent to justify commencing proceedings in the first place!'

<sup>590</sup> The Court of Sessions in Scotland, or the High Court of Northern Ireland in Northern Ireland.

<sup>591</sup> See Stanley, above n. 608, at p. 36-59.

held in the important precedent of *R v Inspectorate of Pollution ex p. Greenpeace Ltd (no. 2)*.<sup>592</sup> So, it appears possible that such groups as Greenpeace could bring judicial review proceedings on this ground so as to try and block disclosures of information damaging to the environment. Also, the Attorney-General himself could bring such actions since he has always standing in judicial review proceedings as a guardian of the public interest.<sup>593</sup>

A very important procedural issue that arises is in deciding an application for judicial review against the refusal to disclose a confidential document, whether the judge is permitted to see the confidential document without releasing it to the applicant. The question that arises is whether *in camera* inspections of requested material in order to determine if it falls under the protection of one of the exemptions are possible. This question is an impossible one, since on the one hand non-disclosure of the document seen by the judge would breach the principle of procedural fairness and equality of arms, as guaranteed in English common law principles of natural justice and in article 6 of the ECHR. On the other hand, if the applicant could get in such way the withheld document, bringing judicial proceedings would be a way to negate third party rights protected by the exemptions. In the *Birmingham Northern relief road* case, the applicant asked for the Court to disclose the agreement under the rules of civil procedure.<sup>594</sup> This issue was resolved by Sullivan J. After having asked the public authority to show him the agreement (and neither parties objected to that), he stated that '*In trying to ensure the fair disposal of an Application where the issue at stake was the confidentiality of the document in question, I considered that the applicants would not suffer any unfair disadvantage if they were unable to see the whole of the Agreement*'.<sup>595</sup> However, he decided that both the applicants and himself should see an edited version of the document after confidential provisions had been erased and stated that '*I am satisfied that the redacted version of the Agreement as finally supplied to both the applicants and myself enables a fair disposal of this application*'.<sup>596</sup> However although the judge had supervised the editing process and had seen the entire document, he concluded that he was going to decide the substantive application on the basis of the edited version of the document as supplied to him and the applicants and he refused to recuse himself for this reason. This approach is a pragmatic one and solves the issue fairly since, although the applicant does not get all of the information disclosed to the judge, he does get an edited version of it and also the judge has a chance to see the contentious information which undoubtedly will help him to reach a correct decision even if he subsequently does not take into consideration the parts not disclosed to the applicant.<sup>597</sup>

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<sup>592</sup> [1994] 4 AllER 329.

<sup>593</sup> On all of these points see S. Bell and D. McGillivray, *Environmental Law*, 5<sup>th</sup> ed, Blackstone 2000, pp. 76-77.

<sup>594</sup> Under the Rules of Supreme Court, Order 24, r. 13. Currently Rule 31 on Disclosure and Inspection of Documents.

<sup>595</sup> See above n. 197, at p. 473.

<sup>596</sup> *Ibid.*, at p. 474.

<sup>597</sup> This solution is also the one expressly adopted by article 67 of the Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991 as amended, which provides *inter alia* that '*Where a document to which access has been denied by a Community institution has been produced before the Court of*

### **g) The issue of standing - Appeals by third parties?**

A very important question is who can ask for review of any decision that he alleges to be unsatisfactory? This raises the question of the rights of third parties<sup>598</sup> to disclosure proceedings.

Concerning people who have requested information, the Aarhus Convention provides<sup>599</sup> that any person who has made a request to information and who considers that it “has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article” may bring appeal proceedings. This is consistent with the information provisions of the Convention, which allow any member of the public to request information.

However, the Convention does not mention any rights of third parties to block disclosure of information that would be prejudicial to their interests. Such a solution is compatible with the purpose of environmental information regimes, which is environmental protection. Indeed, any such third-party rights would prevent disclosure when what is aimed at, is increased accessibility of environmental data. However, such actions by third parties could be based on other legislative instruments and principles; for example the right to privacy and similar human rights.

Interestingly, although Directive 90/313/EEC (and the implementing regulations) were completely silent on the matter, the new environmental information Directive states that member states “may” provide that third parties affected by the disclosure of information may have access to “legal recourse”.<sup>600</sup> This means that member states are granted discretion by the European legislator as to whether to recognise or not third parties rights in regard to disclosure of environmental information. On the other hand, the Directive does not specify what sort of rights could be recognised to third parties by the national implementing measures.

The usage of the very general term of “legal recourse” does not indicate clearly what this recourse could be. Possible solutions could include a right to sue for damages when confidential information has wrongfully been disclosed; a right to bring judicial review procedures with an aim to block disclosure; or even a right to be informed by public authorities before any information involving third parties is disclosed. In this last case, this could be assorted with a right to be given a certain period of time before disclosure is performed, so as to make any representations to the

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*First Instance in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties’.* This provision was inserted by the 2000 Amendments to the Rules of Procedure of the Court of First Instance of the European Communities which also mention in par. 5 of their preamble that ‘in order to resolve certain problems which may arise under the new procedure concerning disputes regarding public access to administrative documents, it is necessary to provide for the Court of First Instance to be able to exclude the communication to the parties of documents the production of which must be ordered’ OJ L 322, 19/12/2000, p. 4.

<sup>598</sup> As defined above.

<sup>599</sup> At art. 9, par. 1.

<sup>600</sup> At art. 6, par. 2.



public authorities or to ask for interim relief in the High Court with a view of initiating judicial review proceedings so as to block disclosure.

The new 2004 environmental information regulations do not expressly provide for a right of consultation of third parties. However, under section 45(2)(c) of the Freedom of Information Act 2000, persons to whom requested information relates or persons whose interests are likely to be affected by the disclosure, have to be consulted beforehand under the Codes of Practice made by the Lord Chancellor. However, there is no legally binding right of a third party to intervene before the information is disclosed and this has been criticised as a defect in the Act.<sup>601</sup> These aforementioned Codes of Practice are made under s. 45 of the Act and provide guidance to public authorities on the implementation in practice of freedom of information. It should be noted, that if a public authority disregards these provisions and nevertheless discloses information the person concerned has no redress under the FOIA 2000.<sup>602</sup> Interestingly, although s. 45 of the Freedom of Information Act 2000 is textually repeated by reg. 16 of the new Regulations, subsection 2, which provides about this right of consultation, is omitted altogether in the regulations. The reason for this omission is unclear, though nothing prohibits the Secretary of State to include such a right as he has already done in the Draft Code of Practice, especially if this right is included in the Codes of Practice concerning general Freedom of Information. In any case, the Directive allows for such a possibility.

However, apart from this limited non-legally binding right of consultation, there is no other right for third parties that would allow them to appeal against a decision favouring disclosure made by a public authority. Third parties cannot appeal to the Information Commissioner since this way of appeal is reserved to people having made requests for information.<sup>603</sup> No such right is provided to third-parties wanting on the contrary to block disclosure.

Consequently, one possible remedy for third parties seems to be to initiate judicial review against a decision made by a public authority that concerns information relating to them if its disclosure can be prejudicial to their interests. For instance, we could imagine of a private corporation wanting to prevent disclosure of information being in her opinion commercially confidential, when the public authority holding the information has a different view. In such cases, it makes no doubt that third parties do have sufficient interest to bring judicial review proceedings against a decision to disclose and ask for an injunction to restrain disclosure. However, it should be noted that in practice this might not be a very effective remedy, first because the third party obviously would need to know that information concerning him has been requested for disclosure, if he is to bring judicial review proceedings. Second, initiating judicial review proceedings cannot by itself halt the administrative decision-making process and thus prevent disclosure, following the

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<sup>601</sup> According to John Macdonald QC, see above n. 578, at p. 880. He adds that third parties should have the right to be informed when a request of information affecting their interests is made; to intervene to protect their interests; to appeal to the Information Commissioner, to the Information Tribunal and to the Courts so as to be able to block disclosure.

<sup>602</sup> See Macdonald, above n. 578, at p. 152.

established principle of public law that any administrative act is presumed lawful until pronounced unlawful. Interim relief has to be sought in order to get an interim injunction ordering the public authority to refrain from any disclosure pending the hearing of the main judicial review proceedings.<sup>604</sup>

Apart from these limited and theoretical possibilities for third parties to block disclosure, there are also other procedures that may allow them to be indemnified when they have suffered damages by unlawful disclosures. These private law procedures will be examined below.

#### **h) Criminal and quasi-criminal law remedies**

The question that has to be examined is whether there are any criminal offences enacted specifically for cases involving requests to access environmental information wrongfully refused or ignored.

None of the relevant international and EC legal instruments provide for any related offence in the field of access to environmental information. However, the inclusion in international treaties and in EC law of specific criminal offences is possible, as demonstrated by the recent adoption of the European Convention on the Protection of the Environment through Criminal law<sup>605</sup> and by the adoption of the Council Framework Decision on the protection of the environment through criminal law.<sup>606</sup>

However, the new environmental information regulations do provide for some specific offences concerning access to environmental information. These offences have been initially created by the Freedom of Information Act 2000, and the regulations extend them to environmental information.

#### **i) Offence of obstructing the execution of a warrant or failing to give reasonable assistance for its execution.**

It is regulation 18(10) that makes it an offence for any person to intentionally obstruct the execution of a warrant issued by a Court in favour of the Information Commissioner when exercising his investigatory powers of entry and inspection. Also, it is an offence to fail without reasonable excuse to assist any person executing such a warrant with any assistance the executor of the warrant may require for its execution. This latter offence is conditional on the reasonableness of the assistance asked for by the executor of the warrant and may vary from case to case, though it seems that if a person is asked to indicate where some relevant documents are held and he fails to

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<sup>603</sup> According to s. 50 of the FOIA 2000.

<sup>604</sup> On interim relief in judicial review proceedings in general, see Peter Cane, above n. 523, at pp.66-68.

<sup>605</sup> Adopted at Strasbourg on the 4/11/1998, ETS no. 172, available online from the Treaty Office of the Council of Europe at <http://conventions.coe.int>

<sup>606</sup> Council Framework Decision 2003/80 of January 27, 2003 on the protection of the environment through criminal law, OJ L 2003, 29 p. 55

indicate that knowing their location, then this offence is committed. These offences are subject to a summary conviction and the only penalty is a fine not exceeding level 5 on the standard scale (thus a maximum of £5,000).<sup>607</sup> These offences can be prosecuted exclusively by either the Information Commissioner or by the Director of Public Prosecutions or with his consent. Thus there is no right to privately prosecute these offences. These offences can be found in paragraph 12 of Schedule 3 to the Freedom of Information Act 2000, to which reg. 18(10) refers.

It is doubtful if this offence will ever be committed, since apart from the fact that it is extremely narrowly drawn (the obstruction has to be intentional and the failure to assist can be avoided if there is a reasonable excuse or the assistance asked for is not reasonable), the power of issue of warrants by circuit judges will be seldom exercised since it would require cogent evidence to satisfy the judge that it should be issued.<sup>608</sup> Thus these provisions seem of little, if any, practical significance.

#### **ii) Offence of altering records etc with intention to prevent entitled disclosure.**

Regulation 19 of the Environmental Information Regulations 2004 extends the offence of altering records etc. found in section 77 of the Freedom of Information Act 2000 to information requested under the Regulations. It is an offence for people employed by a public authority or are officers of it, or are under its supervision to alter, deface, block, conceal, erase or destroy any record held by the public authority with the intent of preventing disclosure of all or part of the information. The offence is only committed if a request for information has been made to the public authority and only if the applicant would have been “entitled” under the regulations to disclosure of information in accordance with that section. The offence is subject to a summary conviction and the only penalty is a fine not exceeding level 5 on the standard scale (thus a maximum of £5,000). The same restrictions on who can initiate prosecution proceedings apply as for the above-mentioned offences.

As Paul Stanley indicates, this offence poses no problem when information is absolutely exempt or when no exemption to communication applies to the requested information. However, he adds that in cases where information covered by an exemption is concerned and thus the public interest test would have to be applied, it would be unsatisfactory for criminal liability to turn on an assessment of something so nebulous as the public interest. So, he argues that the ambiguity in meaning of the word “entitled” would have to be resolved in favour of the defendant, so that an offence is only committed where no exemption to communication applies.<sup>609</sup> We disagree with such a restrictive interpretation. Even though, the principle *in dubio pro reo* is applicable in criminal

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<sup>607</sup> By reference to Section 37(2) of the Criminal Justice Act 1982 which provides for a standard scale of maximum fines for an adult on conviction for summary offences.

<sup>608</sup> According to Paul Stanley, *Current Law Statutes*, Vol. 2, 2000, London : Sweet & Maxwell, 2000, p. 36-65.

<sup>609</sup> See above n. 608, p. 36-79.

cases, adopting the above-mentioned interpretation would result in being possible for officers of public authorities to alter records with the intent to prevent disclosure in all cases where a non-absolute exemption is applicable without an offence being committed! This is also definitely contrary to the intent of parliament, which is to prevent such actions through criminal punishment. In any case, such a restrictive interpretation would render almost totally ineffective the enactment of this offence.

Moreover, according to Macdonald, a prosecution under the equivalent offence of section 77 of the FOIA 2000 would fail if the defendant shows that the destruction or alteration of the record would have taken place at the same time in the course of departmental practice, regardless of whether a request had been submitted or not.<sup>610</sup> This interpretation is based on section 1(4) of the Act which provides that although authorities are under a duty to provide information held at the time when a request is received, they are under no duty to safeguard this information from amendment or deletion that would have been made regardless of the receipt of the request. This section seems to legitimise alterations or destructions made by public authorities in the ordinary course of business, even if they are made in the full knowledge of a request. However, even if we accept such an interpretation, this cannot be applicable as far as environmental information is concerned, since the Environmental Information Regulations 2004 do not contain an exception similar to section 1(4) of the FOIA 2000. Thus, the scope of the offence seems to be different under the regulations: an offence is committed whenever requested environmental information is altered or destroyed in knowledge of a request having been made, regardless of whether this information would have been altered or destroyed in the ordinary course of business of the authority.

### **iii) Contempt of court.**

Lastly, the Information Commissioner's and the Information Tribunal's decisions are enforced through the mechanism of contempt of court, which is not strictly speaking a criminal law remedy, though it will be examined in this part, since contempt proceedings may lead to the punishments with quasi-criminal penalties, such as imprisonment and fines.

#### **1) Non-compliance with the Information Commissioner's notices.**

Section 54 of the FOIA, to which reg. 18(4) of the 2004 Regulations refers, provides that decisions of the Information Commissioner (thus decision notices, information notices and enforcement notices) are to be treated as orders of a court of law so as to be enforced by contempt proceedings. If a public authority fails to comply with any of the notices issued by the

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<sup>610</sup> See Macdonald, above n. 578, at p. 144.

Commissioner, then the Commissioner can certify that in writing to the relevant Court,<sup>611</sup> which in turn is given the power to enquire into the matter and to hear any defence or witness statements. This indicates that the court is not bound by the Commissioner's certificate of non-compliance<sup>612</sup> and therefore must establish itself if there has been in fact been non-compliance or not. However, the regulations expressly indicate that failure to comply with an information notice includes knowingly or recklessly making false statements.

On a theoretical basis, the usage of the contempt of court mechanism seems odd, since contempt intends to protect the dignity of the Court, and thus it seems that in this case the judge would be the Information Commissioner but he has no power to punish contempt by himself and has to remit the matter to the High Court. This extension of the law of contempt by statutory provisions to cover disobedience of orders made by various public bodies is not something new and has been widely adopted in various statutes,<sup>613</sup> although it has not been very coherent to apply the law of contempt to various situations to which contempt is not always necessarily the most effective remedy.<sup>614</sup>

A further issue, is what punishments and fines can be applied when dealing with contempt under these provisions. The FOIA provides that the Court may "*deal with the authority as if it had committed a contempt of court*", without giving any more details on the procedure (criminal or civil contempt)<sup>615</sup> that has to be followed. In general, criminal contempts are offences of a public nature punishing interferences with the ability of justice to function properly, such as threatening witnesses or improper conduct in hearings. Civil contempt occurs when the contemnor intentionally disobeys court orders or judgements and in general abstains from doing certain acts, in which case fines or prison sentences intend to coerce the contemnor into obeying rather than punishing him. Thus, it seems that disobedience of the Commissioner's decisions can result in civil contempt proceedings.<sup>616</sup> However, not under all of his decisions will contempt proceedings be possible. Only disobedience of enforceable decisions will amount to contempt, thus notices which

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<sup>611</sup> In England and Wales it is the High Court and in Scotland the Court of Sessions. See par. 4(4). Also, according to the Rules of the Supreme Court, it is a single judge of the Queen's bench division that has jurisdiction in such cases: "*Where by virtue of any enactment the High court has power to punish or take steps for the punishment of any person charged with having done any thing in relation to a court, tribunal or person which would, if it had been done in relation to the High Court, have been a contempt of that Court, an order of committal may be made by a single judge of the Queen's Bench Division*" (SI 1965/1776 Sch 1 (5) (52) Para 1(4)). Appeals are also possible to the Civil Division of the Court of Appeal under s. 13(2)(b) of the Administration of Justice Act 1960.

<sup>612</sup> See Paul Stanley, above n. 608, p. 36-65.

<sup>613</sup> See amongst others, the Parliamentary Commissioner Act 1967, s. 9(1) (concerning the Parliamentary Commissioner); the Local Government Act 1974, s. 29(8) (concerning the Local Commissioner); the Courts and Legal Services Act 1990, s. 25 (concerning the Legal Services Ombudsman); the Pensions Schemes Act 1993 (concerning the Pensions Ombudsman); the Mental Health Service Commissioners Act 1993, s. 13 (concerning the Mental Health Commissioner); the Freedom of Information Act 2000, s. 54 (concerning the Information Commissioner).

<sup>614</sup> According to Miller, "These specific extension of the law of contempt have apparently been adopted on a random basis rather than as part of a coherent pattern...", Christopher J. Miller, *Contempt of Court*, Oxford University Press, 2<sup>nd</sup> ed, Oxford: 1989, at p. 74.

<sup>615</sup> On the theoretical distinction between civil and criminal contempt and its limits, see Nigel Lowe, Brenda Sufrin, *The Law Of Contempt*, Butterworths, 3<sup>rd</sup> edition, London: 1996, pp. 655 et seq.

merely ascertain that someone's right information has been ignored or that procedures have not correctly been followed, without prescribing any sort of specific action on the part of the public authority concerned will not be enforceable decisions. Thus, contempt proceedings are only possible when information notices, enforcement notices and decision notices requiring specific steps to be taken, have not been complied with. This is consistent with the principle established in *Webster v Southwark LBC*<sup>617</sup> where it was held that since declarations are not coercive orders, refusals to comply with them do not amount to contempt.

As a result, whenever the High Court is satisfied the contemnor has breached a Commissioner's decision, it may either issue a writ of sequestration (temporarily seizing the defendant's property till he obeys), a writ of committal (imprisoning him till he obeys) or order the payment of a fine or order the payment of costs or even grant an injunction.<sup>618</sup> The Contempt of Court Act 1981, s. 14(1), imposes a two-year maximum jail sentence for civil and criminal contempt. This means that even if a person persists in his disobedience, he cannot be held locked-up eternally.<sup>619</sup>

A question that arises is what would happen if the initial decision of the Information Commissioner was unlawful. Could that be challenged in contempt proceedings as defence? Stanley, says no.<sup>620</sup> He recalls the House of Lords landmark decision of *Boddington v British Transport Police*<sup>621</sup> according to which defendants in criminal proceedings are entitled to contend that subordinate legislation or an administrative act made under it was *ultra vires* except when Parliament has expressly prohibited the bringing of such public law challenges by statute. Also, it was held that in construing legislation, there is a strong presumption that Parliament did not intend to inhibit such challenges. First, he accepts that this precedent concerning criminal matters is also applicable in contempt proceedings that have quasi-criminal sanctions. Second, he concludes that since the Freedom of Information Act provides for carefully structured and with suspensive effect appeal mechanisms, this implies that Parliament intended these appeal proceedings to be exclusive, thus not permitting *ultra vires* claims in other court proceedings such as in contempt ones. We do accept that the *Boddington* case is of relevance to contempt proceedings, however we feel that in the absence of a clear and express statutory provision prohibiting such *ultra vires* claims, the provision in the Act of appeal mechanisms against the Commissioner's decisions is insufficient to

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<sup>616</sup> This is also the view adopted by Macdonald. See above, n. 578, at p. 235 and footnote 168.

<sup>617</sup> [1983] 2 WLR 217.

<sup>618</sup> However, as held in *Elliot v Klinger* [1967] 3 All E.R. 141 although the court might in its discretion substitute an injunction in lieu of sequestration or committal, a plaintiff cannot claim an injunction without asking for committal or sequestration.

<sup>619</sup> On further procedural details on how contempt procedures are brought see Lowe and Sufrin, above n.615, Ch. 14 Civil Contempt, Part III Power of the courts to enforce judgements or orders other than for the payment of a sum of money, pp. 603-641.

<sup>620</sup> See above n. 608, at p 36-65.

<sup>621</sup> [1998] 2 All E.R. 203. This case concerns a criminal prosecution for smoking in a train brought under British Railway bylaws. The defendant argued they were *ultra vires*.

rebut the strong presumption that Parliament did not intend to inhibit such challenges.<sup>622</sup> So, such incidental arguments should be allowed in contempt proceedings.

Also, Birkinshaw<sup>623</sup> criticises the choice of using contempt proceedings for enforcing the Commissioner's decisions, since contempt proceedings are unlikely to have any significant role in enforcement unless there is no appeal and the authority does not comply with a decision of the Commissioner. Thus, he recommends that it would have been better if the Commissioner had been given a power to seek injunctions, similar to the one given to the Northern Ireland Commissioner to force the recalcitrant authorities to comply with its decisions. We disagree with this view, because if court injunctions are not complied with, then it becomes a matter of contempt. Thus, the current position leads to the same result, contempt proceedings, and in a faster way since there is no need to seek an injunction first.

However, we do agree with Birkinshaw that the choice of contempt proceedings can be criticised. This is even truer when environmental information is concerned where it should be kept in mind that by allowing greater openness, it is the environment that is protected. Thus, any attempt by public officials to prevent disclosure indirectly harms the environment and as a consequence the public interest too. So, this could justify harsher punishments and more wide-ranging offences than the ones created by the Freedom of Information Act 2000, which have only been extended by the Regulations as to cover environmental information. A possible solution would have been instead of providing for contempt proceedings whenever the Commissioner's decisions are not complied with, to create a **criminal offence** of non-compliance to the Commissioner's decisions made under the Environmental Information Regulations. This offence could carry harsh punishments, and could be a strict liability offence so as to avoid any questions of intent, which might be difficult to prove and thus would prevent successful prosecutions.

## 2) Obstruction etc of the Information Tribunal's proceedings.

Concerning the details of proceedings in front of the Information Tribunal, section 61 of the FOIA provides that they have to be found in Schedule 6 to the Data Protection Act 1998, so far as applicable. According to paragraph 8(1) of this Schedule the Information Tribunal can commit a person to the High Court<sup>624</sup> when a person is guilty of "any act or omission in respect of proceedings before the Tribunal" if it would be such as to amount to contempt of court if the

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<sup>622</sup> Indeed, as held in the *Boddington* case: "In my judgment only the **clear language of a statute** could take away the right of a defendant in criminal proceedings to challenge the lawfulness of a byelaw or administrative decision where his prosecution is premised on its validity" (our emphasis). For such a case in which a statute explicitly provides for an exclusion clause, see *R. v Wicks (Peter Edward)* [1997] 2 All E.R. 801 (HL).

<sup>623</sup> See Patrick Birkinshaw, *Government and information : the law relating to access, disclosure and regulation*, 2<sup>nd</sup> ed 2001, London : Butterworths, p. 41.

<sup>624</sup> In Scotland, the Court of Sessions.

proceedings were before a court of law. In such a case, the Tribunal can certify this matter to the High Court, which can deal of the matter under contempt proceedings.

This covers mainly contempts committed in the face of the Tribunal, such as verbal abuse, throwing objects at members during hearings or violent interruption of proceedings. These, contrary to the previously described contempts about the Commissioner's decisions, are criminal contempts and are punishable by imprisonment, fines, order to pay costs, taking security for good behaviour, and even by granting injunctions either to prevent repetition of the act or to prevent the act of being committed. The same limitations on the length of the jail sentences that can be given apply as analysed above.<sup>625</sup>

### i) Civil proceedings - Actions in tort.

A further question that arises, is what actions are possible under civil liability rules when citizens, either applicants to disclosure or third parties aiming at blocking disclosure, have been damaged in their interests by a wrongful disclosure or a wrongful refusal. It should be noted first of all that in English public law, an *ultra vires* action by a public official or authority (and thus referred in this part as illegal) does not, simply of itself, give rise to an action for damages.

Expressly and unambiguously, reg. 18(6)(e) of the Environmental Information Regulations 2004 ensures that the Regulations do not create any right to sue for damages for breach of a statutory duty present in the Regulations. This regulation refers to section 56 of the Freedom of Information Act 2000, which makes clear that there was no intent to imply that breaches of statutory duty under these pieces of legislation created a right to sue for damages. Interestingly, this is a radical change from the position under the previous 1992 regulations, under which a dissatisfied applicant could pursue an action for breach of statutory duty in the civil courts.<sup>626</sup>

According to Birkinshaw,<sup>627</sup> this preclusion clause cannot prevent actions based on negligence<sup>628</sup> or for breaches of confidentiality, since these duties are not imposed under the Act. However, this provision does not completely oust the Courts' powers to grant damages based on other rules too.

First, as Stanley indicates, this provision does not prevent tort claims in very serious cases based on the tort of **misfeasance in public office**.<sup>629</sup> This tort exists when an official person has

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<sup>625</sup> On further details on these procedures and for other types of criminal contempt, see Lowe and Sufrin, above n.615, pp. 507 et seq.

<sup>626</sup> According to the UK government's report to the Commission in 1997 about the application of the Directive. See the Report from the Commission to the Council and the European Parliament on the Experience gained in the application of Directive 90/313/EEC on Freedom of Access to Environmental information. (COM/200/0400 FINAL).

<sup>627</sup> See above n. 623, at p. 44.

<sup>628</sup> However, according to Macdonald, actions based on the tort of negligence are precluded. See Macdonald, above n. 578, at p. 236.

<sup>629</sup> See Stanley, above n. 608, at p. 36-66.



deliberately acted in the knowledge that what has been done is unlawful and likely to cause damage or when he deliberately acts in a way to injure.<sup>630</sup> This tort is thus of very limited help, since it involves proving the state of mind of the targeted official, which resembles to a *probatio diabolica*. In any case, this tort does not cover most illegal actions.

Second, as we analysed elsewhere, environmental information has Human Right implications, and the **Human Rights Act 1998**, has created what is virtually an administrative tort in cases where damages are caused by unlawful action by breach of a Convention human right.<sup>631</sup> Until now, there has been no precedent on this ground concerning human rights and environmental information.

Third, it should be noted that both the Environmental Information Regulations, contrary to the Freedom of Information Act 2000, transpose a EC Directive which also appears to have direct effect to citizens,<sup>632</sup> since it clearly creates a right to access information in favour of any individual. Thus, damages can also be sought under the *Factortame* line of precedents<sup>633</sup> whenever there has been clear breaches of a right to access environmental information and the damage is of sufficient seriousness. However, there is one serious limit in these claims: the applicant has to prove that the damage has resulted from an incorrect transposition of the EC environmental Information Directive. Thus, he would have to prove that the implementing regulations prevented his right to access information he would have been entitled to get if the UK had correctly transposed the Environmental Information Directive. This is of limited practical significance to people being wrongfully refused disclosure since, first, wrongful implementation would be hard to ascertain, and second, the breach of EC law has to be sufficiently serious.

Also, the common law tort of negligence could also found grounds for actions for damages. However, **negligence in a public law context** is very restricted and limited in cases where public authorities have acted unreasonably in the *Wednesbury* sense, thus when it can be proved that no reasonable authority could have so acted.<sup>634</sup>

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<sup>630</sup> See on this tort McBride Nicholas, Bagshaw Roderick, *Tort Law*, Pearson 2001, chapter 23, and also *Three Rivers District Council v. Bank of England* (No. 3) [2001] 2 All E.R. 513 (HL).

<sup>631</sup> See *inter alia*, Michael Purdue, "Liability for Faulty Planning Decisions" [2001] J.PL 1141. See also the landmark case of *Marcic v Thames Water Utilities Ltd* [2002] EWCA Civ 64, in which a breach of article 8 lead to the award of damages.

<sup>632</sup> As stated by Kurt Riechenberg concerning Directive 90/313, 'Article 3 establishes a right for individuals to receive environmental information that is in possession of public entities. There can be very little doubt that this provision can be relied upon by individuals directly even if Article 3 has not been translated into domestic law provided that no other rights are affected by disclosure', in *Local administration and the binding nature of community directives: a lesser known side of European legal integration*, [1996] 22 *Fordham International Law Journal* 696, at p. 740-741.

<sup>633</sup> See above, n. 118.

<sup>634</sup> On negligence in a public law context, see Cane, above n. 523, at pp. 246-247. Also, according to Birkinshaw, (see above n. 623 at pp. 47-48) because individuals affected by disclosure have to be consulted beforehand under the Codes of Practice made by the Secretary of State, if a public authority fails to notify a third party and then wrongfully discloses information and this disclosure causes damages to the provider of the information, then, under the precedent of *Swiney v. CC of Northumbria Police* [1996] 3 AllER 449 (CA), the public authority concerned is liable in negligence. However, he adds that if the public authority had considered whether the third party ought to have been consulted and had wrongfully found that it should have

Lastly, another tort that might find grounds of application is **breach of confidentiality**. For the common law of confidentiality to be successfully invoked, it has to be shown that 1) the information can be characterised as confidential; 2) the information was communicated in circumstances importing an obligation of confidence; and 3) the information was used without proper authorisation.<sup>635</sup> However, this tort can only be invoked by third parties having suffered damages by unauthorised disclosures, so it would have to be shown that the public authority was completely barred by a specific statutory provision to disclose such information (and was not merely given discretion as to refuse disclosure). This remedy apart from being restricted to cases when disclosure is expressly prohibited (i.e. under a specific act), can be of little help if disclosure has already taken place where as Birkinshaw points out, "... *the real damage brought about by disclosure may already have been perpetrated and the money remedy will offer little solace*".<sup>636</sup>

### **j) Complaints to Ombudsmen.**

Apart from reconsideration procedures that are binding as analysed above, there are also possible recourses to Ombudsmen whose recommendations are not binding even though they are almost always accepted in full.<sup>637</sup> Ombudsmen are bodies investigating informally the working of the state, independent from the sector they are investigating and are cost-free to complainants. In England there are three types of public Ombudsman each responsible for a particular sector of administrative activities and specific bodies. They are the Parliamentary Commissioner for Administration (hereinafter PCA) created by the Parliamentary Commissioner Act 1967 and responsible for mainly governmental bodies; the Health Service Commissioner created by the National Health Service Reorganisation Act 1973 and responsible for the NHS bodies, and finally the Local Government Ombudsman created by the Local Government Act 1974 and responsible for mainly local authorities.<sup>638</sup> Each of these bodies can investigate complaints concerning maladministration that has caused injustice in their areas of competence.

The main advantage of using these bodies as opposed to judicial review proceedings, is that they are free for applicants and that their jurisdiction extends to 'maladministration' which is a wider concept than the *Wednesbury* unreasonableness. Maladministration is inefficient or improper

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not, then negligence could arise only if this decision not to consult could be held to be unreasonable or irrational in the *Wednesbury* sense, in application of *Anns v LB of Merton* [1978] AC 728.

<sup>635</sup> See for more details, Halsbury's Laws of England, *Confidence and Data Protection*, Butterworths, at paras. 401-472.

<sup>636</sup> See Birkinshaw, above n. 623, at p. 48.

<sup>637</sup> Though not always. See the PCA's *Fourth Report* (Session 2001-2002) to Parliament (13 November 2001, HC 353) which is the first occasion on which a Government department has refused to accept the conclusions of the Ombudsman on a question of disclosure of information under the Code of Practice.

<sup>638</sup> There are also equivalent Ombudsmen for similar matters in Wales and in Northern Ireland but their method of operation is mainly similar with their English counterparts. On these see chapter 21 by Purdue, *Investigations by the public sector Ombudsmen*, in David Feldham (ed.), *English public law*, Oxford: Oxford University Press, 2004.

administration and does not cover the merits of a decision but only the manner in which it was reached. However, the public sector Ombudsmen in deciding whether there has been maladministration seem to be willing to extend their assessment on the merits of a decision and to find that when a decision is bad, there has been maladministration.<sup>639</sup>

As mentioned in the introduction, the first legal instrument (though not of a binding nature) on a general right of citizens to access information held by public bodies was the 1994 British Government's Code of Practice on Access to Government Information.<sup>640</sup> This Code was of limited application to only those bodies that came within the jurisdiction of the PCA,<sup>641</sup> as it is the PCA who was responsible to enforce the Code. These bodies are the Central Government or persons or bodies acting on its behalf performing administrative duties, or certain specific non-departmental public bodies, commonly referred to as quangos. The code provides that all information held by these bodies is to be released to any applicant without the need to prove any interest in disclosure, except when requested information is covered by an exemption provided for by Part II of the Code. These exemptions, generally speaking, cover the usual areas of secrecy as under the Freedom of Information Act 2000 and the Regulations. The Code of Practice lays down the principle that applicants who have been refused information, or who consider they have been charged unreasonable fees, should first seek an internal review of the decision from the relevant body. Only if applicants are not satisfied with the outcome of the review, it is open to them to complain, through a Member of Parliament to the PCA.<sup>642</sup> It should be noted that MPs are not obliged to forward such complaints to the Ombudsman for investigation and, when the PCA receives a complaint, he has discretion as to whether or not to investigate the matter.

As far as environmental information is concerned, the Code expressly excludes the competence of the PCA, as it considers that it cannot override statutory provisions on access to information. Section 8 of the Code about relationships with other statutory rights provides that "*...Where the information could be sought under an existing statutory right, the terms of the right of access takes precedence over the Code. [...] There is also a right of access to environmental information. It is not envisaged that the Ombudsman will become involved in supervising these statutory rights.*" However, in some cases the PCA has examined complaints which involve information relating to the environment, as a complaint involving refusal of disclosure of

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<sup>639</sup> See on this point the chapter 21 by Michael Purdue, *Investigations by the public sector Ombudsmen*, in David Feldham (ed.), *English public law*, Oxford: Oxford University Press, 2004.

<sup>640</sup> Available online from the Department for Constitutional Affairs website at <http://www.dca.gov.uk/foi/ogcode981.htm>

<sup>641</sup> According to s. 6 of the Code: "The Code applies to those Government departments and other bodies within the jurisdiction of the Ombudsman (as listed in Schedule 2 to the Parliamentary Commissioner Act 1967)[3]. The Code applies to agencies within departments and to functions carried out on behalf of a department or public body by contractors. The Security and Intelligence Services are not within the scope of the Code, nor is information obtained from or relating to them".

<sup>642</sup> According to section 11 of the Code.

governmental correspondence about the Ilisu Dam project in Turkey.<sup>643</sup> Also in another investigation concerning some farm inspection reports held by the Scottish Office Agriculture, Environment and Fisheries Department (SOAEFD), where the Environmental Information Regulations 1992 were partially applicable, the PCA declined to entertain the complaint raised about the incorrect application of one of the exemptions of the Regulations, since he considered it was a matter for the courts to decide. However, he considered himself competent for environmental information produced before the entering in force of the Regulations, since he considered the Code applicable to them and recommended their disclosure.<sup>644</sup> This shows that the Code and the protection provided by the PCA have still a residual role for environmental information.<sup>645</sup>

Since the coming into force of the Freedom of Information Act 2000 and until its complete implementation across all bodies of the public sector in January 2005, the Code is still relevant for bodies not yet subject to the requirements of the Act and for whose activities one of the Ombudsmen is competent.<sup>646</sup> This is important since sometimes some complaints to the PCA have involved environmental information. In any case, it is important to note that from the time the Freedom of Information Act 2000 is fully implemented and the Environmental Information Regulations provide for a specific appeal procedure to the Information Commissioner, then the PCA (nor any other Ombudsman) won't be any more competent to deal with such complaints about access to information. This is due to the fact that all statutory provisions on the public sector Ombudsmen expressly provide that the Ombudsmen should not investigate when there is an alternative right of appeal to a Tribunal or a remedy by proceeding before a court of law. Indeed, as

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<sup>643</sup> Case No. A.26/01, detailed in the PCA's *Third Report for Session 2001-2002—Access to Official Information—Investigations Completed January-June 2001*, HC 160. All PCA's reports and cases mentioned herein are available online from <http://www.ombudsman.org.uk/publications.html>

<sup>644</sup> Case No A.38/99, *Second Report for Session 1999-2000—Access to Official Information: Investigations Completed—April-October 1999*.

<sup>645</sup> The PCA has dealt with other complaints involving environmental information, though the Code was applied without reference to the Regulations: Case No. A.43/96 Refusal to disclose information about a planning application from the Commission for the New Towns; Case No. A.11/97 Delay in replying to a request for environmental information from the Department of the Environment about the effect of discharges from offshore oil and gas installations on marine wildlife and habitats (the initial application to disclosure was made both under the Code and the Regulations and the PCA did not struck out the Complaint as inadmissible, thus possibly indicating a sort of concurrent applicability of both provisions); Case No. A.37/96 Refusal to disclose information about defects at a nuclear power station sought from the Health and Safety Executive. All these cases are reported in the PCA's Fourth Report (1997-98). See also Case No. A.37/03 Refusal to release information about the construction of the Silverstone Bypass, and Case No. A.12/03 Refusal to release information about accidents involving nuclear weapons, reported in the *Parliamentary Commissioner for Administration (Investigations Completed July 2003 - June 2004) Access To Official Information 1st Report — Session 2003-2004*, HC 701 (Session 2003-2004), available online from: <http://www.ombudsman.org.uk/pca/document/aoi0304/index.htm>

<sup>646</sup> The PCA's jurisdiction is very limited compared to the scope of the Environmental Information Regulations, since it does not extend to private bodies exercising public functions or under the control of public bodies. This has led to some cases being dismissed by the PCA for lack of jurisdiction. In case no. A17/03, the applicant complained of a refusal by NIREX (a private company managing UK's intermediate level radioactive waste and owned by BNFL, UKAEA and British Energy) and the Department of Trade and Industry to release information about a shortlist of 12 preferred sites for the disposal of radioactive waste. The PCA considered that NIREX was not a body within its jurisdiction. See the Parliamentary Ombudsman's report for 2003, *Access to Official Information investigations completed between November 2002 and June 2003* (HC 951).

expressed by Woolf L.J. in *R v Commissioner of Local Administration ex p. Croydon LBC*,<sup>647</sup> “... if there is a tribunal (whether it be an appeal tribunal, a Minister of the Crown or a court of law) which is specifically designed to deal with the issue, that is the body to whom the complainant should normally resort”.

From all of the above, it can be concluded that the role of the Ombudsmen in providing access to environmental information is residual under the Environmental Information Regulations 1992 and non-existent since the coming into force of the Environmental Information Regulations 2004, on the 1<sup>st</sup> January 2005.

#### **k) Conclusion on the available remedies concerning access to environmental information**

It is obvious from what has been described on the available remedies concerning access to environmental information, that there is a great number of various and overlapping remedies which are almost exclusively equivalent to the ones available to general requests to access information made under the Freedom of Information Act 2000. Undoubtedly, the whole environmental information regime was aligned concerning review procedures with the one present in the Act,<sup>648</sup> so as to avoid complexities that two different sets of remedies would have created. However, is this the best possible approach?

The result is a “patchwork” of remedies, which might or might not protect effectively the citizens (we shall not embark on this issue)<sup>649</sup> but none of these remedies is taking into account the protection of the environment. This can firstly be demonstrated by possible inconsistencies of the adopted review mechanism with the Directive’s requirements. A good example is the issue of costs in front of the Tribunal, whereas the Directive imposes an inexpensive procedure. Secondly, even though criminal remedies are used, as demonstrated, these are available in such extreme cases that they will most probably be only of theoretical and academic interest than of any practical relevance. The causes for these inconsistencies are the links the environmental information regime has with the general freedom of information one. The latter aims at providing mechanisms in order to protect the citizen’s right to access information. On the contrary, environmental information is only an instrument aiming at protecting the environment, thus the public interest. Specific remedies would be welcome taking this factor into account. These could be, as analysed before, harsh criminal sanctions for attempts of public officials to block disclosure when environmental information is concerned, similarly to the new trend in European law of the usage of criminal law as a means to protecting the environment and also measures aiming at lowering the costs of court proceedings in environmental matters.

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<sup>647</sup> [1989] 1 All E.R. 1033, at p. 1044.

<sup>648</sup> See above n. 522.

<sup>649</sup> Though on a criticism of the enforcement proceedings found in the FOIA concerning the right of third parties, see Macdonald, above n. 578, at p. 240.

## **CHAPTER 2) Other specific legal instruments of access to environmental information upon request: the example of public registers containing environmental information**

Public registers can be defined as an official compilation of certain specific sort of information required by legislation, maintained by public authorities and open to public inspection although certain restrictions may apply on this account. They can be maintained on a computerised or a more traditional manual form. British law has been for a long time using public registers as a means of making information accessible to interested parties and also the general public. Public registers are widely used in a multitude of different areas ranging from the traditional registers that contain all births, marriages and deaths maintained by the General Register Office for England and Wales to the more modern Data Protection Register, a public register maintained by the Information Commissioner containing all controllers of personal data.

As far as registers containing environmental information are concerned, their characteristics vary depending on the statutory provisions that created them. Public registers containing environmental information are definitely one of the means that allow the public to have access to data on the environment. However, public registers are not just a means of providing environmental information to the public; they perform a dual function. They have also (and it is equally important in our view) a function of being a readily accessible compilation of documents on the same subject present in a single archive. This role facilitates the task of record keeping by public administration bodies; though of course it would always be open to public bodies to do this on their own initiative.

### **A) Public Registers as a route to access to information.**

Public registers are seen by the government as the most practical way for collating and providing information to the public regarding specific and continuing sources of information.<sup>650</sup> We shall first examine the advantages and disadvantages of establishing public registers and their suitability as a means of access to environmental information.

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<sup>650</sup> See the Draft regulations and guidance on implementation of the EC Directive 90/313 on the freedom of access to information on the environment, Department of the Environment, 1992.

## 1) Advantages and disadvantages of public registers.

There is a great deal of controversy between scholars whether registers are an effective means of allowing access to and dissemination of environmental information. According to John<sup>651</sup>, '*registration of data in publicly accessible registers presents perhaps the best possible means of making information public...*' He also believes that despite their defects (lack of comprehensiveness, unwieldy format and the delays in updates) their more extensive use should be promoted. On the other hand, according to Rowan-Robinson *et al.*<sup>652</sup>, '*registers offer an easy option for seeming to meet the pressure for greater public access to environmental information without actually achieving very much*'. The truth probably lies somewhere between these two extremes and we should concentrate on analysing the main issues.

First of all, it has been argued by the British Government<sup>653</sup> that registers are clear and transparent in their use. It is mentioned that they are also clear and simple in operation, free of charge when being inspected, relatively cheap to maintain and it is easy to inform the public on their contents.

Even though all these arguments seem correct on a theoretical basis, in practice studies have shown that the implementation of public registers can be problematic. According to Burton<sup>654</sup> there has been little awareness of the existence of registers by members of the general public and little use has been made of registers by them. He suggests that this might be attributed to the complexity of information and insufficiency of data included on registers.

Moreover, according to Sanders and Rothnie<sup>655</sup>, planning registers are an '*under used facility*' and this is '*cause of concern given the resources involved in setting up and maintaining a register*'. The authors try to find solutions to alleviate this concern. We shall not discuss these solutions, but we think that the author's approach omits to take into consideration an extremely important factor that could in itself justify the costs involved for maintaining a register. As discussed above, public registers have a dual function of providing information to the public and also being a useful administrative archive of relevant documents. Consequently, it can be argued that due to this dual function, their costs are justified since they also help to create an important archive of use to public bodies themselves. It is also suggested that public registers are cheap compared to other means of providing environmental information that do not serve any other functions.

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<sup>651</sup> Edward John, Access to Environmental Information: Limitations of the UK Radioactive Substances Registers [1995] JEL 11.

<sup>652</sup> Jeremy Rowan-Robinson, Andrea Ross, William Walton, Julie Rothnie, *Public access to Information: a means to what end?* [1996] JEL 19.

<sup>653</sup> Cited by Gisèle Bakkenist, *Environmental Information: Law, Policy and Experience*, Cameron May 1994, page 67.

<sup>654</sup> T. P. Burton, Access to Environmental Information: the UK experience of water Registers [1989] JEL 192.

<sup>655</sup> Anne-Michelle Sanders and Julie Rothnie, Planning registers - their role in promoting public participation [1996] JPL 539.

Secondly, the fact that only certain categories of information are included in the registers is definitely a disadvantage of this system, compared to a general right of access to environmental information. The amount of information accessible under registers is finite, compared to a general right provision where all information is accessible except if it is excluded. Consequently, there can be no 'fishing' in files of public bodies, trying to find some 'neglected' piece of information.

Another disadvantage of the system of public registers is that if information is omitted (deliberately or accidentally) from inclusion in the registers it can be precluded from disclosure. If it could be proved that a register was incomplete, the public authority could be forced to remedy this but in most cases the omission might go unnoticed. However, this problem does not apply with a system of general access to information, in which disclosure of information is independent of the fact that it is included or not on registers; though again public bodies might conceal information that they should disclose.

Finally, it must be said that legal provisions that create and organise some registers do not always contain time limits for them being updated. Consequently, information held on public registers could sometimes become out of date. For instance, registers set under the EPA do not contain any time limit for them being updated, except for registers of genetically modified organisms<sup>656</sup>.

## **2) Common features of Public Registers containing environmental information.**

Public registers which contain environmental information were initially set up with the aim of providing a way so that the public can be informed about systems of regulation of polluting activities by public authorities. The registers therefore contain applications to carry out polluting activities and the responses that were taken in accordance with that (through authorisations to pollute or enforcement actions) by pollution regulatory authorities. Since all, or at least almost all, of public registers concerning environmental information are pollution-oriented, they have a lot of features in common, though caution should be taken when generalising about public registers, because, on some minor points, great differences can arise, as we shall see further on. These common features can be analysed in two categories: firstly, features that concern the practical implementation of registers, and secondly, features that concern the information included on them.

### **a) Practical implementation of registers.**

#### **i) How information on registers can be accessed**

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<sup>656</sup> See the Genetically Modified Organisms (deliberate release) Regulations 1992 (SI 3280), Part V on the register of information, and particularly regulation 1, which provides for a fourteen days limit for information to be placed on the register.



As a general rule, the statutory provisions on registers provide that they must be open for inspection by any member of the public at all reasonable times. Although this should not be a source of problems, there is some case law on what are 'reasonable times' and on who are the 'public'.

The determination of what is considered to be reasonable times has been left by the legislature to the discretion of the authorities holding the registers for inspection. However, in *Small v. Bickley*<sup>657</sup> the meaning of the term reasonable was interpreted and it was decided that it is a matter of fact to be determined on a case by case basis. The case involved a Victorian statute which gave authority to the inspector of nuisances to enter places where meat etc. was held only at 'reasonable times'<sup>658</sup>. Justice Blackburn held that: '*I do not think the inspector's judgement on what is reasonable time should be final; but the justices must have a discretion in determining what time, under the circumstances of each case is reasonable*'. This would suggest that whether there is access at reasonable times would be a matter of law for the courts to decide. According to Sanders and Rothnie<sup>659</sup> '*all reasonable times*' is ambiguous and in practice refers to the working hours of the authority. They suggest<sup>660</sup> that the issue of restricted opening times should be addressed by lunch-time, evenings or Saturday openings but also accept that this would have resource implications. We do believe that such extended opening hours can only be beneficial in increasing the importance of public registers as a means towards circulating information. However, we do not think that the phrase 'all reasonable times' could be reasonably interpreted in a way as creating a **statutory duty** for authorities maintaining registers to extend the times at which registers can be inspected outside their normal opening hours. This provision was intended to prevent authorities from reducing unreasonably the times at which registers can be inspected, thus creating a barrier to the public who wants to consult registers, but not to allow members of the public to consult registers whenever that suits them most. Thus, it would presumably be unreasonable for an authority to restrict access one hour every week, or at times that would reasonably prevent people from accessing the registers.

The case of *Stirrat Park Hogg v. Dumbarton District Council*<sup>661</sup> provides an important precedent as to who is to be considered as members of the 'public' for having the right to inspect registers. The case involved the right to inspect planning registers free of charge. It was held that artificial legal persons, such as partnerships and limited companies, are not to be considered as members of the public and consequently they cannot assert such a right for themselves. However,

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<sup>657</sup> *Small v. Bickley* [1875] 32 LT 726.

<sup>658</sup> Section 2 of 26 and 27 Vict. c. 117. This statute and the facts of the case are irrelevant for registers, however the way in which the term 'reasonable times' was interpreted seems that it could be considered as a precedent when interpreting the same terms concerning legislation on registers.

<sup>659</sup> Above n. 655, at page 543.

<sup>660</sup> *Ibid* at page 546.

<sup>661</sup> *Stirrat Park Hogg v. Dumbarton District Council* (1996) SLT 1113. (Outer House, 1994). The case involved the Scottish Planning register of planning applications set up by section 31 of the Town and Country Planning (Scotland) Act 1972, but the provisions concerning planning registers are almost the same in Scotland and England.

this has little practical implications since Lord Cameron of Lochbroom admitted that ‘*this right as it were benefits them only by reason that they are a legal person formed of a partnership of natural persons to whom that right pertains*’ and consequently the applicant (a firm) had title and interest to sue. He also accepted that the employee of the partnership was no more nor less than a member of the public when they subsequently sought sight of the register. So, the exclusion of artificial legal persons has little practical effect. Moreover, this appears to be inconsistent with the Directive on the freedom of access to information on the environment, which states that environmental information should be available ‘to any natural or legal person’<sup>662</sup>. The Directive expressly creates a right of access for an artificial legal person, consequently the term ‘public’ should have been interpreted in a way consistent with EC law as to include an artificial legal person as well as a natural person. In *Stirrat Park Hogg v. Dumbarton District Council* it was held that this was not the case and we believe that the court’s interpretation was erroneous as contrary to the EC Directive on the freedom of access to environmental information.

Moreover, in the vast majority of cases the simple inspection of registers concerning the environment is free. When this is the case it is usually mentioned to be so in the legislative text that creates the register. However, when nothing is mentioned concerning charges for inspecting the registers some authorities maintaining them have been tempted to levy such charges. In *Stirrat Park Hogg v. Dumbarton District Council* it was argued *inter alia* by local authorities that since the Scottish TCPA did not make any provision for the inspection of registers containing planning applications to be free of charge, as it expressly provided for other planning registers (such as the tree preservation orders register and registers of structure plans and local maps), it should be deduced from a comparison of these expressions that the TCPA allowed charges to be levied by way of necessary implication. This argument was rejected by Lord Cameron of Lochbroom who held that silence on the matter of charge in the 1972 Act did not satisfy the rigorous test which had to be passed before a statutory power to charge could be held to exist by necessary implication and consequently, the decision to charge by the local authority was *ultra vires*.

So, in fact, there are three classes of registers in this regard. First, registers where it is expressly stated that inspection is free of charge. Second, registers where there is an express power to charge (either for inspection or for obtaining copies or both). Third, registers where the Act is silent as to charges. In the last category, the presumption would be that no charges could be made for an inspection of the register. In *Stirrat Park Hogg v. Dumbarton District Council* it was decided that it cannot be concluded from the silence of the TCPA on whether local authorities could charge for the inspection of the register of planning applications that they may levy such charges.

As regards the right to obtain photocopies of information present on registers is concerned, even though copies are available most of the times (with the notable exception of planning registers, see below), they are not free, and are subject to a reasonable charge. The fee schemes are designed by each authority and as studies have shown, there can be important differences between

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<sup>662</sup> Article 3, paragraph 1, Directive 90/313/EEC and article 2, par. 5 of Directive 2003/4/EC.

charges, some authorities charging far higher prices than others.<sup>663</sup> However, it is interesting to mention that in the case of water registers set up under the Water Supply (Water Quality) Regulations 1989 and maintained by water supply undertakers, people with a direct interest in the water supply can obtain copies from the register free of charge.<sup>664</sup> This can be probably explained by the will of the government to increase public participation of people directly concerned with the quality of water supplied by private companies: people receiving water through their own taps.

At this point, special mention must be made of regulation 5 of the Environmental Information Regulations 1992. This regulation provided that where any piece of environmental information was not covered by the Environmental Information Regulations 1992 but was required to be made publicly available by other statutory provisions, arrangements for doing so must have provided a similar procedure for that required for information covered by these Regulations. This was very important since it aimed to unify the procedures that provided for access to environmental information. Provisions concerning registers did fall under these provisions since they were '*information contained in records which are required [...] to be made available for inspection by every person who wishes to inspect them*'<sup>665</sup> and consequently they were not information covered by the Environmental Information Regulations 1992.

More precisely, regulation 5 provided that every request for information relating to the environment (made for the purposes of that provision, thus in the case of registers) had to be responded to as soon as possible and in any case not later than two months. Moreover, in the case of a refusal to make information available, the refusal ought to have been in writing and to specify the reasons for the refusal. This was important as it provided the information to ascertain whether the refusal was justified. Finally, the regulation provided that no charge that exceeded a reasonable amount was to be made for making information relating to the environment available.

Thus, the 1992 Regulations distinguished between environmental information subject to existing statutory regimes and other environmental information and required existing rights to environmental information to come up to the standard specified in the regulations. On the contrary, the 2004 Environmental Information Regulations make no special provisions for existing rights to environmental information but just mention that they supersede any other statutory scheme of access to information.. More precisely, paragraph 6 of regulation 5 of the 2004 Regulations mentions that "*Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply*". So, it is the provisions of the new regulations that are applicable, as examined in the previous chapter.

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<sup>663</sup> See Burton above n. 5, at page 199.

<sup>664</sup> According to section 30(2)(a) of The Water Supply (Water Quality) Regulations 1989 (SI 1147) as amended, free copies from the register must be provided '*in the case of a person who receives a supply of water in the zone and whose request is confined to information relating to that zone*'.

<sup>665</sup> Regulation 2(c)(ii).

## **ii) The duty of public authorities to maintain registers**

Equally important to the duty of public authorities to provide upon request information present on registers to any person that requests it, is the duty of public authorities to maintain the registers by collecting, compiling and updating the information that has to be included on them. A right to access environmental information present on a register is, of course, meaningless if there is no information available. Also, as we have seen in the previous chapter, the relevant provisions on active access to information of the 2003 Directive have no direct effect and the 2004 Regulations do not go as far as creating a right for any person to receive environmental information without making a prior request. Thus, the existence of public registers containing environmental information is important, because public authorities are obliged to collect and maintain compilations of environmental data that can be accessed at reasonable times by any member of the public and this can be said to be a way of actively disseminating environmental information, especially when registers are accessible online over the internet.

Registers, at the discretion of the authorities maintaining them, can generally be held either in a computerised version or in a manual form. For instance, section 22(8) of the EPA 1990 concerning registers of Integrated Pollution Control provides that these registers may be kept in any form. There is a problem (although of only theoretical importance) with older Acts that provide for the existence of registers and which do not mention anything about the form in which registers can be maintained. Concerning some of the oldest registers such as the planning registers, Parliament could definitely have not implied that registers could be held in electronic form since computers were a matter of science-fiction in the 40s. However, we can reasonably say that Parliament intended to create a publicly available compilation of information and the form in which this could be held was irrelevant to Parliament as long as the register fulfilled its aim of making information publicly available.

Weight seems to be given to such an interpretation by the Aarhus Convention, which promotes (although not creating a strict obligation) the creation of computerised registers. Paragraph 9 of article 5 provides that '*each party shall take steps to establish progressively [...] a coherent nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting*'. According to Gavouneli<sup>666</sup>, these provisions are not of great significance since most European states have already established such mechanisms and these only aim to harmonise divergent national practices and also serve an educational purpose especially for Eastern-Europe democracies. We do not completely agree with this view. Of course, registers in electronic format already exist and some of them are already available through the internet<sup>667</sup>. But what this article provides for is for a single electronic public database that will unify all sectoral registers into a single mechanism providing

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<sup>666</sup> Maria Gavouneli, Access to Information: Delimitation of a Right [2000] *Tulane Environmental Law Journal* 13, at page 319.

<sup>667</sup> See for instance the electronic planning registers accessible over the internet, below at n. 699.

information. Its wording does not expressly create an obligation to set up such a mechanism into a set period of time. However states parties to the convention will have to take at least some steps to achieve this objective since the Aarhus Convention provides for a mechanism to review compliance of the contracting parties with their obligations<sup>668</sup>.

Also, registers are usually held at the principal or regional offices of the regulating authority or the local authority in relation to the location where the environmental-related activity takes place. For some sorts of registers multiple copies of the same registers (for instance the nuclear Registers) are maintained at different levels (such as at local, regional and central level).

### **b) The nature of information contained on registers.**

Information on registers includes data collected by the relevant regulating authorities concerning pollution measurements as well as data handed in by operators of regulated activities in compliance with a statutory duty to do so. Most of the times these include the amount of pollutants emitted and measurements about the state of soil, water or air quality. Registers also include copies of applications for authorisations to pollute or discharge into the environment and also appeals against these acts and their outcome. They can also include details of criminal convictions concerning regulated activities.

However, some type of information might be excluded from disclosure to the public, even though it is included on the registers. There are two exemptions that apply to information contained on registers: commercial confidentiality and national security.

When national security is concerned, it is normally the Secretary of State that defines what information is to be treated as such<sup>669</sup> and there is no possibility under the EPA 1990 for a member of the public to challenge this decision. In contrast, as we have seen, there is a National Security Appeals Panel as part of the Information Tribunal, which has competence for hearing appeals against a certificate issued by a Minister of the Crown providing conclusive evidence that the information requested by applicants under the provisions of the Data Protection Act 1998, the FOIA 2000 or the 2004 Regulations are matters of national security and thus it should not be communicated. Anyone directly affected by the issue of such a certificate may appeal against it to this panel.

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<sup>668</sup> At articles 15 and 16 of the Aarhus Convention.

<sup>669</sup> See for an example section 65(1) of the EPA 1990: 'No information shall be included in a register [concerning waste under s. 64] if and so long as, in the opinion of the Secretary of State, the inclusion in the register of that information, or information of that description, would be contrary to the interests of national security'.

Commercial confidentiality is usually defined by reference to commercial interests of the person concerned: if disclosure can ‘*prejudice to an unreasonable degree*’<sup>670</sup> commercial interests, then it must not be permitted.

It is interesting to mention that this definition of commercial confidentiality is more restrictive than the definition included in the Environmental Information Regulations 1992 as amended by the Environmental Information (Amendment) Regulations 1998, which exempts from disclosure any information that would affect the confidentiality of matters to which any commercial or industrial confidentiality attaches. The new 2004 regulations adopt a similar definition, the main difference being that additionally a legitimate economic interest has to be protected by commercial confidentiality and that this confidentiality has to be provided by law. This definition is the most recent of all. One would expect the Regulations to be more liberal than the EPA 1990, since they are more recent and there has been a vast movement in the late 90’s toward a greater availability of information maintained by public bodies as demonstrated by the Freedom of Information Act 2000. In the case of the Freedom of Information Act 2000, the test is different again, since according to section 43(2) information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person. This test is situated in between the commercial confidentiality as defined by the Environmental Information Regulations 2004 which is the most liberal, and the test contained in the EPA 1990 which only exempts from disclosure information when there is a prejudice to commercial interests and the prejudice is ‘to an unreasonable degree’.

Operators usually can ask that information they provide remains confidential under the commercial confidentiality exemption. In that case it is for the authority that maintains the registers to decide, though appeals are possible against refusals to the Secretary of State. Since until the appeal is finally decided, information is kept out of the register, this could be a way to delay the disclosure of information by operators who act in bad faith by lodging appeals just to delay disclosure. Not surprisingly, there is no appeal procedure open for third parties to challenge an exemption of information. After a period of time information is treated as not being commercially confidential and is declassified<sup>671</sup> unless its owner applies for a renewal of the exemption. In the case of information being excluded from disclosure due to commercial confidentiality, but not in the case of national security, there is a mention in the register that indicates the existence of the information. Moreover, when it’s in the public interest that commercially confidential information be disclosed, the Secretary of State can direct that such information be placed on the registers<sup>672</sup>. This provision is similar to the balance test that is provided in the Environmental Information

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<sup>670</sup> Section 22(11) EPA 1990.

<sup>671</sup> See for an example section 66(8) of the EPA 1990: ‘Information excluded from a register shall be treated as ceasing to be commercially confidential for the purposes of this section at the expiry of the period of four years beginning with the date of the determination by virtue of which it was excluded; but the person who furnished it may apply to the authority for the information to remain excluded from the register on the ground that it is still commercially confidential and the authority shall determine whether or not that is the case’.

<sup>672</sup> See Section 22(7) of the EPA 1990.

Regulations 2004: disclosure must be performed in all cases when the public interest in maintaining the exception outweighs the public interest in disclosing the information.

## **B) Categories of registers containing environmental information.**

We are not going to describe every single public register in detail, because on the one hand, this has already been done to some extent<sup>673</sup> and on the other hand the law in this area is evolving so rapidly that any attempt to describe all statutory provisions involved would almost immediately become out of date. Instead, we shall be describing very briefly the public registers incorporating environmental information that seem to raise particularly interesting points, depending on whether information is placed on registers held at local level by local authorities or private undertakers, the Environment Agency or directly by the government. It must be said that copies of some registers are held at other places (usually at local level), but our classification will take into consideration the authority responsible for maintaining the register and updating it.

Also, we shall not describe in every detail statutory provisions that create environmental registers since this would be tedious and as explained above, not very useful. We shall instead very briefly mention and describe some of the registers which adopt, on some points, different solutions from the main general Acts in the area of access to environmental information<sup>674</sup>. Concerning the rest of statutory registers, for the sake of completeness, we shall refer the reader to the Annex to this work which contains an extensive list of all the different environmental-related registers.

### **1) Public Registers maintained at local level.**

As mentioned above, at local level registers are either maintained by local authorities or by some private undertakers, such as water and sewerage companies.

Local authorities have a statutory duty to maintain a multitude of different public registers. We shall not be examining them all in this part otherwise than in a very general overview of them, with the exception of planning registers. We shall make an in-depth examination of planning registers in order to demonstrate the incoherence of creating a general right to information (first with the environmental information regulations and then with the Freedom of Information Act) whilst maintaining in force particular statutory provisions that provide for public registers.

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<sup>673</sup> See Environment facts: a guide to using public registers of environmental information, Department of Environment 1995. Also see Gisèle Bakkenist, Environmental Information: Law, Policy and Experience, Cameron May 1994. However, caution must be taken with this work because much of it is out of date.

<sup>674</sup> Namely the Freedom of Information Act 2000, the Local Government Act 1972, the Environmental Information Regulations 1992 as amended in 1998 and the Environmental Information Regulations 2004.

Planning registers are the best example to test this argument, since they are one of the oldest public registers dating back to 1947 and they are also one of the most used public registers<sup>675</sup>.

### **a) The Planning registers.**

Planning Registers are the oldest<sup>676</sup> registers containing environmental information since they date back (for the register of planning applications) to the Town and Country Planning Act 1947. It is also one of the most consulted registers and local associations and conservation groups often have a practice of regularly inspecting the registers.<sup>677</sup>

There are five different types of registers that contain planning-related information: the register of planning applications, the register of enforcement and stop notices, the register of tree preservation orders, the register of structure and local plans and finally the register of listed buildings and places of historical interest. We will talk only about the first three of them, since they are the ones that are most interesting, in our view.

#### **i) The register of planning applications and consents.**

This register is set up under section 69 of the Town and Country Planning Act 1990 and article 25 of the Town and Country Planning (General Development Procedure) Order 1995<sup>678</sup>. The Register of applications is in two parts and is held by every planning authority.

The first part of the register contains a copy of every planning application together with any accompanying plans and drawings. The second part of the register contains a permanent record of the application along with plans and drawings and the particulars of subsequent decisions or directions. The register also contains details on certificates of lawfulness of existing or proposed use or development issued by the local authority. To enable any person to trace any entry in the register the register must include an index that takes the form of a map.

The Town and Country Planning (Environmental Impact Assessment) Regulations 1999<sup>679</sup> also provide in regulations 20 and 21 for the inclusion in this register of details concerning the process of Environmental Impact assessment. This includes details of the environmental impact statement submitted, reasons, directions and opinions of local authorities relating to this statement.

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<sup>675</sup> This can easily be deduced from research undertaken by Rowan-Robinson *et al.*, see above n.652, at page 24, table 1.

<sup>676</sup> According to A-M. Sanders and J. Rothnie, Planning Registers – Their Role in Promoting Public Participation, [1996] JPL 539, ‘Registers of planning applications were first introduced in 1948 and are the oldest form of register containing environmental information’.

<sup>677</sup> See Michael Purdue, *Cases and Materials on Planning Law*, Sweet & Maxwell, London 1977, page 150. Since this was the case 27 years ago, it should also be the same today, in a society where environmental-awareness and public participation have become very important

<sup>678</sup> Town and Country Planning (General Development Procedure) Order 1995, SI 1995/419.



According to section 69(5) of the TCPA 1990 every register shall be available for inspection by the public at all reasonable hours.

**ii) The Register of enforcement and stop notices.**

This register is set up under section 188 of the Town and Country Planning Act 1990 and under article 25 of the Town and Country Planning (General Development Procedure) Order 1995. It includes details relating to an enforcement notice, stop notice or breach of condition notice served by local planning authorities.

According to section 188(5) of the TCPA 1990 every register shall be available for inspection by the public at all reasonable hours.

**iii) Registers of Tree Preservation Orders.**

This register is set up by sections 199 and 212 of the Town and Country Planning Act 1990 and under regulation 3 of the Town and Country Planning (Trees) Regulations 1999<sup>680</sup>.

Tree preservation orders are orders with respect to trees, groups of trees or woodlands issued by local planning authorities when it is expedient to make provision for the preservation of trees or woodlands in their area. These orders specify the land, the trees and the permission that is required before trees can be cut and also provide for replanting requirements. Copies of the orders are to be made available for inspection, free of charge, at all reasonable hours, at the offices of the authority by whom the order was made. The register also contains notices made according to section 211 of the TCPA 1990 concerning trees in conservation areas. These notices are made by owners of land before starting any operation concerning their trees.

**b) Is there a right to obtain copies of the documents in the planning register?**

Although today, as analysed in the previous chapter, there is a right to obtain copies of documents under the new Environmental Information Regulations 2004, which mention that any environmental information should be, in principle, disclosed in the format requested, the position was not straightforward before. We believe it is interesting to examine what was the position before the new regulations, as it helps highlighting the importance of these new regulations, which

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<sup>679</sup> The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999/293.

<sup>680</sup> The Town and Country Planning (Trees) Regulations 1999, SI 1999/1892.

explicitly apply to any environmental information, even if covered by other statutory provisions on disclosure.

The question of the right to obtain copies of information present on the planning registers was a complex one, probably due to the fact that they date back to 1947, when the technique of making photocopies was not available. Also, although the TCPA has been amended a lot, the provisions concerning registers have not varied much over the time in order to reflect the trend of public administration towards greater openness. Sanders and Rothnie<sup>681</sup> state that '*the legislation does allow charges to be levied for copies of entries in the planning register*' and that in the research they conducted concerning planning registers some local planning authorities '*did not permit copies to be taken, notwithstanding the legal position*'. However, the authors do not expressly cite which statutory provisions create this right, but the clear implication is that there is a right provided by a piece of legislation to obtain copies of information present on planning registers. We shall try to locate this 'phantom' piece of legislation.

There is not any provision in the TCPA 1990 or in any delegate legislation made under it concerning a right to obtain photocopies of information present on any planning register, consequently if such a right exists, it does not arise under planning legislation.

Could such a right have been created by the Environmental Information Regulations 1992? This is doubtful for two reasons. Firstly, the Regulations do not create a duty on public authorities to allow copies of environmental information to be made. They merely create a duty for public bodies to make environmental information available, and it is for each particular authority to implement the practical arrangements. This seems to be consistent with the 1990 Directive which provides that practical arrangements concerning the availability of information are to be defined by member states. Secondly, as described above, the Environmental Information Regulations 1992 do not apply to information contained on registers required to be made available for inspection by everyone. This seems to be the view of David Woolley who cites as an example of information exempt from communication under the 1992 Regulations the '*register of actions and decisions under the Town and Country Planning Acts*'<sup>682</sup> (however see the discussion on this point in the chapter concerning the Directive).

The only statutory provision that could create such a right to obtain copies is the Local Government Act (Access to Information) 1985 insofar as it amends the Local Government Act 1972. The Local Government Act (Access to Information) 1985 provides for greater access of the public to meetings of local authorities, allows public access to the agenda and connected officers' reports of meetings in advance of meetings, inspection of background papers before and after meetings and places a duty on local authorities to publish some other documents. Copies of all these documents can be obtained on payment of a reasonable fee. The only logical possibility to

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<sup>681</sup> See above n. 655, at page 545.

<sup>682</sup> David Woolley *et al.*, *Environmental Law*, Oxford University Press, Oxford 2000. See Chapter 5 on Environmental Information, written by Woolley, page 152.

make this Act apply to planning registers would be to consider the registers as background papers<sup>683</sup> for the reports submitted to meetings of local authorities. Although we believe such an interpretation of the Act would be logical, it has been rejected by Lord Cameron of Lochbroom in *Stirrat Park Hogg v. Dumbarton District Council*<sup>684</sup> as ‘wholly incongruous’. According to his Lordship the fact that a local authority’s official consulted and relied to information present on a register, does not constitute the register as a background paper.

Surely, there are two different arguments in this case. First, the Local Planning authority was purporting to charge for inspection of the planning register. It would be incongruous for such a right to apply just because a planning permission was part of background papers or referred in such papers. Second, it is unclear whether the 1972 Act authorises charges for copies of background papers. This Act does authorises charges to be made, but only for documents that can be considered as background papers and does not extend to the planning registers.

Moreover, according to section 100G(3)(b) of the Local Government Act 1972 at the offices of each principal council there shall be kept a written summary of rights to inspect and copy documents and to be furnished with documents which are conferred by the Local Government Act and by ‘such other enactment as the Secretary of State by order specifies’. Under this provision was enacted the Local Government (Inspection of Documents) (Summary of Rights) Order 1986<sup>685</sup>, which does not appear to have ever been expressly repealed and is so still in force. This order mentions the planning registers by reference to the TCPA of 1971<sup>686</sup>. It could therefore be argued that the right to be furnished with copies of documents from registers was created by this order. We think that such an interpretation would not conform to the wording of the order. The Local Government (Inspection of Documents) (Summary of Rights) Order 1986 does not intend to alter previous statutory rights in any manner. Its aim is just to make an official summary of statutory provisions that give a right ‘to inspect and copy documents and to be furnished with documents’<sup>687</sup>. Moreover, even if we accept that this Order had as necessary implication that the right to be furnished with copies has been extended to the registers mentioned in it, this would be a matter for the courts to decide. However, we do not believe that the inclusion of planning registers under the TCPA 1971 in this instrument was more than an unintentional error. Of course the fact that the Order has not been amended to reflect changes in planning legislation and still refers to the TCPA 1971, which has been repealed by the TCPA 1990 does not alter any of these conclusions since

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<sup>683</sup> Under section 100D of the Local Government Act 1972. See on this point Patrick Birkinshaw, *Government and Information, The Law Relating to Access, Disclosure and Regulation*, Butterworths, London 1990, page 167.

<sup>684</sup> See above n. 661, at page 1117.

<sup>685</sup> Local Government (Inspection of Documents) (Summary of Rights) Order 1986, SI 1986/854.

<sup>686</sup> ‘Town and Country Planning Act 1971: section 34(3) including that subsection insofar as it has been applied by section 60(2)(a) to tree preservation orders under section 60(1) section 54(8) section 61A(7) section 92A(4)’ Ibid, tabulation mentioned in the Schedule to the Order.

according to section 17(2)(a) of the Interpretation Act 1978 when an Act is consolidated, references in any enactment to the previous Act that has been consolidated is supposed to refer to the equivalent provisions of the new consolidated Act of 1990<sup>688</sup>.

Consequently, it has been demonstrated that as long as planning registers are concerned, there was no duty arising under any express legal provision (before the coming into force of the new 2004 environmental information regulations) to provide copies of documents present on these registers. However, some local authorities operate a policy of allowing copies to be made if a charge is paid<sup>689</sup>, but they were not under any statutory duty to do so and consequently it was not available as a matter of right but of indulgence.

Finally, to make matters even more complicated, section 21 of the Freedom of Information Act 2000 totally exempts from the applicability of the Act matters reasonably accessible to the public by other means than under this Act. Information is deemed to be reasonably accessible when the public authority is obliged under any other enactment to communicate it to members of the public on request, '*otherwise than by making the information available for inspection*'<sup>690</sup>. Since, as demonstrated above, there was no statutory duty to make information available on planning registers otherwise than by allowing the registers to be inspected at all reasonable hours, it seems that this exemption did not apply to planning registers. Thus information present on them would have to be available under the Freedom of Information Act which provides a right to obtain copies! Whether this consequence was intended by the Act is doubtful.

Subsequently, the question arises whether local planning authorities have also a power to charge for such copies. In *R. v Richmond upon Thames LBC Ex p. McCarthy & Stone*<sup>691</sup> it was held that they could not charge for their services without express or implied statutory authority. Where planning registers are concerned, it appears that charges could be made on the basis of the 1992 regulations. These regulations even though, as explained above, did not create a right to obtain copies (since it was for each public body holding environmental information to choose by which means it would make such information available) provided that no charge exceeding a reasonable amount should be made for making information relating to the environment available. The new 2004 Regulations also provide that only reasonable charges can be made. Concerning these copies

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<sup>687</sup> Section 100G(3)(b), Local Government Act 1972 as amended by the Local Government (Access to Information) Act 1985.

<sup>688</sup> Interpretation Act 1978 (c. 30) section 17 (2)(a): 'Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears,--

(a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;'. See also on this point Francis Bennion, *Statutory Interpretation: A code*, 3<sup>rd</sup> edition 1997, Butterworths, page 230 on adaptation of references.

<sup>689</sup> For an example see the London Borough of Merton policy on charging for copies from planning registers at its website: <http://www.merton.gov.uk/landcharges/fees.asp>

<sup>690</sup> Section 21(2)(b) of the Freedom of Information Act 2000 (c. 36).

<sup>691</sup> *R. v Richmond upon Thames LBC Ex p. McCarthy & Stone* [1992] JPL 467 (HL).

the recent planning green paper states that : “we accept that local authorities should charge for any hard copies they produce but these charges must be reasonable”<sup>692</sup>.

Consequently, it seems (as we shall explain in the following paragraph) that local planning authorities are bound not to charge the full cost of copies, but to subsidise a part of the copying costs.

However, it should be noted that some information present on planning registers might also be present on the Local Land Charges Register<sup>693</sup>, which are registers that contain all charges that affect property and are maintained by local authorities. Part 3 of the Local Land Charges Register which contains all information concerning planning charges, contains also some information concerning planning charges also present in the planning registers. To avoid duplication of registers, Rule 7 of the Local Land Charges Rules 1977<sup>694</sup> provides that when a planning charge or other charge which are required to be entered in the register have been entered in other registers maintained and kept open for public inspection in pursuance of a statutory obligation, it shall be sufficient to enter in the Land Charges register a reference to the other register. The Local Land Charges Register can be searched by anyone and copies of information present on it can be obtained on payment of a fee. These fees for inspection and copies can be found in the Schedule 3 to the Local Land Charges Rules 1977. This charging scheme is quite expensive, probably due to the fact that Land Charges Registers are mostly and almost exclusively used for conveyancing purposes and thus provide a value-added service to professionals in this area for which it is normal to pay. These fees cannot objectively be considered as ‘reasonable fees’ as the environmental information Directives provide since they seem to cover at least the full cost of providing the information. The European Court of Justice has ruled in *Commission v. Federal Republic of Germany*<sup>695</sup> that the term ‘reasonable fees’ for the purposes of Article 5 of the Information Directive must be understood as meaning that Member States are not authorised to pass on to those seeking information the entire amount of the costs actually incurred in conducting an information search. In Land Charges Registers, fees for performing searches (even when performed by the applicant himself) are charged at very high rates, which seem to reflect at least the entire cost of the service. For example, for a personal search in the whole or in part of the register the charge is 10 pounds<sup>696</sup> and if the search extends to more than one parcel of land 1 pound<sup>697</sup> per supplementary parcel is charged subject to a maximum of 13 pounds.

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<sup>692</sup> See the Government’s Green Paper on Planning, *Planning: Delivering a Fundamental Change*, published 12 December 2001, paragraph 5.62 . Needless to say, the green paper is not a legally binding instrument. Available from the DTLR website at <http://www.planning.dtlr.gov.uk/consult/greenpap/index.htm>

<sup>693</sup> Local Land charges Registers and are set up under the Local Land Charges Act 1975 (c. 76).

<sup>694</sup> Local Land Charges Rules 1977, SI 1977/985.

<sup>695</sup> Judgement of the European Court of Justice (Sixth Chamber) of 9 September 1999 in Case C-217/97: *Commission of the European Communities v Federal Republic of Germany*, Official Journal of the E.C., C 352, 04/12/1999 p. 3

<sup>696</sup> Fees substituted by SI 1998/1190 (Local Land Charges (Amendment) Rules 1998, Sch. 1, Para. 1.

<sup>697</sup> Ibid.

This is clearly a way to obtain copies of information present on planning registers, thus bypassing the legal imbroglio described above. However, not all information present on planning registers is also present on the Local Land Charges Register. An example of this is details of conditional planning permissions issued before the 1<sup>st</sup> August 1977<sup>698</sup> which are not held on the Local Land Charges Register, but may be inspected at the Planning register.

It has to be conceded, that the issue raised above may have limited practical significance since now some planning registers can be accessed online via the internet, thus permitting for the cyber-users of the registers to make copies of planning documents that appear on their computer screens<sup>699</sup>. However, these registers (open to everyone even geographically situated at the other end of the globe), pose problems of confidentiality of data present on them. For instance, drawings of houses can depict with great details the interior organisation of buildings thus permitting intruders to enter more easily the premises. Also, planning applicants may not wish their personal data that appears on planning documents (name, telephone, home address, etc) to be readily available online to anyone. These definitely are problems that should be addressed before opening registers held electronically to the internet. In any case, due to the high costs incurred for setting up and maintaining such electronic registers, some small planning authorities may take a lot of time to implement such registers, at least until they are under a statutory duty to do it. The Aarhus Convention seems to create such a duty in paragraph 3 of article 5, but it only applies to information already available in electronic form. This means that authorities do not have a duty to transform manually held registers in electronic ones, but if they do have electronic registers, they should open them to public scrutiny through the internet<sup>700</sup>. This obligation, however, is drafted in a fairly innocuous language that might not prove very effective. For instance, the words 'shall ensure ... progressively' that are used do not seem to create anything more than a weak obligation to consider making information publicly available through the internet. There is no specified time limit for the implementation, so states may take ages to fully implement this obligation.

Thus, before the entry into force of the new regulations, the confused position of planning registers was definitely a matter of concern. It seems that in the case of planning registers there were four different legal instruments that seemed to overlap on the same subject: the TCPA 1990, the Environmental Information Regulations 1992, the Local Government Act 1972 and the

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<sup>698</sup> Pursuant to section 2(e) of the Local Land Charges Act 1977, which states that: 'The following matters are not local land charges [...] (e) a condition or limitation subject to which planning permission was granted at any time before the commencement of this Act ...'.

<sup>699</sup> See for an example the electronic planning register of the London Borough of Wandsworth, which holds in electronic form all applications and all related documents and drawings online and accessible from virtually anywhere at anytime. That are definitely 'reasonable times' for the public to access the registers ! Their website address is <http://www.wandsworth.gov.uk/Home/EnvironmentandTransport/PlanningService/default.htm>

<sup>700</sup> Paragraph 3 of Article 5 of the Aarhus Convention read as follows: 'Each party shall ensure that environmental information progressively becomes available in electronic databases which are accessible to the public through public telecommunications networks. Information accessible in this form should include [...] (d) Other information, to the extent that the availability of such information would facilitate the

Freedom of Information Act 2000. This is definitely a problem that might have led to some incongruous situations where although a person had a right to obtain copies under one of these Acts, he could have seen his claim refused because he had based his request of information on the wrong legal instrument.

The position is very different today, as the new Environmental Information Regulations 2004 set out minimum standards applicable in respect to access to all environmental information, regardless of whether they are also covered under other enactments.

## **2) Other registers maintained at local level.**

### **a) Trade effluent registers.**

Under section 196 of the Water Industry Act 1991, local sewerage undertakers have a statutory duty to maintain registers containing copies of consents, directions, agreements and notices relating to the discharge of trade effluent into public sewers. Details included are the name and address of the premises from where the effluents are discharged, a description of the process producing the waste and limits concerning the maximum quantity allowed to discharge.

According to Bakkenist<sup>701</sup> this register suffers from lack of detailed information. Since there is no record of which sewage treatment works receives the trade effluent and no monitoring data is placed on the registers, it is difficult to identify which business produces which waste and to evaluate whether consents to discharge and conditions attached to them are complied with.

This problem with the trade effluent register not being detailed enough, contrasts with the fact that other registers are criticised as being too detailed and thus too complex, such as the waste management registers (see below). Obviously, it seems to be difficult to find a balance between extreme complexity and lack of essential information. This demonstrates one of the major disadvantages of public registers: that they may leave important parts of information outside their scope. It also demonstrates an important advantage of public registers: that they can make it easier for the lay public to understand environmental information by omitting too technical arguments and complicated amounts of data.

It is interesting to mention that these trade effluent registers were set up under the Water Resource Act 1991 in order to make some information about trade effluent accessible to the public. Just before this Act required more publicity regarding trade effluents to be made through these registers, the situation was totally different since according to section 68 of the Public Health Act 1961 it was a criminal offence for a water pollution inspector to disclose details of effluent passing

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application of national law implementing the convention, provided that such information is already available in electronic form'.

to sewers. This Act has been repealed<sup>702</sup> but it is interesting to see this shift from total secrecy, which is even protected through criminal sanctions, to the opening up to the public of all this information. It raises the question of whether these criminal penalties were really protecting information that was in need to be protected by criminal law from disclosure. We can doubt it because if it would have been the case, there should not have been such a radical change in attitude: passing immediately<sup>703</sup> from a state of complete secrecy of trade effluent information to a state of openness through trade effluent registers.

### **b) Other miscellaneous registers.**

There are of course multitudes of other registers that contain environmental-related information and are maintained by local authorities. The reader can find a list of these registers in the Annex. They cover a wide variety of subjects ranging from registers of stray dogs seized by local authorities<sup>704</sup>, to the noise abatement zones register which contains details of zones designated by local authorities as noise abatement zones where noise levels of particular activities should be kept under certain levels. A very interesting enactment to note is the Environment and Safety Information Act 1988, which requires the authorities who enforce four major safety, fire and environmental laws to set up public registers containing details of enforcement notices they have served.<sup>705</sup>

### **3) Public Registers maintained by the Environment Agency.**

In 1995, the functions of Her Majesty's Inspectorate of Pollution, the National Rivers Authority and local waste regulation authorities were brought together into the Environment Agency. As a consequence, registers concerning matters dealt by these authorities and formerly

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<sup>701</sup> See above n.653, at page 180.

<sup>702</sup> This particular provision has been repealed by Paragraph 1 of Schedule 3(I) to the Water Consolidation (Consequential Provisions) Act 1991 (c. 60). Surprisingly, the fact that this repeal has taken place has been missed by Bakkenist (1994) who states that s. 68 of the Public Health Act 1961 is still an '*anomaly of the trade effluent information*'. See above n. 653, at page 180.

<sup>703</sup> The Water Resources Act 1991 that created the trade effluent register and the Water Consolidation (Consequential Provisions) Act 1991 that repealed the offence of disclosure received Royal assent on the same day: the 25<sup>th</sup> July 1991.

<sup>704</sup> Maintained under section 149(8) of the EPA 1990.

<sup>705</sup> Listed in Schedule 3 to the 1988 Act. These are notices made under various powers: the Fire Precautions Act 1971, the Health and Safety at Work etc Act 1974, the Safety of Sports Grounds Act 1975, and the Food and Environment Protection Act 1985.



maintained by them, namely activities concerning water quality and pollution, waste activities, and Integrated Pollution Control, are now handled by the Environment Agency.<sup>706</sup>

### **a) The Water Quality And Pollution Control Public Register.**

The main register concerning the condition of inland waters and watercourses is the Water Quality And Pollution Control Public Register, maintained under section 190 of the Water Resources Act 1991 and prescribed by the Control of Pollution (Applications, Appeals and Registers) Regulations 1996<sup>707</sup>. This register contains details on notices of water quality objectives served by the Environment Agency under section 83 of the Water Resources Act 1991, applications for consents to discharge or for variation of an existing consent, discharge consents, consent conditions and any variations. It also contains details from samples of water or effluent taken by the Environment Agency or other persons, the result of their analysis and any steps taken by the Agency as a consequence. The register also contains details of enforcement taken by the Environment Agency in relation to water protection as well as details of prosecutions and criminal convictions of consent holders.

It must be noted, that under section 202(2) of the Water Resources Act 1991, the Agency or the Minister of agriculture or the Secretary of State have the power to serve on any person a notice requiring him to furnish within a specified period of time such information as is reasonably required for the purpose of carrying out any of their functions under the water pollution provisions of the Act. Refusal or omission to comply with the notice is a criminal offence. Section 202(3) grants the power to the aforementioned ministers to limit the scope of these powers by making regulations for restricting the information which may be required and for determining the form in which the information is to be so required. However, such regulations have not (yet) been made and consequently these far-reaching statutory provisions stand as they are.

In *R. v Hertfordshire CC Ex p. Green Environmental Industries Ltd*<sup>708</sup> it was held that the powers granted by these provisions extended to (as it is indicated in the Act) 'any person' and consequently they cannot be read as extending only to holders of licenses under the Act, as claimed by the defendant. The case did not involve section 202 of the Water Resources Act but the powers conferred to the Environment Agency by Part II of the Environmental Protection Act 1990 on the disposal and treatment of Waste. Since they are drafted in a similar way, we can reasonably apply this finding to all similar powers to requisition information. These similar powers to requisite information from 'any person' are contained in: section 71 of the Environmental Protection Act

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<sup>706</sup> On the registers maintained by the Environment Agency, see *Public Registers of Environmental Information*, Environment Agency, 1999.

<sup>707</sup> Control of Pollution (Applications, Appeals and Registers) Regulations 1996, (SI 2971)

1990 (on Waste on Land); section 19 of the EPA 1990 (on Integrated Pollution Control and Air Pollution Control); section 135A of the Water Industry Act 1991 (on special category effluents) and section 202 of the Water Resources Act 1991 (on the pollution of controlled waters, see above).

According to Woolley<sup>709</sup>, 'the existence of the power to require the provision of information is a reminder that the dissemination of information about the environment is a bilateral process, involving obligations upon the subject as much as on regulatory bodies which have a duty to keep registers and to make their contents available to the public'. We totally disagree with such an approach.

Firstly, these provisions to demand information have not been enacted to allow or even facilitate dissemination of information. As indicated in the relevant statutory provisions, information is to be asked for in cases where it is reasonably required for the exercise of regulatory functions concerning environmental protection (such as the protection of inland waters etc). Consequently, these provisions are not directly connected with the duty on public authorities to disseminate environmental information, because their purpose is not to achieve this goal either directly or indirectly, but to allow regulatory authorities to perform their functions. Of course, some of the data collected through this method can subsequently be placed on public registers or communicated to the public under the Environmental Information Regulations, but this cannot alter, in any way, the consequence that provisions to demand environmental information are not connected with and do not serve dissemination of information. Otherwise all investigating activities and enforcement procedures undertaken by environmental protection authorities, would be taken to serve the purpose of disseminating information, which is of course absurd.

Secondly, we cannot agree with the fact that dissemination of information is a bilateral process involving obligations between the subject (people that provide information) and the regulatory bodies which have a duty to inform the public. Similarly as before, the bilateral relationship between the regulator and the regulated is not one involving dissemination of information to the public but rather one of a 'cat and mouse' situation where the regulator tries, using information as a means to find how the regulated is performing his statutory obligations, to keep him in the legal boundaries of his activities and to take enforcement if necessary. However, dissemination of information is a process not between the regulator and the regulated, but between the regulator and the public. And it does not involve bilateral obligations, but a unilateral obligation of the regulator to provide environmental information to the public. This information concerns the regulator's activities and fields of action and can be gathered by all possible means, which include provisions allowing requisition of information.

Moreover it must be added, that the Environment Agency and water undertakers are under a reciprocal duty pursuant to section 203 of the Water Resource Act 1991 to circulate information

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<sup>708</sup> *R. v Hertfordshire CC Ex p. Green Environmental Industries Ltd* [1998] JPL 481 (CA).

<sup>709</sup> See above n. 682, at page 173, paragraph 5.51.

between them concerning water quality and water pollution incidents. Information is to be circulated free of charge. It is interesting to note that although the Secretary of State has the power to enforce performance of these duties by water undertakers, the Environment Agency has no such power<sup>710</sup>. It is very interesting to note that although under the Water Resources Act there is the standard exclusion from the duty to disclose information which is commercially confidential to the public unless consent is given by the provider of information, information obtained through this provision is exempt from this exemption. According to section 204(2)(c) of the Act, restrictions on subsequent disclosure do not apply, making such information available to the public. The means of accessing it may vary, depending on whether or not it has been placed on a register. If it is on the register, it should be accessed by the public through provisions regulating the register, and if not, nothing seems to prevent the Environmental Information Regulations from applying. As analysed before, if the provisions on registers do not conform to the environmental information directive and Aarhus, then they should be interpreted in light of it.

#### **b) Other registers maintained by the Environment Agency.**

Important public registers are also these concerning Integrated Pollution Control and have been set out in Part I of the EPA 1990<sup>711</sup>. The interesting part of these registers is the ‘commercial confidentiality’ exemption (section 22(1)), which as discussed above is a more liberal exemption than the one present in the Freedom of Information Act 2000 on commercial confidentiality, but less liberal than the one in the Environmental Information Regulations 2004.

It is also interesting to note that some of the information contained in this register has to be sent to the European Commission in the form of a triennial report which lists emissions of industrial facilities into the air and water of 50 pollutants. This information is then placed on the European Pollutant Emission Register (EPER), which is freely accessible online.<sup>712</sup>

Concerning the other registers that are maintained by the Environment Agency, we shall refer the reader to the Annex.

#### **4) Environmental Registers maintained by the Government or central agencies.**

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<sup>710</sup> Water Resources Act 1991, section 203(5).

<sup>711</sup> In sections 20 to 22 of the Environmental Protection Act 1990.

<sup>712</sup> See the Commission Decision of 17 July 2000 on the implementation of a European pollutant emission register (EPER) according to Article 15 of Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC), OJ L 192/36, 28/7/2000.

## **a) The Genetically Modified Organisms Public Register of Deliberate Releases and Consents to Market**

The control of use and dissemination in the environment of genetically modified organisms (hereinafter GMO's) are matters regulated by EC law. On the one hand there is Council Directive 90/219/EEC<sup>713</sup> on the contained use of genetically modified micro-organisms as amended, and on the other hand there is the recent Directive 2001/18/EC<sup>714</sup> of the European Parliament and the Council on the deliberate release into the environment of genetically modified organisms (which replaced Directive 90/212/EEC). These Directives have been incorporated into British law in part VI of the EPA.<sup>715</sup> We are not going to discuss the mechanism set up by these provisions in order to regulate the use and dissemination in the environment of GMO's. However, in these instruments as we shall examine further on, public information is viewed as an indispensable instrument in order to protect the environment and inform the public.

Under sections 122 and 123 of the Environmental Protection Act 1990 was created a public register on GMO's that is held by the Environment Agency on behalf of the Secretary of State for the Environment. Details of the register are included in the Genetically Modified Organisms (Deliberate Releases) Regulations 2002<sup>716</sup> and the Genetically Modified Organisms (Contained Use) Regulations 2000<sup>717</sup>. Each of these two sets of regulations provides for a different register, but we shall examine them together.

The system of regulation of the use and dissemination of GMO's is substantially based on information mechanisms. Persons who acquire, release or market GMO's are bound to undertake a risk assessment and in some cases to notify to the Secretary of State the assessment and other sorts of information prescribed by the regulations. In some cases, these activities may require the express consent of the Secretary of State, which can also impose conditions or even prohibition notices. In any case, the Directives concerning GMO's place great importance in circulation of information between the companies that handle GMO's, state authorities responsible for monitoring and the general public. Registers include details of prohibition notices issued under section 110 of the EPA 1990. They also include details of applications for consents and consents granted or refused, the

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<sup>713</sup> Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms (O.J.E.C. No. L117, 8.5.90, p. 1), as amended by Commission Directive 94/51/EC of 7 November 1994 (O.J.E.C. L297, 18.11.94, p. 29) and Council Directive 98/81/EC of 26 October 1998 (O.J.E.C.. No. L330, 5.12.98, p. 13).

<sup>714</sup> Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, OJEC L 106 17.04.2001 p.1.

<sup>715</sup> Directive 2001/18/EC, has been transposed in England by the Genetically Modified Organisms (Deliberate Release) Regulations 2002 (SI 2002/2443).

<sup>716</sup> Originally the Genetically Modified Organisms (Deliberate Releases) Regulations 1992, SI 1992/3280, replaced by the Genetically Modified Organisms (Deliberate Release) Regulations 2002 (SI 2002/2443).

<sup>717</sup> The Genetically Modified Organisms (Contained Use) Regulations 2000, (SI 2000/2831), amended by the Genetically Modified Organisms (Contained Use) (Amendment) Regulations 2002, (SI 2002/63).

general description of the GMO's, the location at which the GMO's are to be released, the general purpose for which the GMO's will be released, the dates of the release, the methods and plans for monitoring the GMO's and for emergency response. Very importantly, the registers include the evaluation of the environmental impact of the genetically modified organisms and either the conditions or limitations in accordance with which the consent has been granted, or a summary of the reasons why the consent was not granted. The registers also include any new information, which becomes available with regard to any risks there exist of damage to the environment, and the effects of any release to the environment. Finally the registers also contain details of any convictions for any offence, the name and address of the person convicted, the description of any GMO's in relation to which the conviction was obtained, the offence which was committed, the penalty imposed and any order made by the Court for remedial action. Also are included details of accidents involving GMO's (accidental releases into the environment etc).

Placing environmental information on registers is one of the means to achieve the public information objectives that are present in the Directives on GMO's.

Consistently with provisions concerning all other registers, the EPA in section 123 provides an exemption from inclusion on the registers of any information that the Secretary of State considers is commercially confidential or affecting national security. Concerning commercially confidential information, such information can be excluded only if the person concerned applies to the Secretary of State for it to be excluded. Even if such an application is granted, this 'privilege' lapses after a period of four years and the process has to be repeated.

We must make special mention of two characteristics of the information to be included on GMO's registers.

Firstly, some information must be included on the registers notwithstanding being commercially confidential. This exception from the commercial confidentiality exemption covers information viewed as particularly important by the European-Union and it consists of a description of the GMO's, the name of the notifier, the place where these organisms will be released or used, details of the methods and means of controlling their use, details on dissemination and accidental response as well as evaluation of foreseeable effects on the environment on human health. This duty stems from the Directives regulating the use of GMO's<sup>718</sup> and section 123 of the EPA 1990. The EPA also grants powers<sup>719</sup> to the Secretary of State to add by regulations other descriptions of information that are to be included on the registers despite being commercially confidential, when it is in the public interest. However, these powers not only have not been used, but also all regulations made by the Secretary of State concerning GMO's registers have been more restrictive than the spirit of the EPA, which as this provision demonstrates, is to promote openness.

The regulations that concern the register of deliberate releases do not depart from the aforementioned provisions of the EPA but rather contain more detailed provisions on the

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<sup>718</sup> Article 19 of Directive 90/219/EC; article 19 of Directive 90/220/EC; article 25 of Directive 2001/18/EC.

<sup>719</sup> Section 123 (7).

information that is to be included. On the contrary, the regulation that concerns the register of contained uses of GMO's contains a loophole that permits for information that normally would be included on the register even though it is commercially confidential, not to be, in order to protect intellectual property rights of the notifier of such information. As Bakkenist correctly points out,<sup>720</sup> this exception is not mentioned in the Directives and thus is totally in breach of EC law. It can also be added that it is contrary to section 123 of the EPA which, as mentioned before, only provides for the Secretary of State to add classes of information to the list of information subject to appear on registers despite it being commercially confidential. He is not granted any powers to reduce such information, thus making less information available to the public than provided in the Act itself. On these grounds, it appears that regulation 22(8) of the Genetically Modified Organisms (Contained Use) Regulations 2000 could be challenged as being *ultra vires*.

On top of that, the Genetically Modified Organisms (Contained Use) Regulations 2000 were amended in 2002 exclusively in order to include provisions restricting access to information placed on this register in the interests of national security.<sup>721</sup> A new regulation, regulation 23A was inserted, which makes provision for keeping information confidential so long as the Secretary of State is of the opinion that such information should be kept confidential in the interests of national security. Also, regulation 24A was inserted in and makes provision for the exclusion from the register of any information where, in the opinion of the Secretary of State, the inclusion of such information on the register would be contrary to the interests of national security. These provisions are hard to understand as it is difficult to conceive how information on GMO's can affect national security. It should also be noted that these provisions do not contain any public interest test, that would allow disclosure in cases of a prevailing public interest in favour of disclosure.

Moreover, the Regulation on the contained use of GMO's missed an opportunity to allow greater public scrutiny on the use of GMO's other than micro-organisms. Concerning these, since they are not covered by the EC Directives, the government has decided there should be no exception from the commercial confidentiality exemptions. Thus, regulation 22(3)(b) that prevents some classes of information (despite being commercially confidential) from being placed on the registers, does not apply to GMO's other than micro-organisms. This definitely demonstrates the will of the Government not to allow more openness than what is dictated by EC law.

The second important exemption relating to information that is normally placed on registers concerning GMO's, is the one included in section 123(2) of the EPA 1990. According to this provision, the Secretary of State may refrain from including on the registers any information whose inclusion could lead to damage in the environment. This exemption is identical to the equivalent one found in the 1992 and 2004 Environmental Information Regulations and demonstrates the fact when environmental information is considered, the protection of the environment is given preference to public information. It proves that when environmental

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<sup>720</sup> See above n. 653, at page 216.

<sup>721</sup> The Genetically Modified Organisms (Contained Use) (Amendment) Regulations 2002, (SI 2002/63).

information is involved, the aim of such legislation is to use public information as a lever to protect the environment, rather than to grant a right *per se* to the individuals.

Finally, it is interesting to mention that GMO's is a domain of environmental protection that uses two different mechanisms of environmental information. As describe above, registers are used but also environmental-information labelling is another means of information on GMO's. More precisely, article 26 of Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms, provides that products must be subject to adequate labelling in order to provide for clear information on the presence of GMO's. The Directive imposes the phrase '*This product contains genetically modified organisms*' to appear either on a label affixed on the product or in an accompanying document.

#### **b) Register of industrial sites and local authorities participating in the Eco-Management and Audit Scheme.**

In this register are listed the location of industrial sites which have been registered under the Eco-Management and Audit Scheme (hereinafter EMAS) and the companies which have registered them. This register also contains details of the local authorities that have registered all or part of their authority under the EMAS scheme.

EMAS is a voluntary scheme set up under EC law discussed summarily before.<sup>722</sup>

#### **c) Register concerning eco-labels.**

A list of products, which have been awarded the European Community eco-label by the UK government is maintained by the Department of Environment. This list was previously maintained by the United Kingdom Ecolabelling Board. The European Commission also maintains a register of all eco-labelling applications approved by each national authority. A list of all these products is published regularly in the Official Journal of the European Communities<sup>723</sup>.

The European eco-labelling scheme is another voluntary scheme to provide environmental information set up under EC law. It has already been examined previously.

### **C) Registers containing environmental information: a need to redefine their role.**

<sup>722</sup> See the Introduction.

<sup>723</sup> Article 6 par. 5 of Regulation (EC) No 180/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme, Official Journal of the EC L 237, 21/09/2000 p. 1 – 12.

### **1) A unique right of access to environmental information or rights varying in scope extending only to each particular statutory register?**

Initially, when state secrecy was the rule (see the introductory chapter on history of environmental information) provisions permitting disclosure of information present on public registers were the only legislative provisions that entitled citizens to have access to a certain amount of environmental information. It was a limited right of access since it only extended to information that not only was included on the registers, but also was not confidential (see above on the forms of information included on environmental registers). Consequently, registers were statutory creations that allowed the disclosure of some specific bits of environmental information, leaving all the rest unobtainable.

Moreover, not all information present on registers can be communicated, since as demonstrated above, a huge variety of exemptions still applies, depending on the particular statutory provisions creating each public register. There can be identified three classes of information, depending on their degree of availability to the public. Firstly, there is information present on statutory registers. Secondly, there is information that is not present on any register, either because it is not covered by any statutory provisions under any public register scheme, thus not being part of a register, or either because, although it is information deemed to be available on a register, it was omitted from inclusion for any reason. Thirdly, there is information that although present on a register is exempt from communication because it is exempt information under the provisions establishing the register.

The third class of information is available through the Environmental Information Regulations (both the 1992 and the 2004 ones), but it is subject to the exemptions provided therein. As to the second class of information, it is also available through the Regulations. There is a problem concerning the first class of information that is present on statutory public registers. In order to avoid any overlap with the Environmental Information regulations, the 2004 regulations provide that the exceptions they contain apply to any environmental information, even if obtainable under a different regime.<sup>724</sup> Thus, when the Regulations overlap with other statutory requirements to provide environmental information (such as registers) the more liberal regime prevails. This is the only interpretation that is fully compatible with EC law, by giving to the Information Directive full effect in British Law and not allowing other statutory provisions to override it.

If we accept that the most liberal provisions apply, it means that what was available under the statutory provisions on registers would remain available under these provisions even after the Information Regulations were enacted. In contrast, information that was expressly unavailable to public scrutiny under statutory provisions on registers should be available under the Regulations

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<sup>724</sup> Reg. 5(6): "Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply".



upon request.<sup>725</sup> As a consequence, statutory provisions creating public registers containing environmental information do not appear to create autonomous rights to environmental information. In effect they are subsumed under the general right.

Since the coming into force of the first Environmental Information Regulations (incorporating the Environmental Information Directive into British Law), it is arguable that statutory provisions on environmental registers are just a particular mechanism that permits access to environmental information and do not create rights of access. As mentioned in the environmental information Directive, member states enjoy discretion to choose the particular mechanisms they can use in order to implement the aim of the Directive. As a result, all public registers could be seen as another mechanism implementing the Directive alongside the Regulations themselves.

From all this, it appears logical to deduce that there is today, after the incorporation into British Law of the environmental information Directives, a single right of access to environmental information that stems from these Directives (as opposed to the situation before the 1990 Directive when each individual provision concerning a specific register was creating a limited right of access but distinct from each other). Since the 1990 Directive, all these particular and segmented rights have merged into a single right to access to environmental information. This is, of course, still the case under the 2003 Directive and the Environmental Information Regulations 2004.

As a consequence, all statutory provisions regulating access to information stored on registers should now be considered simply as mechanisms that implement the Environmental Information Directive and not as self-standing legal provisions. For this reason, they should be construed in accordance with the Directive and read in conformity with it. Statutory provisions regulating access to environmental information registers (as opposed to statutory provisions that regulate what types of information should be collected and compiled on registers examined below) are just another one of the practical arrangements under which such information is effectively made available.

This view can also be sustained when examining more in-depth some of the statutory provisions creating registers. Some of the most recent registers such as the waste management registers<sup>726</sup> are the kind of registers on which '*all must be included*'<sup>727</sup>. They are very detailed and complex. Consequently, if we accept the view that the Environmental Information Regulations should not apply when there are specific statutory provisions on registers, this could lead to huge domains being subject to various statutory requirements, each accompanied by specific complicated exemptions and procedures for access. EC law and the environmental information

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<sup>725</sup> This interpretation is supported by Bakkenist: '...It is arguable that the Regulations could be applied where other legislation was more restricted, because the information is not then "...required in accordance with any statutory provision, to be provided". If the other provision were applied the information would be withheld.', see above n. 653, at page 49. This interpretation concerns the 1992 regulations but can be applied to the 2004 ones.

<sup>726</sup> Set up under section 64 of the Environmental Protection Act 1990 (Part II) and prescribed by Regulation 10 of the Waste Management Licensing Regulations 1994 (SI No.1056).

<sup>727</sup> According to Woolley, see above n.682, at page 163.

Directive override the statutory provisions on environmental registers since they have a higher status in the legal hierarchy. In any case, the great majority of statutory provisions on registers are older than even the Environmental Information Regulations 1992.

All in all, as explained above, it is arguable that even though statutory provisions on environmental registers have not been enacted under the European Communities Act 1972, they should form a unique body of principles with the Environmental Information Regulations creating a single right to environmental information. We do not believe as written by Rowan-Robinson et al.<sup>728</sup> that '*specific rights remain*' to access environmental information under the registers.

The consequences of the answer given to this question are very important.

On the one hand, if we accept that there is only a single right of each member of the public to environmental information, then only one set of exemptions can be allowed to limit such right. If due to the higher nature of EC law we accept that the EC Directive on environmental information supersedes national law provisions that allow less transparency, then provisions concerning registers that allow more information to be withheld than the Directive, should be disapplied, thus allowing the more liberal provisions to prevail.

On the other hand, if we accept that there exist multiple rights each created and regulated by the different statutory provisions concerning each individual register, then the scope of all these rights varies depending on the applicable provisions in each case. Each of these rights is subject to the limitations that are set up by the specific legal instrument that created it, and since when examined in detail provisions on registers can have significant different scope and limitations, all these rights vary depending on the provisions under which they arise.

In applying any of these two cases, there would be a need to identify and compare the legal provisions that apply in each case. Consequently, in any case whether there is a single or multiple rights of access to environmental information, there would be a problem of legal complexity.

## **2) The problem of legal complexity.**

The registers analysed above, demonstrate with enough force and clarity the fact that even though registers can be a convenient way to present information to the public, maintaining in force a multitude of different statutory provisions some of them having great differences with the environmental information Directive, leads to a chaotic situation where different legal instruments overlap with each other. We believe that we have demonstrated that the complexity caused by such overlapping statutory provisions, might even almost nullify for the public, at least in the most extreme cases which were used as examples, the simplicity and convenience of using public registers as a means of providing environmental information.

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<sup>728</sup> See above n. 652, page 23.

As a consequence, there is a need of simplifying the different regimes of accessing environmental information and unifying them under a single general legislative instrument that will permit the achievement of legal simplicity. We do not believe that registers, when used as a means to provide environmental information to the public, should cease to coexist alongside more general statutory mechanisms. In any case, the choice between registers or general mechanisms of providing information is a matter for information scientists to debate. Public registers providing environmental information can stay, but we think there is a need of a general legislative instrument that will explicitly set forth exemptions applying to all environmental information irrespective of whether it is held or not on public registers and that will also expressly repeal other enactments. Although the Environmental Information Regulations 2004 mention at reg. 5(6) that '*Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply*', this is not enough, as the provisions on registers have not been repealed. Thus, there is still a risk of overlap and confusion in practice, especially with the provisions on registers also containing non-environmental information. This is because section 39 of the FOIA 2000 provides that the Act does not apply to environmental information covered by the 2004 regulations, even when the information is unobtainable because of an exemption contained in the regulations. In contrast, section 21 of the same Act which is not limited to environmental information or any other subject-specific type of information, provides that any information which is obtainable under any other statutory regime cannot be obtained under the FOIA regime, except if an exception under this other statutory regime applies in which case the FOIA becomes applicable.

Registers as a legal instrument allowing the public to access specific domains of environmental information is a result of the culture of secrecy that was predominant in this country till the early 90s. Secrecy was the rule but as environmental legislation developed, information was seen as an effective tool that could assist command and control regulation in achieving its role of environmental protection. As a consequence, as different legislative provisions were gradually enacted protecting amenities, a lot of them contained parts promoting environmental information of the public. And since general provisions on access to information or even only environmental information did not exist at that time, the creation of registers was seen as a practical mechanism that could substitute this lack. This led to the creation of a multitude of registers as environmental law kept expanding to regulate more and more domains.

Consequently, today, when the right to access environmental information is established, legal provisions establishing registers remain as a legacy of the past and seem to be a burden in preventing the existence of a single comprehensive general legal instrument to cover all situations of environmental information of the public.

To sum up, the problem is that although the environmental information regulations (both the 1992 and the 2004 ones) mention that they supersede any less liberal enactments, they do not expressly repeal them. As a consequence, public officials might still use them in practice,

especially when it is not clear whether the specific register concerned, contains environmental information and thus whether the regulations are applicable.

However, the solution of expressly repealing the provisions on registers in order to allow for greater legal simplicity has one major disadvantage.

### **3) The obligation to collect and compile information for inclusion on registers**

In the present chapter, we have mainly seen how the statutory provisions on registers provide under which circumstances information held on a register can be accessed by members of the public upon request. These specific provisions create a right for any person to access information held on the registers and also a duty on public authorities maintaining the registers to provide the information requested. This is similar to the right to access information created by the Environmental Information Regulations, which supersede the provisions on registers concerning this point.

However, and this is also important, the statutory provisions on registers also impose another duty on public authorities: the duty to collect and compile the information that has to be included on the registers. Thus, statutory provisions on registers also serve a different function than the Environmental Information Regulations: they also impose the collection and compilation of certain types of environmental information. This is extremely important for ensuring the effectiveness of a right to access environmental information upon request, as if there is no environmental information in the possession of public authorities, such a right would be of little practical significance.

Although, as we have seen, the Environmental Information Regulations 2004 do contain some very limited provisions imposing on public authorities a positive duty to collect some limited amounts of information, they do not go as far as the very detailed statutory provisions on registers containing environmental information. This is the reason why these provisions on registers still perform a very useful role. Thus, if they were repealed, new legal instruments would be needed in order to replace the function of obliging public authorities to collect and compile certain types of environmental information.

## **CHAPTER 3) Access to Environmental Information and the 1950 European Convention on Human Rights**

In this chapter, we shall be examining the relationship between environmental information and human rights. This is even more important since the coming into force of the Human Rights Act 1998, because section 6 of the Act makes it unlawful for any public authority to act in a way that is incompatible with Convention rights except where provisions of primary legislation prevent the authority from acting differently. The main question we shall try to answer is whether access to environmental information can be qualified as a fundamental right and if so, to what extent. But we shall also examine the opposite situation: can access to environmental information be limited by human rights considerations, even if it is viewed as a fundamental human right, and if so, to what extent?

First of all, we shall start by defining 'human rights'. This will allow us to set the limits of our analysis. In this chapter, we shall not take the reader through theoretical developments about environmental law and human rights in general. We shall restrict ourselves to the law of the European Convention of Human Rights and Fundamental Freedoms (hereinafter ECHR). The Convention was opened for signature by member states of the Council of Europe at Rome on 4 November 1950. It entered into force on 3 September 1953 and was ratified by the United Kingdom in March 1951. But it was only formally incorporated in national British law by the Human Rights Act 1998. Today arguments based on the ECHR are commonly invoked in a multitude of national cases thus demonstrating its great importance in British law. Consequently, our analysis on environmental information would be incomplete if it did not include a human rights perspective. Our approach shall also encompass the law of the European Union insofar as it deals with human right aspects. This will only include 'constitutional-level' EC law whereas 'lower-level' EC law on environmental information is dealt of elsewhere in this work.

When dealing with the impact of the ECHR on access to Environmental Information our analysis shall almost exclusively focus on the case law of the European court of human rights (hereinafter ECtHR) rather than on general thoughts on human rights in general, law and justice. Because the ECHR is drafted in a vague and imprecise manner, there is little or no point at all in trying to apply Convention articles to various situations without carefully examining the Strasbourg case law. The convention is so general that someone could easily apply it to almost any kind of legal situations but of course, that would have hardly any practical meaning.

According to Philippe Sands<sup>729</sup> international treaties can be categorised into three categories according to the extent they refer to the environment. The first category contains treaties which are silent as to the environment. This is the biggest category. The second category contains treaties which make mention of matters closely related to the environment such as health. And the third category contains treaties which expressly refer to the environment. The European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>730</sup> which was signed in Rome in 1950, is part of the first category of international treaties that do not refer to the environment neither directly nor indirectly. This can be attributed to state of world affairs at this period of history.

The originality of the ECHR laid in the fact that it was the first international treaty to establish an international Court, the ECtHR which was competent to judge individual complaints of breaches of human rights attributed to public authorities of the signatory States. The ECtHR has adopted a constructive approach of the rights contained in Convention articles, which are all civil-political rights, and has interpreted them in a way as to derive from them other rights, some of which are linked to the environment. According to Margaret DeMerieux, the Court would not be entitled under the convention to declare an independent human right or rights to 'environmental quality'.<sup>731</sup> We can only agree with such a conclusion since any other interpretation would definitely be stretching too far the wording of the Convention, which does not even mention once the word 'environment'.

However, the ECtHR has interpreted Convention articles in a way that can lead to recognition of a limited but still fundamental right to access to environmental information, even if an examination of ECtHR case law demonstrates that the Court is not actively using the Convention to promote the environment.<sup>732</sup> We shall first start by examining the relevant case law.

### **A. The recognition of a jurisprudential right to environmental information based on Convention articles.**

Environmental information is a subject that is relevant to two general areas of law. Environmental law and general freedom of information law. The ECtHR has not had a large number of environmental-related complaints or cases related to general freedom of information. However, as we shall be examining in this part, a small number of such cases does exist. These

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<sup>729</sup> Philippe Sands, Human rights, environment and the Lopez-Ostra case: context and consequences, [1996] 6 *European Human Rights Law Review*, p. 601.

<sup>730</sup> For the full consolidated text of the Convention see the Council of Europe's website at <http://conventions.coe.int> Also, all ECtHR case-law is available freely from the Court's website at <http://hudoc.echr.coe.int/>

<sup>731</sup> Margaret DeMerieux, Deriving Environmental Rights from the European convention for the Protection of Human Rights and Fundamental Freedoms, *Oxford Journal of Legal Studies*, Vol. 21, no. 3 (2001), p. 525.

<sup>732</sup> *Ibid.* at page 550: 'The foregoing examination of cases does not reveal a Human Rights Court (or Commission) active to promote protection of the environment through its fundamental rights jurisprudence ...'.

cases either suggest that the Convention guarantees a limited right to access to environmental information or that there is a duty on States to supply environmental information to individuals. These findings are based on an extensive interpretation by the Court of the ECHR. The relevant articles are article 10 (on freedom of expression), article 6 (on the right to a fair trial), article 2 (on the right to life), article 3 (which prohibits inhumane or degrading treatments), article 8 (on the right to respect for private and family life) and finally on article 1 of the first additional protocol (right to property). We shall examine how these articles have been interpreted in relation to environmental information. In some instances, the Case law does not refer directly to environmental information but rather to a general right of information. We shall examine these cases, since their conclusions are also valid when environmental information is concerned. However, we shall not deal with cases protecting private data as being too far from our main arguments.<sup>733</sup> Finally, it must be noted that the Court is not bound by any rule of precedent<sup>734</sup> and consequently it may in the future freely depart from its past interpretations on the subject and either find that these articles are not any more applicable for environmental information or that others can be used.

### **1) The right to information (Article 10)**

Paragraph 1 of Article 10 of the ECHR guarantees freedom of expression and includes the right to receive and impart information. As with most rights and freedoms expressed in the Convention it is not an absolute right, since paragraph 2 subjects this freedom to restrictions that are deemed necessary in a democratic society.

The relevance of article 10 to environmental information applies as far as this article guarantees a general right to information. Article 10 does not, at least expressly, provide for a right to access information held by public authorities or impose a duty on states to give information.<sup>735</sup>

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<sup>733</sup> An example of such a case is the Case of *Rotaru v. Romania*, Application no. 28341/95, 4 May 2000. The case concerns the right to access private data held by public authorities and the obligation to modify such data if it is incorrect.

<sup>734</sup> The rules of procedure on the functioning of the ECtHR are to be found in Section II of the ECHR at articles 19 to 51. They do not expressly contain any rule of precedent.

<sup>735</sup> The ECHR has used article 10 so as to protect the freedom of the press. But this indirectly has led to the press being protected when divulging environmental information as seen in the case of *Bladet Tromsø and Stensaas v. Norway* (2000) 29 EHRR 125, which is especially interesting since it directly concerns environmental information. This case concerned the publication of an article alleging breaches of seal hunting regulations and based on an official report of the Norwegian Ministry of Fisheries, which has been considered as exempt from disclosure to the public under Norway's freedom of information Act as being confidential. The fishermen blamed in the report for illegal seal hunting practices brought defamation proceedings against the newspaper and its editor for divulging details of the report. Certain statements published in the newspaper were found to be defamatory and compensation was awarded to the seal hunters. Relying on Article 10 of the Convention, the applicants complained that the Norwegian judgment constituted an unjustified interference with their right to freedom of expression. The ECtHR restated the principle established in *Sunday Times v United Kingdom* that freedom of expression was essential in a democratic society, subject to the restrictions in Art. 10(2), which were to be strictly construed. That freedom applied to both information that was favourably received and to ideas that could offend or disturb. The Court also

When article 10 was being drafted, the word 'seek' was on purpose not included in order to stop discussions as to whether States were under a duty to provide information.<sup>736</sup> However, some initial Commission and Court decisions seemed to indicate that under certain circumstances, article 10 could imply a right to seek information. However, the ECtHR has not used this interpretation in subsequent cases in order to expand the scope of article 10 into a general right to receive official information from public authorities. And the jurisprudence of UK courts has been reluctant to go further than the interpretation given to article 10 by the ECtHR.

### **a) A limited right to information based on article 10.**

The Commission ruled in *X. v. Germany*<sup>737</sup> that 'the right to receive information may under certain circumstances include a right of access by the interested person to documents which although not generally accessible are of particular importance for his own position'. The Court in the case of *Sunday Times v. the United-Kingdom*<sup>738</sup> reached a similar conclusion and also indicated in which circumstances a right to seek information could arise under article 10. This case involved the drug Thalidomide which after being widely prescribed in the 70s was proved to have unexpected side-effects for unborn children who were being born with deformities as a consequence of the drug being prescribed to their mothers. The Court held that '... Article 10 guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed' and also that '...the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions'.<sup>739</sup> According to Giorgio Malinverni<sup>740</sup> although these two

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accepted that the national authorities had a margin of appreciation when assessing the need for a restriction under article 10(2), but this was subject to a final ruling by the court on whether the restriction was proportionate. It also acknowledged that the press had an essential role in a democratic society, and had a duty to impart information that was in the public interest, even if it had to remain within certain bounds regarding the rights and reputation of others and to prevent disclosure of confidential information. Also the Court stated that the margin of appreciation of the State has to be restricted in the interests of a democratic society so that the press is free to impart information of general public concern. The Court mentioned that '*In cases such as the present one the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern*' (at par. 59) and also that '*the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined*' (at par. 68). Thus, the Court found that the fishermen's interest in protecting their reputation was not sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest and that that the interference complained of was not 'necessary in a democratic society'.

<sup>736</sup> See Giorgio Malinverni, Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political rights, 4 [1983] 4 *Human Rights Law Journal* 449. Also Stefan Weber, Environmental Information and the European Convention on Human Rights, 12 [1991] 5 *Human Rights Law Journal* 179.

<sup>737</sup> *X v. Germany*, App. No. 8383/78; 17 Decisions & Reports 227.

<sup>738</sup> *Sunday Times v. the United-Kingdom*, ECtHR, 26/04/1979, App. No. 6538/74, available freely from the Court's website at <http://hudoc.echr.coe.int/>

<sup>739</sup> Ibid. at paragraph 66.

<sup>740</sup> See above Malinverni n. 736, at page 450.



decisions do not recognise a general right to obtain information, they establish under certain circumstances a right of access to documents which without being generally accessible, are of particular importance for the position of the person seeking access. Also, they establish that States cannot deny access to information that is of general interest. This analysis was certainly true when it was written in the early 1980s, but may not longer be the current position.

**b) The refusal of the Court of Strasbourg to further extend the meaning of article 10.**

Subsequent and more recent case law of the ECtHR seems to have departed from the above findings, thus making the above analysis doubtful. As indicated before, there is no formal rule of precedent binding on the Court.

The case of *Leander v. Sweden*,<sup>741</sup> involved a personnel control procedure set up under Swedish law for posts of importance for national security. Under these procedures, checks were made to secret police registers which contained personal information. The law did not provide any right to access information released to recruiting authorities, on the basis of which the applicant to the ECtHR was denied employment in the Swedish Navy. As long as article 10 was at issue, the Court held that article 10 basically prevented States from restricting a person from receiving information that others wish or may be willing to impart to him. However, the Court found that '*Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual*' (our emphasis). The Court did not indicate in which circumstances article 10 could confer a right to access information. But it could be argued that these circumstances are the ones mentioned in the *Sunday Times* case, namely when information is of general interest for a great number of people or when some piece of information is of particular significance for the person<sup>742</sup> seeking access.

The conclusion reached in the *Leander* case concerning article 10, was confirmed by the Commission in its decision on the admissibility of the application of *Clavel v. Switzerland*.<sup>743</sup> This case concerned a refusal to allow a journalist, in the course of one of his investigations on someone's properties, to access the local land registers held by a Swiss Local authority. According to Swiss law, this register was public but only people showing an interest could consult it. The Commission restated the finding of the Court in *Leander* where it was found that the right to receive information concerned essentially the access to sources of information and that it aimed to prohibit States from blocking someone from receiving information others aspire to provide him.

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<sup>741</sup> *Leander v. Sweden*, ECtHR, 26/03/1987, App. No. 9248/81, available freely from the Court's website at <http://hudoc.echr.coe.int/>

<sup>742</sup> Such seems to have been the case in *Leander*, but the ECtHR found article 10 was inapplicable.

<sup>743</sup> *Clavel v. Switzerland*, 15 October 1987, (decision of admissibility) App. No. 11854/85, unreported in English, available in French only from the Court's website at <http://hudoc.echr.coe.int/>

The Commission also concluded that in this particular case article 10 does not grant a right to access a register on which appear information on the financial situation of third parties nor does it oblige the authorities to communicate such information.

The ECtHR in the case of *Gaskin v. the United-Kingdom*,<sup>744</sup> restated the above findings as far as article 10 is concerned. The applicant to the ECtHR was during his minority under the care of Local Authority's social services. Under the Boarding-Out of Children Regulations 1955 the local authority was under a duty to keep certain confidential records concerning the applicant and his care. He was not entitled to access these confidential records but he tried to learn about his past and have access to them. According to the applicable law when this case arose, access was only possible if the contributors of information agreed to the disclosure and there was no possibility for an appeal against a refusal decision. Gaskin brought an application for discovery of documents with a view to bring legal proceedings against the Local Authority under which he was in care during his minority. The application was refused by UK courts<sup>745</sup> on the grounds that public interest requires that the confidentiality of child care documents in a local authority's possession be preserved, and they should not be disclosed or inspected. Concerning the alleged breach of article 10, the ECtHR held exactly as it had in the aforementioned decisions, that the right to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him and that in the circumstances of the present case, article 10 does not embody an obligation on the State concerned to impart the information in question to the individual.<sup>746</sup>

The ECtHR has not departed from this restrictive interpretation of article 10 concerning the right to access information and it restated the above interpretation in the famous case of *Guerra and others v. Italy*.<sup>747</sup> In this case, the population of an Italian town successfully complained about the local government's lack of information in respect of a nearby chemical plant, which was presenting a hazard to those living nearby. There had been a history of incidents at the plant, including one explosion where in 1976 local people had to be hospitalised. Still, the applicants themselves could not show that they had directly and physically suffered by the specific regulatory acts or omissions by local government of which they complained. The ECtHR held that the local government's failure to give local residents information that would allow them to assess the risks of living in the factory's vicinity, amounted to a violation of article 8 which protects family life. The Court also restated that as long as article 10 is concerned, it basically prohibits public authorities from preventing circulation of information.

All these decisions undoubtedly show that the ECtHR has refused to interpret article 10 in an extensive manner that would be a recognition of the right to receive information held by public

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<sup>744</sup> *Gaskin v. the United-Kingdom*, 07/07/1989, App. No. 10454/83, accessed at the Court's website at <http://hudoc.echr.coe.int/>

<sup>745</sup> See *Gaskin v. Liverpool City Council* [1980] 1 WLR 1549.

<sup>746</sup> See above n. 744, at paragraph 52.

bodies and in consequence would also include the right to receive environmental information. The refusal of the Court to recognise a general right of access to information based on article 10 has been criticised by Dimitri Yernault<sup>748</sup> as being inconsistent with its findings in the *Sunday Times* case, where the court found there was a right of the public to receive information of general importance. We believe this statement should be qualified. The court has not departed from the *Sunday Times* case in its subsequent decisions on article 10 and access to information. In all of these decisions, the Court mentioned that in the specific circumstances of each case article 10 could not imply a right of the applicant to access information. The Court did not totally exclude the possibility of the applicability of article 10 but rather found that in the specific circumstances article 10 was inapplicable. The logical consequence of this is that there could be some other circumstances in which article 10 could create a right of access. The Court however has been silent on which sort of circumstances these could be. As suggested earlier, it could be argued that such circumstances could be similar to those of the *Sunday Times* case, namely when the information concerned is of general importance or is particularly important to numerous people. Consequently, we do not believe the Court acted inconsistently by not basing a right to access information on article 10. However it could reasonably have been expected for the Court to base any subsequent developments of the right to information on article 10 and not to abandon the move initiated by the *Sunday Times* case. As demonstrated by the dissenting opinions expressed in the *Guerra* case, article 10 could have been further developed and be used in order to imply a right to information generally.

Some of the dissenting opinions in the *Guerra* case give valuable indications as to the circumstances that could justify the existence of a right to access information under article 10. In the concurring opinion of judge Palm, joined by judges Bernhardt, Russo, Macdonald, Makarczyk and Van Dijk, although they agreed that article 10 was not applicable in the particular circumstances of the *Guerra* case, they accepted that ‘...*under different circumstances the State may have a positive obligation to make available information to the public and to disseminate such information which by its nature could not otherwise come to the knowledge of the public*’.<sup>749</sup> Moreover, judge Jambrek indicated in a very precise manner in which circumstances article 10 would be applicable: if those who are potential victims of an industrial hazard have requested that specific information, evidence, tests, etc., be made public and be communicated to them by a specific government agency and it did not comply with such a request, and gave no good reasons for not complying, then such a failure should be considered equivalent to an act of interference by the government, proscribed by article 10 of the Convention. This idea could be interpreted as

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<sup>747</sup> *Guerra and Others v. Italy*, 19/02/1998, App. No. 14967/89, available freely from the Court’s website at <http://hudoc.echr.coe.int/>

<sup>748</sup> Dimitri Yernault, *Libertés classiques et droits dérivés: le cas de l’accès aux documents administratifs*, *Revue Trimestrielle des droits de l’homme*, 1996, p. 216 (in French).

<sup>749</sup> See above n. 747.

including any circumstances that could cause hazards to humans, but it is just a concurring opinion of a single judge.

### c) The approach of UK courts on the matter.

Article 53 of the ECHR<sup>750</sup> provides that the protection it grants over human rights issues is a *de minimis* one and that the Convention does not prevent the implementation of higher degrees of protection in member states than it itself establishes. Article 53 therefore makes it possible for national courts to expand human rights protection beyond the principles laid down by the ECtHR. However it seems that the British House of Lords regards ECtHR decisions as a sort of binding precedents, refusing to adopt any interpretation of the Convention that would differ from the Court of Strasbourg's views. According to Lord Scarman,<sup>751</sup> '*And,] if it be a possible interpretation of the European Convention, I shall not adopt it unless and until the European Court of Human Rights declares that it is correct.*' This statement might need to be qualified in the light of article 53, which seems to allow a more protective approach for Human Rights than the ECtHR's one. Moreover, it seems that section 2 of the Human Rights Act by providing that courts 'must take into account' the ECtHR's jurisprudence, implies that they are not bound by it and consequently it allows for UK courts to go even further than the ECtHR's findings.<sup>752</sup> In the recent case of *Alconbury*, Lord Slynn reiterates that in the absence of any special circumstances the Courts are bound to follow the ECtHR jurisprudence.<sup>753</sup> However, Lord Hoffmann seems to indicate that when this 'deference' to ECtHR law would lead to a finding contrary to the British Constitution, then the ECtHR jurisprudence should not be applied.<sup>754</sup> This seems to indicate that ECtHR case-law could be considered as hierarchically lower than the British constitution.

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<sup>750</sup> 'Article 53 – Safeguard for existing human rights – Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party'.

<sup>751</sup> In the case *United Kingdom Association of Professional Engineers v. Advisory, Conciliation and Arbitration Service*, (HL) (1981) AC 424. (at page 444) The issue concerning the ECHR was about the right of association (article 11).

<sup>752</sup> See on this point Kate Cook, *Environmental Rights as Human Rights*, 2002 EHRLR 2, 196, at page 210: '[Moreover,] the fact that the effect of section 2 of the HRA is to oblige the U.K. courts to take this jurisprudence into account but not necessarily to follow it, opens the way for U.K. courts to go even further than Strasbourg has done in environmental cases, particularly in the light of some of the strong dissenting judgements [referred to above] and bearing in mind the ongoing development of international rules and standards in the field of the environment.'

<sup>753</sup> *R. (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions*, [2001] JPL 920 (HL). Per Lord Slynn at par 26: 'In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights'

<sup>754</sup> *Ibid.* per Lord Hoffmann, at par. 76: '[However,] section 2(1) of the Human Rights Act 1998 requires an English court, in determining a question which has arisen in connection with a Convention right, to take into account the judgments of the European Court of Human Rights ("the European court") and the opinions of the Commission. The House is not bound by the decisions of the European court and, if I thought that the Divisional Court was right to hold that they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed'.

In this context three English cases show two different approaches of the use of article 10 when invoked as granting a right of access to information: a restrictive approach and a more liberal one.

All these cases concerned an application for judicial review of a decision by a Secretary of State to hold an inquiry in private and to make public only its report, rather than to hold a public inquiry open to everyone including the press. In all of the cases the reason for setting up the inquiry was to enquire into a matter that had created great public concern (the outbreak of foot and mouth disease in the *Persey* case<sup>755</sup>, the indecent assault by a doctor of some of his patients in the *Wagstaff* case<sup>756</sup> and the murder by a doctor of some of his patients in the *Howard* case<sup>757</sup>).

In all of these cases it was argued *inter alia* that setting up a private inquiry in which neither the general public nor the media could be present was an unlawful restriction of the right to information as guaranteed by article 10 of the ECHR. This complaint has been correctly qualified by Lord Justice Brown in *Persey*<sup>758</sup>, as being a claim by the applicant to sustain a right to access to information (a right to access the information being imparted at the closed inquiry sessions) rather than a right to receive or impart information. The decisions reached in *Persey* and *Howard*, both relied on the ECtHR's jurisprudence and particularly in the *Leander*<sup>759</sup> case and reached the conclusion that '*The European Court of Human Rights has consistently rejected attempts by applicants to assert a right of access to information under Article 10, holding that Article 10(1) does not confer a right on individuals to receive information that others are not willing to impart.*'<sup>760</sup> Consequently, article 10 was held not to have been engaged in these two cases, since they concerned the right to access to information and not freedom of expression.<sup>761</sup>

The interpretation of article 10 adopted in these two cases seems to correctly reflect the approach of the ECtHR's jurisprudence on the subject, which refuses to interpret article 10 as according a right to access to information. In doing this, the High Court missed an opportunity to go beyond the ECtHR's case-law by interpreting the Convention in a more liberal way than the Court of Strasbourg has done. This would have been possible since, as analysed above, it would increase the protection of human rights and, as discussed earlier, the Convention allows more liberal interpretations.

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<sup>755</sup> *Persey v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371.

<sup>756</sup> *R. v Secretary of State for Health Ex p. Wagstaff*; *R. v Secretary of State for Health Ex p. Associated Newspapers Ltd* [2000] HRLR 646.

<sup>757</sup> *Howard v Secretary of State for Health* [2002] EWHC 396.

<sup>758</sup> See above n. 755, at par. 52.

<sup>759</sup> See above n. 741.

<sup>760</sup> Per Justice Baker in *Howard* at paragraph 103. The same conclusion was reached by Brown L.J. in *Persey* at paragraph 52: '...freedom of expression-- whether the right to receive, or the right to impart, information-- is one thing, access to information quite another, and [that] Article 10, whilst naturally conferring the former, does not accord the latter'.

<sup>761</sup> See also the case *Petition No. 2 of the British Broadcasting Corporation* [2000] HRLR 423, a Scottish case in the Appeal Court of the High Court of Justiciary, in which it was held that article 10 is not engaged where a television network is excluded from publicly broadcasting the Lockerbie trial, even if the trial would be broadcasted to four remote sites where only relatives of the victims of the tragedy will be allowed to view the transmission.

Such was the approach adopted in an earlier decision, the *Wagstaff* case. In this case the court relied on article 10 even before its incorporation into English law, by considering it was of the same effect as the common law which recognises freedom of expression as a fundamental right. The court considered that article 10 applied not only to the content of information but also to the means of transmission or reception, since any restriction imposed on the means necessarily interfered with the right to receive and impart information. Consequently, the court found that the decision of the Secretary of State to hold a private inquiry thus prohibiting the general public from having access to what was being said, was an unjustifiable breach of article 10. This judgement undoubtedly goes beyond the interpretation of article 10 adopted by the ECtHR, since it implies that article 10 also grants a right of access to information, which as shown above in practice it does not. This view was heavily criticised and rejected in the aforementioned cases of *Howard* and *Persey*.<sup>762</sup> We believe it would have been possible for the High Court in these two cases to rely on the *Wagstaff* decision and to interpret, if not article 10, then the English common law on freedom of expression as recognising a right to access to information. This could have been consistent with section 11 of the Human Rights Act 1998 that provides a safeguard for existing human rights.<sup>763</sup> However, as analysed above, the Court subsequently preferred not to depart from the ECtHR's interpretation of article 10. Therefore, it has been correctly suggested that the *Wagstaff* case is unlikely to be followed in the future.<sup>764</sup>

But even if a right to information may not be recognised under article 10, it might be recognised under other articles, a possibility which we shall examine further on.

## **2) The right to respect for private and family life (Article 8)**

While, the ECtHR has not used article 10 in order to proclaim a right of access to environmental information, it has used article 8 of the European Convention which protects the right to family life. Under this article the ECtHR has ruled that States are under a positive obligation to provide information in some circumstances. It has also ruled that States have to provide a sufficient and accessible procedure enabling people to seek information. Surprisingly, all these findings have been exclusively based upon article 8 and not article 10, which could seem *a*

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<sup>762</sup> Interestingly, although the interpretation of article 10 that the Court adopted in these subsequent two cases was totally different that the one in *Wagstaff*, the Court merely mentioned that *Wagstaff* should be 'distinguished', when it was clear that they were completely departing from the findings of *Wagstaff*.

<sup>763</sup> s. 11: 'A person's reliance on a Convention right does not restrict - (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom ...'

<sup>764</sup> See Timothy Pitt-Payne, below n. 817, at p. 113.

*priori* more closely linked to a right to receive information. Finally, we shall examine the restrictions that may arise by the usage of article 8 when artificial legal persons are involved.

**a) A positive obligation to provide information: the Guerra case.**

Paragraph 1 of article 8 establishes the right to respect for private and family life, home and correspondence. This article protects individuals from arbitrary interference with these protected rights by public authorities. According to paragraph 2 of article 8 public authorities are permitted to interfere with these rights only when it is in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the economic well-being of a country, the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others. Apart from such a negative obligation not to interfere with the amenities protected by article 8, this provision has also been interpreted as containing positive obligations inherent in the effective respect of private and family life.<sup>765</sup>

Article 8 provisions might seem unlikely to sustain any environmental right. However, the ECtHR has used it in order to guarantee environmental rights. This was first done in the case of *López Ostra v. Spain*.<sup>766</sup> In this particular case, the Court held that there had been a violation of the applicant's right to respect of private and family life because she had to live in very difficult conditions next to a waste treatment plant that was allowed to operate without a licence and emitted gas fumes, pestilential smells and contamination. The court considered that the Spanish State did not succeed in striking a fair balance between the interest of economic well-being (that of having a waste-treatment plant) and the applicant's effective enjoyment of her right to respect for her home and her private and family life and that consequently it had violated article 8 by failing to protect these amenities.

The *López Ostra* case was greeted by scholars as a movement of the ECtHR towards protecting environmental values.<sup>767</sup> The Court in the *Guerra* case<sup>768</sup> reiterated the findings in *López Ostra* that severe environmental pollution can affect the individuals' well-being preventing them from enjoying their homes in such a way that it leads to an interference with their private and family life. The Court concluded that failure of public authorities to provide applicants with '*essential information that would have entitled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed in the event of an accident at the factory*'<sup>769</sup> amounted to a breach of article 8. According to David Hart,<sup>770</sup> this

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<sup>765</sup> See *inter alia*, Sue Farran, *The UK before the European Court of Human Rights – Case law and Commentary*, Blackstone 1996, see the relevant chapter on article 8.

<sup>766</sup> ECtHR, *López Ostra v. Spain*, 09/12/1994, App. No. 16798/90, available from the ECtHR website see above note n. 730.

<sup>767</sup> See *inter alia* supra note n. 729.

<sup>768</sup> For the facts of *Guerra*, see *supra*.

<sup>769</sup> See above n. 747, at paragraph 60.

finding amounts to a positive obligation for States to inform local people about health matters and it might extend beyond the duty to provide existing environmental documents provided for by the Environmental Information Regulations 1992. This would seem to be correct. It is obvious that the Court in *Guerra*, laid down a positive obligation of States to inform citizens when environmental hazards are so severe as to be able to affect people's well-being and private and family life. In *Guerra* the Court considered this duty to provide information, as being a necessary step (meaning a positive obligation) to ensure effective protection of private and family life. But as with article 10, a severe threat that would trigger the application of article 8 could only happen in special circumstances.

### **b) The application of the *Guerra* case by UK courts.**

There seems to be only one English High Court case, in which the *Guerra* precedent was relied upon so as to claim access to information, though unsuccessfully. This is the case of *R. (On the Application of Furness) v. Environment Agency*<sup>771</sup> which concerned a challenge by way of judicial review of a decision of the Environment Agency to grant authorisation for the incineration of municipal waste under the pollution control regime provided by the Environmental Protection Act 1990. The argument that is relevant here, is the challenge that the conditions of the authorisation were insufficient to protect the claimant's procedural right to information arising under article 8 of the ECHR as construed in the *Guerra* case. The claimants argued that even if the pollutants emitted by the activities in question had to be placed on a public register,<sup>772</sup> this method of monitoring provided insufficient information to enable people living in the locality to assess risks with regard to pollutants to which they may be exposed.

Turner J. started by stating that the facts in *Guerra* were extreme and involved emissions of chemical far more dangerous than the one in question in the present case and that even in the worst case scenario, the proposed plant could not present any substantial risk of injury to health or property if it was operated. As a consequence, he ruled that there was no obligation on the basis of the *Guerra* precedent, to make the relevant information available prior to it being placed on the public register in accordance with the legislative provisions regulating the maintenance of the register.

This English case is undoubtedly important, because it accepts that when there might be severe risks from pollution to human health and life, then information will have to be provided even before it could be made available through the relevant statutory registers that might exist or through the Environmental Information Regulations.

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<sup>770</sup> David Hart, The impact of the European Convention on Human Rights on Planning and Environmental Law, [2000] JPL 125-6.

<sup>771</sup> [2002] Env. L.R. 26.



**c) The duty to provide an effective and accessible procedure for providing information: the *McGinley and Egan* case.**

Contrary to what happened with the *Sunday Times* case whose conclusions on article 10 have not been developed, the conclusions of *Guerra* have not only been restated in subsequent cases, but also have been distinguished in order to widen the duty incumbent on States to provide information.

Such a case is that of *McGinley and Egan v. the United Kingdom*.<sup>773</sup> The two applicants in this case had participated as British military personnel in the Christmas Islands nuclear tests. They subsequently applied for pensions due to the alleged fact that they had been exposed to iodising radiation thus resulting in various illness and disabilities they had been suffering. In order to sustain their claims for disability pensions, they requested from the British government documents concerning their exposure to radiation from the nuclear tests. The UK government provided some of the requested documents but for some other ones it claimed that they were inexistent. It is of importance that rule 6 of the Pension Appeals Tribunals (Scotland) Rules 1981,<sup>774</sup> provides for a mechanism to ask in a limited time period for the discovery of related documents while an appeal is pending to the Pension Appeals Tribunal (hereinafter PAT). However, the applicants although they had applied to the PAT, did not use this procedure. The applicants complained of a violation of article 6 and article 8 of the Convention due to failure of the State to provide information. The issue raised under article 6 will be considered *infra* when we shall discuss this particular article.

It should be noted that this case is different from *Guerra*, since the applicants had expressly asked for information from the State authorities. As mentioned before, the court ruled in *Guerra* that the duty that imparts on States to provide information exists **whether or not people have requested such information**.

In *McGinley and Egan*, the Court considered article 8 applicable, since the issue of access to information concerning their radiation exposure was linked to their private and family lives due to the fact that applicants were in doubt as to whether they had been exposed to dangerous levels of radiation (thus leaving them in a permanent state of distress and anxiety).

First the Court started by distinguishing this case from the *Guerra* case. In *Guerra*, it was an undisputed fact that the Government (even though the hazardous activities involved a private

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<sup>772</sup> Maintained following the requirements of the Environmental Protection (Applications Appeals and Registers) Regulations 1991 as amended by the Environmental Protection (Applications, Appeals and Registers) (Amendment) Regulations 1996.

<sup>773</sup> *McGinley and Egan v. the United Kingdom*, 09/06/1998, App. Nos. 21825/93 and 23414/94, available from the ECtHR website see above note n. 730.

<sup>774</sup> Rule 6(1) 'Where for the purposes of his appeal an appellant desires to have disclosed any document, or part of any document, which he has reason to believe is in the possession of a government department, he may, at any time not later than six weeks after the Statement of Case was sent to him, apply to the President for the disclosure of the document or part and, if the President considers that the document or part is likely to be relevant to any issue to be determined on the appeal, he may give a direction to the department concerned

plant) held information on hazards involved by the plant's operation. On the contrary, in *McGinley and Egan*, there was not any clear evidence that the information requested existed. Consequently, the Court refused to rule that there was a positive obligation of the State to provide information on the possible consequences of radioactivity of nuclear tests to the lives of the applicants. However, concerning this point, judges DeMeyer, Valticos and Morenilla dissented and found that in such serious issues involving nuclear tests, information on possible adverse health consequences should have existed and ought to have been communicated to the people concerned. But the majority refused to adopt this view which implies that States not only are under a positive duty to provide information on hazardous activities in which they are engaged, but also have a duty to collect such information even if they do not have it. This would mean that article 8 not only imposes a duty to disseminate information, but also to collect it. The Court refused to adopt this very liberal approach.

However, the Court went on and ruled that 'where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information'.<sup>775</sup> The Court considered that the provision for the applicants to the PAT to ask for a discovery of documents was such a procedure since there was no evidence that it was ineffective<sup>776</sup> since the applicants had not used it. As a result the Court dismissed the application. This ruling raises three issues.

First, the Court recognises that there is a duty for States to provide for a procedure that will allow people to seek relevant and appropriate information to possible dangers to their health due to environmental hazards. This is different from recognising a positive obligation for State authorities to provide information or even providing a right to citizens to access official information. It merely means that states are under a duty to provide for procedures that will allow affected people (and only them) to seek information. So, this is not about a general right to information open to everyone, but only open to people who can justify being potential victims of a hazardous activity and even then, only if they ask for it. The need for interested parties to ask for information is only waived where it is undisputed that State authorities have relevant information in their possession (like in *Guerra*). It should be however noted that judges DeMeyer, Valticos and Morenilla

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requiring its disclosure (if in the possession of the department) in such manner and upon such terms and conditions as the President thinks fit [...]'. (These regulations have been repealed)

<sup>775</sup> Ibid. at par. 101.

<sup>776</sup> It should be noted that the applicants having discovered new evidence suggesting this procedure was ineffective since it required the identification of specific documents to be asked for and not merely a request in general terms for any documentary evidence as suggested by the U.K. government (on which suggestion the Court relied to prove the effectiveness of the procedure), returned to the ECtHR and asked for a revision of the case under article 80 par. 1 of the Rules of Court. However the application for revision failed since the ECtHR considered it was facts that could have been reasonably been known to the applicants prior to the delivery of the original judgement. See *McGinley and Egan v. the United Kingdom (Revision request)*, 28/01/2000, App. Nos. 21825/93 and 23414/94, available from the ECtHR website see above note n. 730.

dissented and found that the applicants '*they had the right to know what might happen to them, without having to ask*'.<sup>777</sup>

Second, these procedures must not only be accessible, but also effective. In *McGinley and Egan*, the court ruled it was the case. However, judge Pekkanen dissented on this particular point and estimated that this procedure was not effective and accessible, since the applicants could only seek it for in a limited time and outside this period there was not any other procedure that could have enabled disclosure of documents not already in the public domain. It should be stressed that two different procedures of seeking information should be distinguished: the procedure which allows a person to ask for information and the procedure which allows a person to contest a refusal or partial acceptance of such a request. In the context of the *McGinley and Egan* case the term 'accessible' refers to the procedure which allows a person to request information and not the procedure which allows an appeal against a decision to communicate information or not.

Third, the hazards in question must arise by State activities, which are dangerous in nature, such as nuclear activities. As mentioned before, this is different from the *Guerra* case where the polluting activities were a result of a privately owned plant. This restriction to public activities is comprehensible since the European Convention on Human Rights does not apply to actions caused by private individuals. However even though some interferences may not be directly caused by an action of a public authority, public bodies can still be held responsible if they fail to prevent or stop (as in the *López Ostra* case) the infringement of a citizen's human right protected by the Convention. Consequently, we feel that the Court could easily expand these findings even to private activities if they reach the same level of danger as nuclear tests. This will be hard to achieve, but it is contended that civil applications of nuclear power (nuclear power plants, radiological equipment, etc) could be considered as such, in certain circumstances.

#### **d) The reliance of the Court on article 8 rather than article 10.**

A major issue that arises is why the ECtHR chose to base a right to environmental information on article 8 rather than choosing to further use article 10 as interpreted in the *Sunday Times* case. According to Margaret DeMerieux, in using article 8 rather than article 10, the Court in the *Guerra* case '*can be seen to resile substantially from its view in The Sunday Times v UK or at least not to have taken those views to their logical conclusion*'.<sup>778</sup>

On the contrary, it has been argued by Sandrine Maljean-Dubois<sup>779</sup> that the fact that article 10 was not used to achieve such a result should be welcomed, since it would have not led to such an increased right of environmental protection as the one recognised on the basis of article 8. She

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<sup>777</sup> See above n. 773, dissenting opinion of judges DeMeyer, Valticos and Morenilla.

<sup>778</sup> See above n. 731, at page 538.

<sup>779</sup> Sandrine Maljean-Dubois, *La Convention Européenne des droits de l'homme et le droit à l'information en matière d'environnement - A propos de l'arrêt rendu par la CEDH le 19 février 1998 en l'affaire Anna Maria*

thinks that the Court could not have interpreted article 10 in such a way as to create such a positive obligation to provide information as it did in *Guerra*. In her opinion, article 10 just prohibits State interference in the circulation of information and deriving a positive obligation from it would have been too difficult for the Court because it would signify a radical change in the court's interpretation of article 10. We would agree to the extent that the ECtHR would enjoy more flexibility when creating a new positive obligation to provide environmental information from scratch, rather than deriving it from the well-established jurisprudence on article 10.<sup>780</sup> This is why article 8 was used in the *Guerra* case (whose findings were subsequently confirmed in *McGinley and Egan*).

To put it in other words, the reason why it could be said that there is an inconsistency between *Guerra* and the *Sunday Times* case, is because the development of article 10 was abandoned and then article 8 was brought into play as being seen as more effective in order to establish a right to environmental information. In *Guerra* the Court adopted a very liberal approach: it did not just create a right for any citizen to access environmental information. It also imposed a duty on public authorities to actively provide environmental information that was in their possession to citizens, whenever their family lives were affected by environmental hazards. There was no condition for citizens to ask for such information in order for the creation of a duty on public authorities to disclose it. This should be contrasted with the Environmental Information Directive, where any duty to provide information arises only when someone asks for it. In *McGinley and Egan* the Court went even further than that, by imposing under some circumstances the duty on states not only to provide on their own initiative environmental information, but also to provide effective mechanisms that would allow citizens to ask for such information whenever the State is engaged in dangerous activities for human health.

However, this explanation on why article 8 was used instead of article 10 does not have unanimity amongst scholars. According to Maria Gavouneli, '*in the circumstances of the Guerra case, the Court considered it politic to avoid any repercussions on the right of the media to seek information that might ensue from a less restrictive reading of Article 10, and preferred to grant relief on the basis of the right to a family life under Article 8*'.<sup>781</sup> We do not find this argument very clear. It seems to indicate that if the Court had interpreted article 10 as containing a positive obligation for States to provide information, this could have resulted in unwanted repercussions for the right of the media to seek information. The author seems to suggest that this would lead in an increased right of the media to ask for official information from State authorities and in a duty of States to provide it. Thus, this would have been an unwanted consequence for member States and the Court considered it 'politic' to avoid using article 10. We do not think that if the *Guerra* case

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Guerra et 39 autres c. Italie, *Revue Générale de Droit International Public*, 1998, Vol. 4, page 1016 (in French).

<sup>780</sup> However, the contrary could also be argued on the ground that to have complete freedom of expression you need access to information, otherwise knowledge would be incomplete.

had been decided under article 10 and not article 8 it would have changed anything for the right of the media to seek information as it is suggested. These two rights (the right of the media to seek information and the right of the public to receive information) would have been independent and would have had a distinct parallel evolution, even though they were both stemming from article 10. They do not necessarily have to be linked together and the Court could have granted different rights to receive information to the public as being a 'victim' in the ECHR's sense and more restricted rights to the press.

#### **e) The problem of artificial legal persons and the right to environmental information.**

As examined above, article 8, which has been used in *Guerra* and subsequent case law to establish a right to environmental information, protects private life, home, family life, privacy and correspondence. According to article 1 of the ECHR, the rights contained in the Convention are to be secured for 'everyone'. This term undoubtedly includes not only natural but also artificial legal persons. Also, following established case law of the ECtHR, if artificial legal persons are affected by the Convention, the rights and liberties contained in it are also applicable to them.<sup>782</sup> However, when protecting private life, home and family life, article 8 seems to apply only to natural legal persons. Of course, artificial legal persons have a right to protection of correspondence under this article, but this right is irrelevant when environmental information is concerned.

The question that arises then is whether artificial legal persons can have a 'home' and 'private life' in the meaning of article 8 of the Convention, thus resulting in them also having a fundamental right to receive environmental information in the circumstances described above. Although *a priori* it could seem that artificial legal persons could not have a private life and a home,<sup>783</sup> in the case of *Stés Colas Est and others v. France*,<sup>784</sup> the ECtHR held that it can be possible under certain circumstances to recognize the right to a home to artificial legal persons. In this case, the ECtHR held that the term 'home' is broad and can include the right of an artificial legal person to receive protection of his offices or headquarters. The Court reached this decision by reference to the fact that the ECHR should be interpreted by reference to the conditions of modern life. Although the case concerned only the right to a home, it is not impossible to presume that the Court, using the same method of 'dynamic' interpretation, might reach the conclusion that artificial legal persons are also entitled to the protection of their 'private life'. Interestingly, the European Court of Justice has reached the opposite conclusion: that the fundamental right of

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<sup>781</sup> Maria Gavouneli, *Access to Environmental information: Delimitation of a Right*, [2000] 13 *Tulane Environmental Law Journal* 326.

<sup>782</sup> See Weber, above n. 736, at page 183.

<sup>783</sup> However, the ECtHR had left the matter open accepting that the fact that premises were used for business purposes did not necessarily render article 8 inapplicable (the case concerned the search by police of a lawyer's office). *Niemietz v. Germany* (1993) 16 EHRR 97 (a 1992 case).

<sup>784</sup> *Stés Colas Est and others v. France*, 16 April 2002, App. No. 37971/97.

inviolability of domicile was applicable to the private residence of natural persons, but could not be extended to commercial premises. For the Court of Luxembourg '*The protective scope of that article [article 8] is concerned with the development of man's personal freedom and may not therefore be extended to business premises.*'<sup>785</sup>

The problem of whether the right to environmental information applies to an artificial legal person, will not arise when the right of information is based on article 3 (prohibition of inhuman or degrading treatment) or article 2 (the right to life).<sup>786</sup> We do not believe that it could be reasonably suggested that these two articles could apply to artificial legal persons. Artificial legal persons cannot have a right to life or a right to protection from inhumane or degrading treatments; they are not humans for a start. Consequently, in such cases when the right to receive information can only be sustained under article 2 or 3, it seems that artificial persons cannot receive the benefice of this right. So, English law and EC law in this respect grant more rights to information (via the Environmental Information Directive and the implementing Regulations) than the European Convention on Human Right's law.

#### **f) The possible use of article 1 of the First Protocol in a Guerra style.**

As we have seen, in *Guerra* the court of Strasbourg considered that in order for public authorities to protect the right to home and family life, they are under a positive obligation in certain circumstances to provide information on threats to these amenities. A similar reasoning could be used for the right to protection of property, as guaranteed by article 1 of the First additional Protocol to the ECHR. Thus, when there would be a possible threat to property, public authorities could be held to be under a duty to provide information to the owners of the property affected. For instance, this could happen in cases of contaminated land, where such contamination may affect the financial value of property, thus engaging article 1, and consequently this could also raise the question of a right to obtain information under article 1 of the First Protocol.

This reasoning could be used in order to recognise a right to information in cases where there is no interference with any other Convention right like article 8 or 2 or 3. Thus, it could be used for the least serious cases in matters of breach of human rights. Of course, it should be noted that for the time being, there is neither a case on this point nor even a case suggesting that article 1 of the First Protocol could be used in the context of environmental information. However, we believe such an interpretation could be possible in the current trend of the ECtHR to use article 1 in

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<sup>785</sup> *Hoechst AG v Commission of the European Communities* (46/87), *Dow Benelux NV v Commission of the European Community* (85/87), *Dow Chemical Iberica SA v Commission of the European Community* (97/87) [1989] ECR 2859 at par. 18. It is possible, though, that the CFI will modify these precedents, in light of its *Akzo Nobel* decision in which it ruled (without referring to the ECHR) that the protection of the confidentiality of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence, even if the client is an artificial legal person. See *Akzo Nobel Chemicals Ltd v Commission of the European Communities* (T125/03 R) [2004] 4 CMLR 15.

order to protect environmental amenities.<sup>787</sup> It should be interesting to observe the judicial developments in this area.

### 3) The right to life (Article 2)

Paragraph 1 of article 2 of the ECHR guarantees the right to life to everyone, except when convicted to death by a lawful court.<sup>788</sup> As explained before, we do not reasonably think that this right may logically be recognised to artificial legal persons. Paragraph 2 lists the only permissible exceptions to this right, which are irrelevant when this article is used for guaranteeing a right to information. This article aims to avoid not only killings of individuals but also serious risks to life. Admittedly, it seems a little odd to interpret article 2 on the right to life as creating a right to receive environmental information. However, the Commission has held that article 2 could also be engaged when there are severe environmental hazards or threats to the environment that may threaten human lives.<sup>789</sup>

The ECtHR has interpreted article 2 and the right to life as granting a right to environmental information in two cases. The first such case is the one of *L.C.B. v. The United-Kingdom*,<sup>790</sup> which concerned the nuclear tests performed by the British military forces on the Christmas Islands. During the Christmas Island nuclear tests, the applicant's father was stationed on the islands. The applicant, who had never participated in these tests, was diagnosed with leukaemia. She was arguing that both the State's failure to warn her parents of the possible risk to her health caused by her father's participation in the nuclear tests, and its earlier failure to monitor her father's radiation dose levels, gave rise to violations of Article 2 of the Convention.

The ECtHR started by expressly referring to the *Guerra* case and interpreted article 2 as not only creating a duty for States not to unlawfully take lives, but also to take positive steps in order to safeguard life. The court then examined whether the UK should have been expected to take positive steps to provide advice to the applicant's parents and to monitor her health. It ruled that the State could only have been required on its own motion to provide advice to the applicant's parents and to monitor the applicant's health 'if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health'.<sup>791</sup> The Court, applied this principle to the instant case and found that, given the information available at the time the

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<sup>786</sup> On the relevant case law recognising a right to information under article 3 and 2, see *infra*.

<sup>787</sup> For a recent such example where article 1 of the First Protocol was used in order to protect neighbours from unlawful planning activities, see Jean-Jacques Paradissis, Unlawful Planning Development and the right to peaceful enjoyment of Possessions: the Antonetto Case, [2002] *Journal of Planning & Environment Law*, June, pp. 674-683.

<sup>788</sup> However, the death penalty has been abolished gradually first in peace time and very recently in all cases. See the 6<sup>th</sup> Additional Protocol to the ECHR on the abolition of the capital penalty in peace time and also the 13<sup>th</sup> Protocol concerning the abolition of the death penalty in all circumstances.

<sup>789</sup> On this point see Stefan Weber above n. 736 at page 181.

<sup>790</sup> *L.C.B. v. The United-Kingdom*, 09/06/1998, App. No. 23413/94, see above note n. 730.

nuclear tests were performed, the UK could not have been reasonably expected to take on its own motion any of these steps.

According to Margaret DeMerieux ‘the LCB judgement may well countenance a duty on the State under Article 2 to warn of risks to health from certain state activities or to monitor the health of persons but only where the authorities know for a certainty or conclusively of the risk of harm’.<sup>792</sup> We totally agree with this interpretation of the L.C.B. judgement. As long as environmental information is concerned, this decision seems to indicate that when public authorities engage themselves in risky activities and have some clear indication about what these risks could be, they have to inform people who might face threats to their lives. To summarise, this means that information that is ‘vitality’ important for one’s life must not only be accessible but must also actively be communicated by public authorities to interested people.

It is interesting to see that the Court used a very similar reasoning as it did in the Guerra case but based it on a different article: article 2 rather than article 8. Moreover, the Court in *L.C.B.* refused to examine the case under article 8 since it had not been an issue raised in front of the Commission. However, it stated that certain aspects of the claim raised under article 2, raised no separate issue under article 8. This seems to suggest that certain aspects of article 8 may well coincide with article 2.<sup>793</sup> This is logical since when human life faces a threat, the family and private life of the relevant individual should in most cases also be affected. But the contrary will not always be true. If there is an interference with private and family life, there will not always be a serious threat to life. Thus, it seems that the Court will reserve the use of article 2 only to the most serious cases. This is restrictive, since recognising a right to information under article 2 only, would reserve such right only when there are serious threats for life. Consequently, we believe that the use of article 2 for establishing a right to environmental information might limit such recognition. We therefore believe that the sole use of article 8 could lead to a more liberal and flexible right to information under the Convention. Moreover, as already discussed, we do not see how the right to life could be applied when artificial legal persons are involved in order to recognise to them a right to information. This could be possible under article 8 as explained *supra*.

Also, in the recent case of *McShane v The United Kingdom*<sup>794</sup> the Court found that article 2 implies that public authorities are under a duty to conduct an effective and prompt official investigation on their own motion in order to establish the circumstances of death of people. This particular case involved the killing of a demonstrator in Northern Ireland due to the use of force by the Royal Ulster Constabulary and the British Army. More importantly for our point, the Court adds that: ‘*there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may*

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<sup>791</sup> Ibid. at paragraph 38.

<sup>792</sup> See above n. 731, at page 543.

<sup>793</sup> See DeMerieux, above n. 731, at page 537.

<sup>794</sup> *McShane v The United Kingdom*, Application n. 43290/98, 28/05/2002. Available from <http://hudoc.echr.coe.int>



well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.<sup>795</sup> This seems to indicate that when various activities result in the loss of human lives, public authorities are not only under a duty to run an investigation on the circumstances of the deaths, but must also provide to the general public access to information on the investigation. The degree of access varies depending on the facts of each particular situation, however, relatives are to be involved in all cases.

In the similar case of *Edwards v United Kingdom*,<sup>796</sup> the ECtHR ruled under article 2, that when a prisoner dies in prison due to an attack from a co-prisoner, the state is under a duty to carry out an effective investigation. On the basis of the *Edwards* case, was decided the English Court of Appeal case of *R. (on the application of Amin (Imtiaz)) v Secretary of State for the Home Department*<sup>797</sup> which also concerned a murder in prison by a cellmate. The Home Secretary refused the family's request that an independent public inquiry into the death should be set up, on the grounds that such an inquiry would add nothing of substance to previous internal investigations and would not be in the public interest. That decision was challenged by way of judicial review. The Court of Appeal accepted that the state had a procedural duty to investigate deaths, where there had been a breach of its positive substantive duty under article 2 to take steps to protect life in cases where its servants were or ought reasonably to be aware that a particular individual who was in the state's care was at immediate risk of death or serious injury. The Court accepted that while a credible accusation of murder by state agents would call for an independent investigation of the utmost rigour, an allegation of negligence leading to death in custody, bore a different quality. But in any case, the court should look at each case on its own facts and balance them. In the present case the Court found that there was no need of a public inquiry since the investigations carried out were sufficient to fulfil the procedural information requirement of article 2. Thus the Court of Appeal clearly indicated that there are no fixed requirements of publicity and public participation and so each case has to turn on its own facts. These cases, although not directly related to environmental information could be applied, *mutatis mutandis*, when death is caused by severe environmental hazards.

Finally, a very important case is the one of *Öneryıldız v. Turkey*<sup>798</sup> which concerns a Turkish applicant who was living with his family in a shanty town near Istanbul. The shanty town comprised slums built on land surrounding a rubbish tip and no official measures had been taken to prevent a possible explosion of the methane gas emanating from the decomposing refuse, even if a report had mentioned that danger. Unfortunately, a methane gas explosion did occur on the waste-collection site and the refuse erupting from the pile of waste buried 11 houses situated below it, including the one belonging to the applicant, who lost nine members of his twelve-members family.

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<sup>795</sup> Ibid. at paragraph 98.

<sup>796</sup> *Edwards v United Kingdom* (App. No. 46477/99), 14 March 2002, (2002) 35 EHRR 19.

<sup>797</sup> [2002] EWCA Civ 390 CA.

<sup>798</sup> *Öneryıldız v. Turkey*, application no. 48939/99, 18 June 2002, available from the ECtHR's website; a summary can be found in [2002] 6 EHRLR 782.

The applicant alleged various breaches of the Convention and the one that is relevant here is the failure of the authorities to inform him of the risk he and his family faced by living in this shanty town, under article 2.

The ECtHR first started by stating that the facts of the present case were similar to the ones in the *Guerra* case and that the reasoning adopted in that case was *a fortiori* applicable to the present case based on article 2. Then the Court considered that the information about the risk of a methane explosion could not be deemed to have been directly available to the applicant, since the ordinary citizen such as he, could not have been expected to know of the specific risks inherent in the process of methanogenesis and of a possible landslide. Only the State authorities could have knowledge of such risks. The Court also indicated that the information in question could not have been imparted to the public other than by an action on the part of the administrative authorities, which were in possession of that information, and therefore rejected the argument that for the information to be disclosed, the applicant ought first to have complained of the harmful effects of the environment in which he lived. As a consequence, the Court found a violation of article 2 because Turkish administrative authorities '*failed to comply with their duty to inform the inhabitants of the Kazım Karabekir area of those risks, which might have enabled the applicant – without diverting State resources to an unrealistic degree – to assess the serious dangers for himself and his family in continuing to live in the vicinity of the Hekimbaşı rubbish tip.*'<sup>799</sup>

This case is important, not only because it is a restatement that a right to receive information might arise under article 2 when human life is at risk, but mainly because it sets the limits of such a right. First, it seems to indicate that when information is directly accessible to the applicant, then State authorities have no duty to provide such information. This is logical and in a way reminds us of the exception found both in the FOIA 2000 and the Environmental Information Regulations 2004 on information directly accessible to the applicant by other means.<sup>800</sup> Second, the usage of the phrase 'without diverting State resources to an unrealistic degree' seems to indicate that an extreme financial burden for providing such information might be a justification for not providing it. This could be criticised, since one could argue that when article 2 is engaged and therefore human lives are at stake, then no financial burden can be unreasonable since a human life has no price.

#### **4) The prohibition of inhumane or degrading treatments (Article 3)**

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<sup>799</sup> Ibid. at par. 87 of the judgement.

<sup>800</sup> Examined in details in Chapter 1.

Article 3 of the ECHR prohibits torture and inhumane or degrading treatments in absolute terms. This means that it is a right that States cannot derogate from. The ECtHR had considered article 3 and the right to impart information in most of the cases already examined, but had not found that such a right could arise under this article. However, in a recent inter-states case,<sup>801</sup> brought by Cyprus against Turkey, the Court seems to indicate that a right to information could be sustained under article 3.

**a) The recognition of a right to information under  
Article 3: the initial reluctance of the Court**

In the case of *López Ostra* examined above, the Court also examined whether article 3 had been violated. The ECtHR ruled that there had not been any violation of article 3, even though the conditions of the applicant's life due to severe environmental pollution were 'very difficult', since they were not severe enough so as to be equivalent to a degrading treatment in the meaning of article 3.<sup>802</sup> According to Philippe Sands this particular finding shows that under certain circumstances environmental pollution might lead to a breach of article 3.<sup>803</sup> This finding also demonstrates that the threshold for the application of article 3 in environmental cases is very high, since in the *López Ostra* case although there was an interference with the right to home and family life caused by severe environmental pollution which also caused harm to the applicant's life, there was not any degrading or inhumane treatment. A strict reading of article 3 ought to be the case. A too extensive reading of article 3 could lead to illogical results where mere annoyances or illnesses caused by environmental nuisances could be considered as inhuman or degrading treatments.

The Cases on the Christmas islands nuclear tests were also considered under article 3. In the case of *L.C.B.* the question whether there was an inhuman or degrading treatment was considered, but no violation was found.

In the case of *McGinley and Egan* article 3 was also considered but the court found it was inapplicable since the complaint, based on lack of access to documents, fell more appropriately within the scope of the complaints made under articles 6, 8 and 13.

All these cases seem to indicate that article 3 could have been a ground on which a right to information (and as a consequence environmental information) may have been sustained. However, none of these cases were successful under article 3.

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<sup>801</sup> Apart from the examination of applications brought in front of the ECtHR by private individuals and artificial legal persons against member states, the ECHR also provides in article 33 for inter-state applications. They consist of proceedings brought by state parties to the Convention against one another.

<sup>802</sup> See above n. 766, at paragraph 60.

<sup>803</sup> See Sands above n. 729, at page 613.

## **b) A recognition of a right to information based on article 3?**

The case of *Cyprus v. Turkey*<sup>804</sup> is important because not only it indicates that under certain circumstances a right to information may arise under article 3, but also because the court actually found a breach of article 3 due to lack of information concerning the fate of some missing Greek-Cypriots.

This case was about the people gone missing and displaced during the 1974 Turkish military operations in Cyprus and also about the minority of Greek-Cypriots living in the Turkish part of Cyprus. The ECtHR found Turkey guilty of human rights violations in Cyprus concerning most of the rights protected by the Convention. The court held that Turkey had violated 14 articles of the convention, including the right to life, the prohibition against torture and inhumane and degrading treatments, the right to liberty and security, the right to freedom of expression. Most importantly for the right to information, the Court held that since Turkey had failed to make the necessary investigations and thus had given no information about the fate of the missing persons during the invasion of Cyprus in 1974 by Turkish forces, their relatives had been subjected to inhuman treatment of the kind proscribed by article 3 (the fate of these 1,500 missing people is officially still unknown). In these circumstances, the Court found that it was the lack of provision of information that constituted an inhumane or degrading treatment, since living in continuous anxiety about the fate of these missing people amounted to a violation of article 3, as long as relatives of missing people were concerned. According to the Court '*the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3*'.<sup>805</sup> Interestingly, the fact that relatives could not perform any searches by themselves due to their impossibility to travel to the North part of Cyprus made Turkey responsible for providing such information.<sup>806</sup> Finally the ECtHR held that it was not necessary to examine the claims raised on the violation of articles 8 and 10 and based on the same facts, since it had previously found a violation of article 3.

This case is not about environmental information and moreover the facts are extreme. However, it can be contended that this reasoning could also be applied *mutatis mutandis* when extremely serious environmental disasters are involved. For instance, if some people go missing after a nuclear accident, relatives should be entitled to receive information concerning the accident so as to understand what happened to them and to evaluate the chances of survival of the people

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<sup>804</sup> *Cyprus v. Turkey*, 10/05/2001, App. No. 25781/94, (2002) 35 EHRR 30.

<sup>805</sup> *Ibid.* at paragraph 157

<sup>806</sup> *Ibid.* at paragraph 157: 'In the absence of any information about their fate, the relatives of persons who went missing during the events of July and August 1974 were condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time. [...] The fact that a very substantial number of Greek Cypriots had to seek refuge in the south coupled with the continuing division of Cyprus must be considered to constitute very serious obstacles to their quest for information. The provision

affected. Such interpretations of article 3 may seem far stretched, but the case of *Cyprus v. Turkey* seems to indicate that they cannot be excluded.

This case is similar in a way to *Guerra* and the Christmas Islands nuclear tests cases: if due to lack of information so much distress and anxiety is caused that it amounts to a violation of a protected right (either articles 2, 3, or 8) then States' authorities are under a duty to provide such information. Interestingly, in such cases **both these 3 articles can be engaged simultaneously. But according to the severity of the situation only the most appropriate would be considered.** In *Cyprus v. Turkey*, it was article 3 since the relative's lives could not have been threatened by lack of information on the missing people. Consequently it seems that in the most serious cases it will be article 2 that will be engaged, then article 3 and then article 8, this last article being engaged in less serious situations.

In any case, the reasoning is totally similar. If the lack of proper information by the State can lead to an interference with a protected convention right, then the public authorities involved are under a positive duty to provide the information that could relieve the people involved.

## **5) The right to a fair trial (article 6-1)**

Article 6-1 applies whenever there is a determination of civil rights and obligations thus giving procedural protection. It mainly provides for a fair trial. But it can be used indirectly in order to achieve access to information, when the information sought is part of the documents submitted to the Court by some other party.

A very relevant case linking the right to a fair trial with access to information is *Kerojärvi v. Finland*.<sup>807</sup> Kerojärvi had received compensation for an injury suffered during the war. When the relevant public authorities rejected his request for the grant of a higher disability pension, he appealed to an Insurance Tribunal and then further appealed to the Finnish Supreme Court. The Finnish Supreme Court had a practice not to transmit to parties some of the files of cases, and it didn't supply some of the files to the applicant. The applicant to the ECtHR did not raise any complaints in front of Finnish courts on this point, but complained of a violation of article 6 in front of the Court of Strasbourg. The ECtHR ruled that the procedure in front of the Supreme Court violated art. 6-1 on a fair trial as it prevented the applicant's full participation in the proceedings.

This Case shows the important link that exists between effective information and access to justice. As the ECtHR mentioned in its judgement, the Finnish Supreme Court ought to have taken positive measures to make these documents available to the applicant.<sup>808</sup> This seems to indicate that

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of such information is the responsibility of the authorities of the respondent State. This responsibility has not been discharged.'

<sup>807</sup> *Kerojärvi v. Finland*, 19 July 1995, Application No. 17506/90, (2001) 32 EHRR 8.

<sup>808</sup> *Ibid.* at paragraph 42: '... the Supreme Court, which was competent to examine the merits of the case, did not take any measures to make the documents available to him'.

there is a duty on authorities hearing appeals to make sure that the appellants have had access to all the necessary information that would allow a fair trial. Consequently, when someone is challenging an administrative decision in courts or in front of a tribunal, he should be given access without even having to ask for it, to the documents that are referred to Court by the other party. This duty may even extend to the provision of any other information on which the court or tribunal relied on for its decision.

In the *McGinley and Egan* case (for the facts see *supra*), the Court found that article 6 was also applicable. The applicants argued that they had been denied a fair hearing in front of the PAT since they were not in possession of all relevant information in order to sustain their case. However, the Court found that since there was a specific procedure provided that would have allowed discovery of documents that the applicants did not use, the applicants had had a fair hearing.

All these cases show how fundamental can be a specific procedure that will allow for environmental information to be communicated to people and particularly to claimants to courts. This is particularly important in the field of judicial review of administrative decisions, where the applicant for an order must prove his claims. The ideas of access to Courts and access to information are to be found, dealt with side by side, in the Aarhus Convention.

## **B. The limitations posed by the Convention to a right to environmental information.**

Today, most contracting states to the ECHR and all EEA states have introduced in their national laws a right to environmental information of some sort. Irrespective of how this right is implemented in each national legal system, it may conflict with some Convention rights, thus limiting it.

Moreover, as we have seen, under certain circumstances, it is possible to induce a right to environmental information from some articles of the ECHR. However, each of these articles carries its own limitations, thus creating an overlap between all these different Convention provisions.

### **1) Limits set by Convention rights to a national right to environmental information.**

The right to receive information may conflict with a right to privacy of third parties. Such rights are protected by the ECHR by mainly article 8. It can also conflict with a right to commercial secrecy and a right to a protection of state and other protected secrets (military secrets, commercial secrets etc). These secrets although not directly protected in the ECHR under stand-alone articles

can be derived from other articles. Finally, the right to receive information may be subject to article 6.

### a) The right to personal privacy (article 8)

As we have seen, article 8 guarantees *inter alia* a right to private life. The importance of this provision for protecting privacy is increased by the fact that before the Human rights Act 1998 according to Patrick Birkinshaw there was ‘*no statutory or common law right to privacy as such*’.<sup>809</sup> Under article 8 the ECtHR has held numerous times that personal data has to be protected as a component of one's private life. These cases concerned whether the obligation to provide personal data, the dissemination of personal data without the concerned person's consent, the collection and storage of personal data and the refusal to have inaccurate personal data held on registers corrected, were a breach of the right to privacy and if such breach was legitimate.<sup>810</sup> According to Birkinshaw personal data means data which relates to a living individual which can be identified to that data.<sup>811</sup> We are not going to examine in detail the abundant case-law on the protection of personal data under the Convention since this would be more relevant in a work on data protection than a work on environmental information. Nevertheless, we shall examine whether the present legal framework for accessing environmental information protects private data.

First, as long as the Environmental Information Regulations are concerned (both the 1992 and the 2004 ones) they contain as we have seen an exemption to disclosure of personal information. This seems to satisfy the requirements of article 8 of the Convention.

In any case, as the Court of Appeal in *R. (on the application of S) v Plymouth City Council*<sup>812</sup> suggests, a balance between confidentiality and other interests in disclosure has to be struck on a case by case basis. The Court indicated that at common law and under articles 6 and 8 of the ECHR it was necessary to strike a balance between maintaining confidentiality of information and permitting or requiring that information to be disclosed in certain cases.

Second, matters are more complex as long as the different registers containing environmental information are concerned. As we have seen, it all depends on the particular piece of

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<sup>809</sup> See Patrick Birkinshaw, *Government & Information – The Law Relating to Access, Disclosure & their Regulation*, 2<sup>nd</sup> edition, Butterworths, London 2001, at pp. 311-2. However, it seems that there is also a right to privacy under English law, with which we are not going to deal. See on this point the relevant chapter in Edwin Shortts and Claire de Than, *Human rights law in the UK*, Sweet & Maxwell, London 2001. Also, in *Douglas v. Hello! Ltd* [2001] Q.B. 967, CA, the Court of Appeal mentioned that there is ‘... a right of privacy which we will today recognise and protect and which was grounded in equity and the common law’, at page 1001. See also *Developing key privacy rights*, edited by Madeleine Colvin, Oxford : Hart, 2002.

<sup>810</sup> On all of these points see the loose-leaf publication *Human Rights Practice*, Sweet & Maxwell, Chapter 8, n. 8.010 – Personal Data. Also see Freedom of Information and Data Protection Acts: the interface, *Data Protection and Privacy Practice*, 2001, 4(Mar), 30.

<sup>811</sup> See Birkinshaw above n. 809, at page 280.

<sup>812</sup> [2002] EWCA Civ 388. The facts of the case are irrelevant and concern an appeal against the dismissal of an application for judicial review of the decision by the local social services to refuse to a mother of a child with learning and behavioural difficulties, permission to see his social services files and other material upon which guardianship decisions had been made by the Council under the Mental Health Act 1983.

legislation, which enacts each register. Most of the registers contain exemptions to disclosure of personal data when there is no consent of the people concerned. However, some of the older registers (like the planning registers) do not contain such provisions. A recent case of the Administrative Court concerning the electoral registers seems to be able to provide an answer to this problem.

The case of *R. (on the application of Robertson) v. Wakefield MDC*<sup>813</sup> concerned the refusal of an electoral registration officer to exclude the petitioner's details from copies of the electoral register given to commercial organisations for marketing purposes. Under the regulations that govern the setting up and maintenance of the electoral registers, citizens have no explicit right to object to personal data present on the register being sold to companies for marketing or other purposes. The Court held *inter alia* that article 8 on the right to privacy had been engaged by the disclosure of electors' personal details exposing them to invasive marketing strategies. Also it ruled that the failure to afford electors a right of objection was disproportionate to the legitimate economic aim of maintaining a commercially available register and hence, article 8 had been breached.

The findings of this case could be applied *mutatis mutandis* to the case of registers containing environmental information when there is no explicit provision for citizens to object to personal data being circulated. For instance, as we have already seen,<sup>814</sup> the register of planning applications not only does contain some sort of personal data (like the name and addresses of people making the applications) but also in some cases it can be widely accessible on the internet. Consequently, it seems that article 8 might prevent circulation of personal data present on registers containing environmental information.

This then raises the question of the ranking of the right to private life and the protection of the environment. Could the public interest of protecting the environment allow a limited breach of article 8 rights? The answer seems to be yes, as indicated in the Gypsy cases<sup>815</sup> concerning enforcement notices against Gypsy caravan owners. In these cases the ECtHR ruled that even though enforcement notices against caravans owners could be a breach of article 8 even where there was a breach of the planning law, these interferences were legitimate and necessary in a democratic society since aimed at protecting the environment. These cases indicate without any doubt that environmental concerns might justify a breach of article 8. Consequently, it seems that it could be possible under Convention law to justify breaches of article 8 (for instance by

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<sup>813</sup> *R. (on the application of Robertson) v Wakefield MDC* [2001] EWHC Admin. 915.

<sup>814</sup> See Chapter 2 on Registers.

<sup>815</sup> The most important of these cases are: *Chapman v. UK* (2001) 33 EHRR 18; *Buckley v. UK*, 25/09/1996, App no. 20348/92, available from the ECtHR's internet site, see above n. 730. The issue of whether Gypsies are refused planning permission for their Caravans in breach of article 8 arises also very frequently in national case-law. See among others *Buckland v Secretary of State for the Environment, Transport and the Regions* [2002] JPL 570. Also, for an analysis linking human rights, environmental protection and the rights of minority communities and people to environmental protection, see Sevine Ercmann, "Human Rights, Environment & Community: A Workshop Conference held at University at Buffalo Law School, April 17 &



disseminating personal data, as mentioned above) in cases where this aims to protect the environment. In such cases, a proportionate balance will have to be struck between the competing protected amenities and this in turn can now be reviewed by the courts.<sup>816</sup> On this basis, we feel that the concerns expressed by Pitt-Payne that to the extent that there is a conflict between freedom of information and privacy ‘*there is at present a serious risk that FOI will be undervalued*’ are unduly alarmist at least as long as environmental information is concerned.<sup>817</sup>

## **b) The right to privacy and the protection of commercial, industrial and professional secrets.**

If the professional secrets (which we will consider as including commercial secrets and industrial secrets) concern a natural legal person, then they are covered by the right to privacy.<sup>818</sup> However, most of the times such secrets will belong to artificial legal persons. Even in these cases, as analysed before, the jurisprudence of the Court of Strasbourg recognises that article 8 rights apply to artificial legal persons, thus providing protection of professional secrets.

Moreover, the Convention refers in article 8(2) to two grounds for the restriction of rights arising under article 8 which seem to be relevant. They are ‘the protection of the rights and freedoms of others’ and ‘national security’. Article 10(2) also refers to ‘the protection of the reputation or rights of others’ and ‘information received in confidence’. The Court of Strasbourg has already applied in the *McGinley and Egan* case a limitation present in article 8(2) in order to limit a right to access information that arises under article 8. In this particular case it was the protection of national security that could have limited a right to information arising under article 8.<sup>819</sup> The same reasoning could be applied for professional secrets under the justification based on ‘*the right of others*’.

However, an infringement to professional secrecy might be justified by the proportionality test under article 8(2), if it is ‘necessary in a democratic society’ for achieving a legitimate aim. For instance, if supposedly there are lethal risks for health by certain activities (like in the *McGinley*

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18, 1998: Linking Human Rights, Rights of Indigenous People and the Environment” [1999] 7 *Buffalo Environmental Law Journal* 15.

<sup>816</sup> About the increased review of administrative decisions in cases involving human rights, going farther than the ‘classic English public law concepts’ of irrationality, illegality and procedural impropriety, see *R. (on the application of Daly) v. Secretary of State for the Home Department* [2001] 2 WLR 1622. Also Ben Pontin, Human Rights and Judicial Review (editorial), E.L.M. 13 [2001] 5.

<sup>817</sup> Timothy Pitt-Payne, Privacy versus freedom of information: is there a conflict?, 2003 EHRLR Special Issue: Privacy, 109, at p. 110.

<sup>818</sup> See *Kopp v. Switzerland* (1999) 27 EHRR 91. This 1998 case concerned the monitoring of calls received in a lawyer’s office. The Court found a breach of article 8, since the monitoring of such calls was totally prohibited under national Swiss law provisions.

<sup>819</sup> The court ruled at par. 100-101 that: ‘The Court recalls that the Government have asserted that there was no pressing national security reason for retaining information [...] In these circumstances, given the applicants’ interest in obtaining access to the material in question and the apparent absence of any

and *Egan* case examined before), then it seems that professional secrecy could not be invoked effectively to restrain disclosure.

Furthermore, it is interesting to note that in *Ashdown v Telegraph Group Ltd*<sup>820</sup> the Court of Appeal concluded that under certain circumstances the public interest might require the verbatim reproduction of copyright material. Thus human rights considerations might outweigh proprietary interests in special circumstances. Such special circumstances might be when there is a duty to provide vital information under one of the Convention articles examined before.

### **c) The right to a fair trial. (article 6)**

The question we shall try to answer is whether article 6 is applicable to proceedings concerning environmental information provided by public bodies. This should only be the case if the right of an individual to access environmental information is of a civil nature. Two situations should be distinguished.

The first situation we shall examine is what is the case when the right to receive environmental information arises due to the applicability of a Convention article conferring such a right as analysed above, namely article 8 or 2 or 3 or even 10. When an article of the Convention is engaged, then it is established case law of the ECtHR that article 6 is applicable too. Consequently, in such cases, article 6 is applicable, thus providing procedural protection. Moreover, when Convention rights are engaged, article 13 (providing an effective remedy when Convention rights are violated) is also applicable, although the court will only apply one of them (either art. 6 or art. 13) since they are equivalent in this context.

Article 6 should also be engaged when an individual challenges the decision of a public authority to provide environmental information that might contain personal data concerning him. In such cases, as we have already seen, article 8 is engaged since personal data are protected as a component of the right to privacy guaranteed by article 8.

Second, the situation is very different if the right to receive environmental information arises only in relation of national law provisions. In such cases, the Commission decision in the *Clavel* case seems to indicate that article 6 is not applicable at all. The Commission ruled in its decision that due to the official nature of the land register maintained by Swiss state authorities in order to ensure land publicity, the applicant's application for judicial review to the Swiss courts against the refusal of the relevant authorities to allow him access to the registers was not a dispute concerning the applicant's civil rights.<sup>821</sup> Thus, article 6, which is only engaged in the

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countervailing public interest in retaining it, the Court considers that a positive obligation under Article 8 arose.' See above at n. 773

<sup>820</sup> *Ashdown v Telegraph Group Ltd* [2001] HRLR 57. This case was about the publication of copyrighted minutes of confidential political meetings by a newspaper. See also Louis Joseph, Human Rights Versus Copyright: The Paddy Ashdown Case [2002] *Entertainment Law Review* 72.

<sup>821</sup> This case concerned the refusal opposed to a journalist to access during his investigations information present on a local land register in Switzerland. See above n. 743.

determination of civil rights and obligations, was not applicable. Even though this decision is quite old since it dates back to 1987, it does not seem that there are cases indicating this position has been altered. Consequently, it seems that when the right of the public to access environmental information arises **only** under national law, then it is not a right of civil nature for the purposes of applying article 6 and thus this article is not applicable.

Interestingly, apart from article 6, it seems that article 8, even if taken independently, may also provide procedural protection. In *Gaskin*<sup>822</sup> the ECtHR ruled that the principle of proportionality (under article 8) required that an independent authority should have been in existence to determine the respective competing claims to confidentiality and to access. The absence of such a procedure was found to be a violation of article 8. In the UK these requirements seem to have been fulfilled by the creation of the Data Protection Commissioner, renamed by the Freedom of Information Act 2000 into the Information Commissioner.

## **2) The uncertain boundaries of a right to environmental information recognised under the convention.**

As we have seen when we analysed the case-law of the Court of Strasbourg, under some convention rights it is possible to sustain a positive obligation for public authorities to provide information, in order to protect the specific amenities that each article encompasses. This could lead to difficulties for finding which specific article is applicable in each particular circumstance. This is an important question since Convention rights carry limitations which can justify interference, though limited, to the protected right. These limitations however, vary according to the specific convention article engaged. So, it can be a cause of legal uncertainty, since different provisions might be applicable simultaneously, each carrying its own limitations.

### **a) The overlap between various articles of the Convention.**

The human rights under which a right to information may be sustained are the right to home and family life (article 8), the right to life (article 2) and the prohibition of torture and similar treatments (article 3). There could also be a right to access to information under article 10 (on freedom of expression) **in certain circumstances**, however the Court of Strasbourg has never indicated what these circumstances could be, except maybe in the *Sunday Times* case. Unfortunately, the findings of this case were never confirmed as long as access to information is concerned in subsequent cases, leaving it a standalone precedent. Sedley LJ has criticised the

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<sup>822</sup> On the case of *Gaskin* see *supra* no. 744.

approach of the ECtHR as inconsistent, arguing that there is something odd in interpreting article 8 as recognising a right to information when this article says nothing about that and at the same time refusing to find such a right in article 10.<sup>823</sup> Consequently, at the present time, for the recognition of a human right to access information there seems to be an overlap only between articles 2, 3 and 8.

In some very serious situations, these three articles can be engaged simultaneously, but in other cases, like in *López Ostra*, the interferences to protected amenities might not be serious enough to tantamount to more than a breach of article 8. Moreover, as already mentioned before, the ECtHR stated in the *L.C.B.* case that certain aspects of the claim brought under article 2, raised no separate issue under article 8. This seems to indicate that the Court will reserve the use of article 2 only to the most serious cases, thus the use of article 2 would ‘embrace’ all claims that could have been raised under article 8. A similar reasoning was used in the *Cyprus v. Turkey* case where article 3 was applied. The court found that ‘*In view of its conclusion under Article 3, with its emphasis on the effect which the lack of information had on the families of missing persons, it finds it unnecessary to examine separately the complaints which the applicant Government have formulated in terms of Articles 8 and 10 of the Convention*’.<sup>824</sup> In this case it was article 3 that ‘embraced’ claims based on articles concerning less serious violations to human rights like articles 8 and 10.

Such an approach might not be effective, since recognising a right to information under article 2 or 3, would reserve such right only when there are serious threats for life or degrading treatments. Articles 2 and 3 require serious interferences with protected amenities in order for them to be engaged. Consequently, it could lead to a restriction of the number of different situations in which they could be used in order to recognise a right to access information. However, this seems to be counterbalanced by the fact that when they are engaged, the ground on which interferences with article 2 and 3 rights can be justified under the proportionality test, are more restricted than under article 8(2), which provides various reasons for justification.<sup>825</sup> In fact, it seems that none of the restrictions present in the body of the text of article 2(2)<sup>826</sup> (article 3 contains no exemptions at all) may justify a restriction to a right to information that could stem from these articles. So, it seems that in such cases, there will be no possibility for the application of a proportionality test, since there could be no other countervailing interests to place on the other scale of the balance in order to counterbalance a right to information arising under article 2 or 3. For the time being, there

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<sup>823</sup> See Sedley LJ ‘Information as a Human Right’, in *Freedom of expression and freedom of information - essays in honour of Sir David Williams*, edited by Jack Beatson and Yvonne Cripps, Oxford: Oxford University Press, 2000, at p. 244.

<sup>824</sup> *Cyprus v. Turkey*, Op. Cit. at par. 161.

<sup>825</sup> Art. 8(2): ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

<sup>826</sup> Art. 2(2): ‘Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection.’

seems that there is no authority on this particular point. In fact, in all cases involving either article 2 or 3 and the right to access information, the proportionality test found no grounds for application and the defendant states did not seem to have raised any such issue.

However, we still believe that the sole usage of article 8 could lead to a more liberal and flexible right to information under the Convention, since article 2 and 3 rights could not be reasonably applied to recognise to artificial legal persons a right to access information. This is however possible under article 8 as analysed *supra*.

In any circumstances, this overlap creates legal uncertainty concerning the applicable Convention article and an indication on a method to establish the applicable legal provision should be welcomed. Having different articles providing rights to environmental information is a problem, since it creates legal uncertainty, which is contrary to the rule of law as interpreted by the ECtHR. The Court of Strasbourg has ruled that for the actions of public authorities to be legal, the applicable provisions of domestic law on which they base their actions must be sufficiently accessible, precise and foreseeable.<sup>827</sup> The basis of this finding according to the Court of Strasbourg is the rule of law, a principle inherent to all Convention articles. It concerns domestic law, but it could be *a fortiori* applied to ECHR law itself.

#### **b) A possible solution: a rationale based on the court's jurisprudence.**

It seems that a solution to this problem could be induced from a detailed examination of how the Court of Strasbourg dealt with this overlap in the most recent of all of the aforementioned cases.

This is the case of *Cyprus v. Turkey*, where although both articles 8 and 3 could have been engaged simultaneously, only the claims under article 3 were considered by the Court since this article was seen as the most appropriate. Consequently this might indicate that in the most serious cases it will be article 2 that will be used, then article 3 and then article 8, this last article being utilised in less serious situations. The criterion for determining under which article arises a right to information could be the severity of the breach of human rights, depending on the particular facts in each specific case.

However, in *Guerra* the Court found a violation of article 8 and so held that it was unnecessary to consider the claim in relation to article 2, even though it seems that article 2 could have been applicable. In fact, article 2 protects more crucial amenities than private life and home: human life itself, without which the recognition of any other human rights to individuals would be meaningless. The Court did not indicate why due to the finding of a violation of article 8 it was

‘unnecessary to consider the case under Article 2 also’<sup>828</sup>. This seems to be contrary to a criterion of ‘severity’ as described above. However, we do not think it could undermine our ‘severity test’ analysis since the *Cyprus v. Turkey* on which this analysis is based was a subsequent case, thus demonstrating a turn in the Court’s approach. Judges Walsh and Jambrek had welcomed such a change by stating in their dissent in *Guerra* that:

‘It may therefore be time for the Court’s case-law on Article 2 (the right to life) to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life. Article 2 also appears relevant and applicable to the facts of the instant case in that 150 people were taken to hospital with severe arsenic poisoning.’

For Kate Cook,<sup>829</sup> *Guerra* might demonstrate the reluctance of the ECtHR to consider claims in relation to article 2 in an environmental context. However, it seems that in the subsequent case of *L.C.B.* which concerned the risks to health because of the Christmas Island nuclear tests and thus was definitely an environmental case, the Court considered article 2 but found there had been no breach of it. So, this case perhaps demonstrates that the ECtHR has since *Guerra* added article 2 to the articles under which a right to access information might arise in an environmental context.

### **C. The fundamental right to environmental information in an EC law context.**

Even though, as discussed elsewhere in this work, in EC law there is a right recognised to individuals<sup>830</sup> to receive environmental information provided by the Directives 90/313 and 2003/4, we are going to examine in this part if there exists in EC law a fundamental right to access environmental information. In the present context, a "fundamental" right is a right of paramount importance that is hierarchically higher than regular rights, in the sense that if a fundamental EC legal norm conflicts with a non-fundamental EC legal norm, then the former prevails.

#### **1) The presence of human rights in general and fundamental environmental rights in particular, in EC law.**

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<sup>827</sup> See the ECtHR cases of *Hentrich v. France*, 22/09/1994, paragraph 42; *Lithgow and Others v. UK*, 8/07/1986, paragraph 110; *Beyeler v. Italy*, paragraph 109. All available from the ECtHR website at <http://hudoc.echr.coe.int>

<sup>828</sup> See *Guerra*, above n. 747, at par. 62.

<sup>829</sup> See Cook above, n. 752, at page 207.

<sup>830</sup> See Joanne Scott, *EC Environmental Law*, Longman: London 1998, at page 159. On rights recognised to individuals by substantive EC Environmental Law (as opposed to fundamental human rights) see Chris Hilson, ‘Community rights in Environmental Law’, Chapter 4 in Jane Holder, *The Impact of EC Environmental Law in the UK*, John Wiley & sons 1997, pages 51 et seq.

Human rights have today become a substantial component of EC law following the increase of community competencies and are now present both in the treaties of Amsterdam and Maastricht but also in the Charter of Fundamental Rights of the European Union.<sup>831</sup> However, initially, the Treaty of Rome which was the founding treaty of the EEC did not mention at all any fundamental rights and did not make any reference to such rights.<sup>832</sup> The ECJ considered in its jurisprudence in the 60's that this lack of a catalogue of fundamental human rights could prevent the Court from subjecting EC law to human rights review.<sup>833</sup> This could be understandable when treaties were granting strictly only economic competencies to the EEC, since situations of conflicts between human rights and EEC rules would be rare in such a context, even though possible.<sup>834</sup> With the extension of EC capacities following the introduction of the second pillar (Common Foreign and Security Policy) and third pillar (Justice and Home Affairs), possible human rights conflicts could arise in every action of the EC,<sup>835</sup> thus making human rights control a necessity. However, the ECJ did not wait for the increase in Community attributions in order to establish EC human rights, since there had been strong reaction from the Italian and the German supreme courts to its initial reluctance to subject community measures to a human rights control.<sup>836</sup> Thus, in its landmark case of *Internationale Handelsgesellschaft*<sup>837</sup> the ECJ ruled that fundamental rights form an integral part of the general principles of Community law. In the subsequent case of *Nold*<sup>838</sup> the ECJ referred to international human rights instruments that member states had ratified as guidelines to be followed in Community law, and finally in the *Rutili*<sup>839</sup> case the Court referred for the first time explicitly to the ECHR. It has been constantly referring both to the ECHR and the interpretation given to its provisions by the ECtHR, in subsequent cases. All these cases, demonstrate that today fundamental rights are a very important part of EC law and that human rights may reach national

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<sup>831</sup> The Charter is a non-legally binding political declaration that contains fundamental principles contained either in the ECHR or the EC treaties but also some new ones to the EC legal order. It has been published in O.J.E.C. C364, 18-12-2000, p.1. See The Charter of Fundamental Rights of the EC, *Human Rights Law Journal*, Vol. 12, No. 1-2, 15 Sept. 2000, (The whole issue is dedicated to the Charter). The Charter has now been incorporated in the draft Treaty establishing a Constitution for Europe. See Agreement reached on the EC Constitution (editorial) [2004] *EC Focus* 147, 2-3.

<sup>832</sup> On the slow development of human rights in the Communities see Christiane Duparc, *The European Community and Human Rights*, Commission of the European Communities, Office for Official Publications of the European Communities: Luxembourg 1993.

<sup>833</sup> See Pavlos Z. Eleftheriadis, The Future of Environmental Rights in the European Union, in Philip Alstom (edited by), *The EC and Human Rights*, Oxford University Press 1999, Chapter 16, at page 538 and the Cases mentioned at footnote 35.

<sup>834</sup> See Jacqueline Dutheil de la Rochère, *Introduction au Droit de l'Union Européenne*, 2<sup>nd</sup> ed., Hachette Supérieur: Paris 1998, at pages 102-3. (in French)

<sup>835</sup> See on the potential possible human rights conflicts in these areas, Deirde Curtin & Ige Dekker, The EC as a 'Layered' International Organization: Institutional Unity in Disguise, in Paul Craig & Grainne de Burca (edited by), *The Evolution of EC law*, Oxford University Press 1999, Chapter 3, at pages 126-131.

<sup>836</sup> See Jacqueline Dutheil de la Rochère above n. 834 at page 103.

<sup>837</sup> ECJ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel*, [1970] ECR 1125.

<sup>838</sup> ECJ Case 4/73, *Nold v Commission* [1974] ECR 491

<sup>839</sup> ECJ Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219.

law through the application of EC law in member states.<sup>840</sup> However, the ECJ has only been raising issues concerning human rights within its existing area of competence as defined by EC law. Acts of member states that implement EC law<sup>841</sup> but also national law derogations<sup>842</sup> from EC obligations allowed under EC law, can be reviewed for human rights violations as long as they concern EC law and thus fall under the competence of the Court of Luxembourg.

Today EC law covers environmental law with both sectoral provisions (on water, soil, fauna and flora, water, nuclear radiation, air) and general provisions that apply to all of these particular areas (such as rules on Environmental Impact Assessments, access to information, environmental information labels, EMAS schemes). Consequently, it appears that the environment is an area where human rights are applicable through EC law.<sup>843</sup>

These human rights can be of two sorts. First, as we discussed above, the fundamental rights and freedoms contained in the ECHR are applicable at EC level by the various institutions and in particular by the ECJ and also apply to national state measures when they concern implementation or derogation of Community law. The status of the ECHR law in EC law seems to be that of general principles of law, as article 6(2) of the treaty on the European Union indicates.<sup>844</sup> The ECHR law is not in itself applicable in EC law. It is just an **authoritative source** for EC's unwritten fundamental rights.<sup>845</sup> There has been an issue whether the Community could accede to the ECHR. However in a 1996 opinion<sup>846</sup> the ECJ found that a ratification of the ECHR by the Community was legally impossible because of legal obstacles. These obstacles concerned both EC law (the treaties are not a sufficient legal basis for granting authority to the EC to ratify the ECHR) and the ECHR itself (article 59 of the ECHR allow for the accession of only member states of the Council of Europe and article 4 of the Council of Europe statute opens membership only to European States, thus not international institutions). To avoid repetition we shall refer the reader to what has been said previously in the present chapter on the law of the ECHR and the environment. To sum it up, there is not in the ECHR as interpreted by the Court of Strasbourg such a thing as a

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<sup>840</sup> On this point see Nicholas Grief, *The Domestic Impact of the European Convention on Human Rights as Mediated through Community Law*, [1991] *Public Law* 555.

<sup>841</sup> See for an example the ECJ Case 5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, at paragraph 19.

<sup>842</sup> ECJ Case C-260/89, *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925. Also referred as the 'ERT case'.

<sup>843</sup> See on this point Lamy Betten & Nicholas Grief, *EC Law and Human Rights*, Longman: London 1998, at pp. 108-110.

<sup>844</sup> Article 6(2): 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. This position will change in the near future, when the new EC Constitutional Treaty will have been ratified.

<sup>845</sup> See Hans Christian Krüger and Jörg Polakiewicz, *Proposals for a Coherent Human Rights Protection in Europe – The European Convention on Human Rights and the EC Charter of Fundamental Rights*, *Human Rights Law Journal*, Vol. 22 No. 1-4, 1, at page 3.

<sup>846</sup> Opinion of the ECJ of 28 March 1996. Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion 2/94. [1996] ECR I-1759.



right to environmental protection. According to Pavlos Eleftheriadis,<sup>847</sup> the recognition of such a fundamental right should not be welcomed since its existence would be characterised by the uncertainty of its contents and redundancy since there are already numerous international law provisions that protect the environment even if they are not 'fundamental rights'. He considers that the environment could be better protected by the incorporation of environmental concerns in existing human rights, an approach adopted by the ECtHR. We cannot agree with such an approach. On the one hand, most human rights are both uncertain in their boundaries and are also protected by other non-fundamental international provisions.<sup>848</sup> On the other hand, using first generation human rights for creating environmental rights leads (as analysed when reviewing the ECtHR jurisprudence) to great uncertainty, due to the fact that since civil and political rights were not initially conceived as being a means to protect environmental amenities, their scope of protection when being applied to the environment cannot be foreseen at all.

Second, it seems that EC law contains its own human rights which even if they are similar to those included in the ECHR, are different since they stem from different sources. Specific human rights are present in the Treaties itself.<sup>849</sup> The EC treaty does contain provisions on the environment at articles 2 (on harmonious development and balanced expansion) and 176 (on environmental protection in conformity with sustainable development).<sup>850</sup> However, we do not think that they create or even imply such thing as a **fundamental** right to a clean and healthy environment. They are more guidelines for the Community's actions and a basis of the competence of the EC on environmental matters. It should be mentioned that article 37 of the EC Charter of Fundamental Rights states that '*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*'. First of all, it should be noted that the Charter is not legally binding.<sup>851</sup> Also, even if the Charter has now been incorporated into the Treaty establishing a Constitution for Europe, this Treaty has not yet entered into force. However, even if it was in force, this statement does not seem to create any **fundamental** right to a decent environment. It merely restates principles already present in the EC Treaty.<sup>852</sup> Article 37 of the

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<sup>847</sup> See above n. 833, at pp. 530-533.

<sup>848</sup> For instance, concerning the right to property, the numerous case law on article 1 of the first protocol to the ECHR demonstrates its uncertainty, and there is also a multitude of international conventions protecting foreign investments and on the prevention of double taxation, that cannot be reasonably construed as laying down fundamental human rights.

<sup>849</sup> For a list of such human rights see Vaughne Miller, *Human Rights in the EC: the Charter of Fundamental Rights*, Research Paper 00/32, House of Commons Library Research Papers, London 2000, pp. 9-11. Also available electronically at <http://www.parliament.uk/commons/lib/research/rpintro.htm>

<sup>850</sup> See Joanne Scott, above n. 830, at pp. 4-10.

<sup>851</sup> However, it has been suggested that UK courts could use the Charter so as to depart from the Court of Strasbourg's jurisprudence and to enhance UK human rights jurisprudence, which it is suggested should not be less protective than the protection of human rights offered by EC law. See Ian Rogers, 'From the Human Rights Act to the Charter: Not another Human Rights Instrument to Consider', [2002] 3 EHRLR 343, at p. 353-354.

<sup>852</sup> The Convention that drafted the Charter explains in a non-authoritative commentary under article 37 that 'The principles set out in this Article are based on Articles 2,6 and 174 of the EC treaty. It also draws on the

Charter is more an invitation to the EC policy maker to take the protection of the environment and sustainable development into consideration before taking any action. It seems difficult that this article creates any judicially defensible right. It seems that the drafters of the Charter made the error to confuse human rights with policy in general. As Pavlos Eleftheriadis had warned,

‘We are running the risk of forgetting the special and uncompromising nature of human rights standards that can or ought to be protected judicially. Hence, there is a need to define carefully those areas that matter most from the point of view of human rights, and those that are open to the discretion of decision-makers’<sup>853</sup>

We feel that article 37 of the Charter contains more policy based provisions than judicially enforceable fundamental rights. In any case since this article is based on the EC treaties, it does not change anything to the legal position existing before the Charter, since according to article 53 of the Charter, rights based on the treaties are to be exercised under the conditions and within the limits defined by the treaties.<sup>854</sup> According to Kate Cook,<sup>855</sup> it is not certain that article 37 of the Charter will add any further individual dimension to the principle already present in the Treaties.

All in all, it seems quite clear that there is not in EC law a fundamental right protecting the environment *per se*, or a right to live in a decent environment. There are only aggregates of such a right, based on traditional civil and political rights and developed mostly by the jurisprudence of the ECtHR. It remains to be seen whether EC law recognises a fundamental right to environmental information.

## **2) The absence of a fundamental right to environmental information in EC law.**

Before answering the question whether there is a fundamental right to environmental information in EC law, we shall distinguish the situation in ECHR law. As analysed before, ECHR law is applicable in EC law. We shall therefore refer the reader to the previous section where the existence of a fundamental right to environmental information in ECHR law was analysed, bearing in mind that ECHR law is applicable in EC law too.

As long as EC law in itself is concerned, there seems to be no fundamental right to access information and of course no fundamental right to access environmental information. The only ECJ case that seems to indicate indirectly that such a fundamental right to access information might be recognised at EC level, is the case of *The Netherlands v EC Council*.<sup>856</sup> This case concerned an action of annulment brought by the Netherlands against the Code of Conduct concerning public access to Council and Commission documents. The Court ruled that this document because it had

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provisions of some national constitutions’. In document CHARTE 4473/00, under art. 37, available online at <http://www.consilium.eu.int>

<sup>853</sup> See Eleftheriadis above n. 833, at page 545.

<sup>854</sup> On this point see Koen Lenaerts & Eddy de Smijter, A “Bill of Rights” for the European Union, [2001] *Common Market Law Review* 38, 273, at page 289.

<sup>855</sup> See Kate Cook above n. 752, at page 198.

not any legal effect, could not be attacked by way of an action of annulment and thus dismissed the application as inadmissible. The ECJ, however, mentioned a '*trend, which discloses a progressive affirmation of individuals' right of access to documents held by public authorities*'<sup>857</sup> but did not expressly mention whether this right was a fundamental human right or a hierarchically lower right. In his opinion the Advocate General Tesouro linked the right to access information with various Council of Europe documents and with article 10 of the ECHR and article 19 of the International Covenant on Civil and Political rights (on the right to information). He concluded that '*It may be considered that the right of access to information is increasingly clearly a fundamental civil right*'.<sup>858</sup> However, the ECJ did not clearly reaffirm this statement in its decision, thus making it unclear whether in EC law there is such a fundamental human right.

In any case, there is no such thing as a fundamental right to receive environmental information in EC law when examined on its own (i.e. when the law of the ECHR is excluded). Neither are there aggregates of such a right, based on other fundamental rights like the ECtHR has recognised. As Pavlos Eleftheriadis has stated, the ECJ has not yet recognised fundamental human rights regarding environmental protection, but such a movement should be welcomed.<sup>859</sup> Of course, there are ECJ cases on the right to access information held by Community institutions (examined in Chapter 1), but they have not addressed the problem from a fundamental rights perspective.

### 3) The reciprocal influences of EC law and ECHR law.

Finally, it is interesting to examine the influences that EC and ECHR law can have on each other. This demonstrates that these two legal systems are closely related to each other, thus making any advance in one of them benefiting the other legal system too.

An example of the influence of EC law in ECHR law is the *Guerra* case. The *Guerra* case concerned a breach of a Directive (the Major Accident Hazards of Certain Industrial Activities)<sup>860</sup> that uses dissemination of information on industrial hazards as a way to promote environmental and health protection. The ECtHR in *Guerra* was influenced by the use of information made in the Directive as a means to protect human health and used it itself as a means to protect amenities guaranteed by article 8.<sup>861</sup>

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<sup>856</sup> ECJ Case C-58/94, *Kingdom of the Netherlands v Council of the European Union*, [1996] ECR I-2169.

<sup>857</sup> *Ibid.* at paragraph 36.

<sup>858</sup> Opinion of Mr Advocate General Tesouro delivered on 28 November 1995 (concerning Case C-58/94), at paragraph 16.

<sup>859</sup> See Eleftheriadis above n. 833, at page 549.

<sup>860</sup> Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities O.J.E.C. 230, 05/08/1982, p. 1. (Repealed and replaced by the Seveso II Directive)

<sup>861</sup> According to Jean-François Renucci, *Droit Européen des Droits de l'Homme*, Librairie Générale de Droit et de Jurisprudence, 2nd edition, Paris 2001, at page 474. (In French)

However, there is also a possibility of conflicts between human rights recognised at EC level and ECHR level. The *Hoechst* case, discussed above, in which the ECJ found that article 8 is inapplicable for protecting businesses, is such an example.<sup>862</sup> Still, the rules laid down in article 52(3) and 53 of the Charter of Fundamental Rights of the EC might provide a mechanism to avoid any such conflicts in the future. These articles provide that in case of rights enshrined both in the ECHR and the Charter, the most protective should prevail.<sup>863</sup>

In any case we tend to agree with the view expressed by Margaret DeMerieux<sup>864</sup> concerning the fact that the existence of ‘environmental principles’ in article 174 of the EC Treaty (on sustainable development etc) might induce the ECtHR to recognise that some environmental rights that already exist in EC law at different levels are in fact fundamental rights. Using the same pattern as in the *Guerra* case, where the Court of Strasbourg recognised a right already present in an EC Directive as being fundamental, the ECtHR could promote environmental policies present in EC law and ‘transform’ them into fundamental rights.

Similarly, for Thornton and Tromans,<sup>865</sup> a more broadly construed article 8 may help overcome *locus standi* difficulties when bringing actions based on environmental directives with no direct effect in national courts. Such a position might overcome the difficulty individuals face when challenging national authorities not implementing or implementing incorrectly environmental directives due to the fact that most environmental directives intend primarily to protect the environment rather than individuals, thus having no direct effect. This position is convincing and could be definitely applied to environmental information, since, as demonstrated, article 8 includes such a right. Even though the Directive on Environmental information most probably has direct effect,<sup>866</sup> a supplementary fundamental liberties protection of rights enshrined in it should be welcomed.

#### **D. Conclusions on whether there is a fundamental right to environmental information based on the European Convention of Human Rights.**

The law of the ECHR, which we examined in detail in the beginning of this chapter, is particularly important both in EC law and British law and therefore we shall be drawing conclusions based on the ECtHR jurisprudence on whether it grants a right to environmental

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<sup>862</sup> See *supra* note n. 785.

<sup>863</sup> See Koen Lenaerts & Eddy de Smijter, above n. 854, at pp. 293-294.

<sup>864</sup> See DeMerieux above n. 731, at page 557.

<sup>865</sup> See Justine Thornton and Stephen Tromans, *Human Rights and Environmental Wrongs – Incorporating the European Convention on Human Rights: Some thoughts on the Consequences for UK Environmental Law*, [1999] *Journal of Environmental Law* 35, at page 53. See also DeMerieux, above n. 731, at page 524, footnote 15.

<sup>866</sup> See John Alder & David Wilkinson, *Environmental Law & Ethics*, Macmillan: London 1999, at page 377. This analysis concerns the 1990 Environmental Information Directive but can be applied, similarly to the 2003 Directive.

information. This question has been answered above, as far as EC law of human rights is concerned.

### **1) Are environmental rights in general and a right to environmental information in particular recognised in ECHR law?**

First, we shall start by examining whether the law of the ECHR as reflected by the dispositions of the Treaty of Rome and the Court of Strasbourg's jurisprudence, recognise any environmental rights. We shall not going to examine whether environmental rights exist or ought to exist or not.<sup>867</sup> For our purpose, we shall consider that environmental rights are legal rights protecting amenities connected to the environment, but not necessarily the environment itself.<sup>868</sup> This approach is large enough to cover both the anthropocentric and the ecocentric approach of human rights, thus preventing us to engage in this debate.<sup>869</sup>

There are various approaches on whether the ECHR encompasses environmental rights, and some of them reach totally opposite conclusions.

According to Thornton and Tromans '*it is not possible to conclude that any 'environmental rights' have been established under the Convention*'.<sup>870</sup> The authors seem to minimise the significance of *Guerra* and *López Ostra* by stating that they were 'only two cases' and that their facts were extreme. We do not feel that these two arguments are very relevant with the question of whether environmental rights are recognised or not under ECHR law. What is more relevant is whether the principles established in these two cases have been considered as a precedent by national courts and are being successfully used by litigants. This seems to be the case since in *Marcic v Thames Water Utilities Ltd*<sup>871</sup> it was held, similarly to the *López Ostra* case, that severe back flow of foul water from a sewer system leaking onto someone's garden, constituted a breach of the right to respect for home under article 8(1) and of the right to peaceful enjoyment of possessions under article 1 of the first protocol.

Another scholar, Kate Cook, sustains that the ECHR covers '*environmental rights, understood for these purposes as individual human rights with an environmental dimension*'.<sup>872</sup> The fundamental right to environmental information as established in the jurisprudence of the

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<sup>867</sup> On this endless discussion, see John Alder & David Wilkinson, *ibid.*, Chapter 12 – Environmental Rights, at pages 354-361. See also Alexandre Kiss, "Environnement, droit international, droits fondamentaux", in *Cahiers du Conseil constitutionnel* n° 15, 2003, available from <http://www.conseil-constitutionnel.fr/cahiers/cc15/env5.htm> (in French).

<sup>868</sup> A largely accepted definition of 'environmental rights' has not been yet accepted. See Maurice Sunkin, David M Ong, Robert Wight, *Sourcebook on Environmental Law*, 2nd edition 2002, Cavendish Publishing, at page 746.

<sup>869</sup> See *inter alia*, Philip Sands above n. 729, at page 598.

<sup>870</sup> See Thornton and Tromans, above n. 865, at page 45.

<sup>871</sup> *Marcic v Thames Water Utilities Ltd* [2002] 2 All E.R. 55 (CA). This finding in relation to the ECHR was however reversed in the House of Lords, see [2003] 3 WLR 1603.

<sup>872</sup> See Kate Cook, above n. 752, at page 198.

ECtHR is certainly such a right, since it is founded on individual rights (right to a home and family life, right to life etc) and protects amenities related to the environment (a 'home' free from pollution, a life free from environmental hazards etc). We tend to agree with this view, and believe that the Convention does recognise environmental rights, as the term has been broadly defined above. Even if it is individual civil-political rights that are contained in the ECHR, these rights are stretched by the Court of Strasbourg so as to protect amenities related to the environment. This of course should not be interpreted as meaning that the environment is protected in itself (we shall come back on this point later on). It merely means that environmental amenities can be protected indirectly by fundamental human values present in the Convention.

As long as the existence of a fundamental right to environmental information is concerned, scholars are divided too. For Stephan Weber, writing in 1991 before the *Guerra* case, '*only a rough outline of a right to environmental information can be derived from the present case law*'.<sup>873</sup> The position since then has evolved and today we can certainly speak, as DeMerieux does, about a procedural environmental right to environmental information.<sup>874</sup> We do agree with this approach. Undoubtedly, providing a right to environmental information when protected Convention rights are at risk by environmental hazards, ends up protecting environmental amenities, even if only indirectly.

Consequently, we can quite safely conclude from what precedes that today in ECHR law, even if there is no right to a decent environment, there are aggregates of such a right<sup>875</sup> that protect procedural rights as the right to information. Thus, the ECtHR seems to have recognised what is in essence a fundamental right to environmental information, although it remains to be seen whether it is a human right of the first generation (traditional civil-political rights), second generation (social and economic welfare rights) or third generation (community and solidarity rights)<sup>876</sup> or even a *sui generis* human right. We shall cover this next.

## **2) In what category of human rights could environmental information be placed ?**

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<sup>873</sup> See Stephan Weber above n. 736, at page 185.

<sup>874</sup> See DeMerieux, above n. 731, at page 544.

<sup>875</sup> For Maria Gavouneli, it remains to be seen whether this piecemeal recognition of fundamental substantive rights will be sufficient for the effective protection of newly arising human rights such as the right to a decent environment. See Gavouneli above n. 781, at page 324. See also Sueli Giorgetta, *The Right to a Healthy Environment, Human Rights and Sustainable Development*, [2002] 2 *International Environmental Agreements: Politics, Law and Economics* 173, at p. 184: "*The procedural aspect of the right to a healthy environment embodies the right to information, the right to participate and the right to effective remedies*".

<sup>876</sup> On the distinction of human rights and liberties into three 'generations', see *inter alia* Falk, R. *Human Rights Horizons: The Pursuit of Justice in a Globalizing World*, London, Routledge, 2000.

The ECHR, drafted after the end of the Second World War, contains civil-political rights (first generation rights), protecting the individuals from State interventions. However, the Court of Strasbourg adopted a very constructive jurisprudence and interpreted these rights in a manner that would bring protection of second generation rights. The Court made clear its attitude in the case of *Airey v. Ireland*, where it stated that:

‘Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.’<sup>877</sup>

However, this constructive approach, has not been used in order to create totally new rights. Such an example is the right to a decent environment, which cannot reasonably be derived from any Convention article. The Commission firmly established for the first time in *X and Y v. Federal Republic of Germany*<sup>878</sup> that there was no such right in the convention as a right to a decent environment. The position is today unchanged. However, other rights were stretched so as to encompass environmental concerns.

In *López Ostra* the Court for the first time used article 8 in a way that would bring similar results: protect neighbouring amenities from environmental harms. The result is definitely more limited than recognising a general right to a clean and safe environment, but that would be far beyond the role of the Court, which is to interpret the wording of the ECHR in the light of recent society changes. It would have been a rewrite of the ECHR. In *Guerra* the Court went a step further by recognising a right to receive information on environmental hazards that could affect the right to a peaceful family life. The jurisprudence of the ECtHR on the right to environmental information has subsequently evolved with other cases (all analysed *supra*) leading to an expansion of the boundaries of this right over more protected rights than the right to a home and family life.

In the *Guerra* case the court referred to the Council of Europe’s resolution adopted after the Chernobyl nuclear accident,<sup>879</sup> in which public access to clear and full information is considered as a ‘basic human right’.<sup>880</sup> But in what category of human rights could the right to environmental information recognised by the ECtHR case law could be put? According to Maljean-Dubois, the right to know as laid down in *Guerra* is an extension of the economic and social rights. She believes that the Court in *Guerra*, after having recognised economic and social rights based on traditional political and civil rights present in the Convention, takes a step further by recognising a

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<sup>877</sup> *Airey v Ireland* (No.1) (A/32) European Court of Human Rights, 9 October 1979, (1979-80) 2 EHRR 305, at paragraph 26.

<sup>878</sup> See above n. 737.

<sup>879</sup> See *Guerra* above n. 747, at paragraph 34.

<sup>880</sup> ‘... the Assembly believes that public access to clear and full information on this subject - and many others for that matter - must be viewed as a basic human right’. Council of Europe’s Parliamentary Assembly Resolution 1087 (1996) on the consequences of the Chernobyl disaster, paragraph 4. Available electronically at <http://assembly.coe.int/>

new category of rights or at least in the extension of economic and social rights.<sup>881</sup> She seems to agree with the view expressed by judge Greve in the *Hatton* case, that the right to environmental information could be a new sort of human right. He declared in his dissent that (speaking on article 8) '*The Convention being a living instrument, the provision has gradually been interpreted to include also environmental rights ... These environmental rights are nonetheless of a different character from the core right not to have one's home raided without a warrant*'. He also adds that '*environmental rights represent a new generation of human rights*'.<sup>882</sup>

We tend to agree with this view. The fundamental right to environmental information expressed by the ECtHR is too different from the rights expressed in the Convention, even if it is based on them, to be considered as a first generation right. The right to environmental information is a sort of hybrid right that certainly protects first generation rights (such as the right to life) but also second generation rights (since it also ends up in increased environmental protection). It cannot clearly be categorised in any of these two categories, so we believe it would be better considered as a *sui generis* right, different from the rest. Moreover, even if we accept that there is a fundamental right to the environment *per se* (that some consider being a third generation right), the fundamental right to environmental information cannot be considered as such, since it is clearly linked to its civil and political origins. As we shall see below, the fundamental right to environmental information aims to protect first generation rights (since it arises when such Convention rights are engaged) and can only protect the environment indirectly. On the contrary, a fundamental right to the environment would protect directly environmental amenities and this could indirectly lead to the protection of individual rights too (right to life, family life and home etc) or indeed limit such rights.

Thus, we believe that the fundamental right to environmental information is not similar to a fundamental right to the environment. Philippe Sands seems to agree<sup>883</sup> with the finding that the right to access information on the environment cannot be categorised with the rights that substantively protect environmental standards. However, he considers that the right to access information on the environment is a civil and political right, since this category includes procedural rights of citizens that can also be used to protect the environment. We only partially agree with that view. The general right to access information is definitely a procedural right and can thus be categorised as a civil-political one. However, as we shall examine, the right to access environmental information (which aims to protect the environment) should be distinguished from the **fundamental** right to access environmental information as recognised by the ECtHR (which aims to protect Convention-established values). They are of a different nature.

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<sup>881</sup> See Maljean-Dubois above n. 779, at page 1014.

<sup>882</sup> *Hatton and others v. The United Kingdom*, ECtHR, 02/10/2001, Application no. 36022/97, per Judge Greve (in his dissent), available from <http://hudoc.echr.coe.int/>. The case concerned breaches of article 8 due to noise generated by night flights to and from Heathrow airport.

<sup>883</sup> See Philippe Sands above n. 729, at pages 603-607.



### **3) The different nature of the fundamental right to environmental information compared to its 'non-fundamental' equivalent.**

The right to access environmental information enshrined in the Information Directive and in the Aarhus Convention might seem quite similar in nature to the fundamental right to receive environmental information, as recognised by the Court of Strasbourg. However, these two rights should not be confused, as they are different in nature.

The right to obtain environmental information, when arising under the Convention, is necessarily linked to an interference with an individual's right enshrined in a specific article. Convention articles define rights that give individuals some basic protection for their own sake. In this context, when a right to information arises, it necessarily aims to protect Convention-protected values and only those. Thus, the right to environmental information in an ECHR context is limited by the scope of the Convention itself. In such a context, environmental information is viewed as a procedural right, aiming to protect Convention-enshrined substantive rights. The Convention is definitely as the Court of Strasbourg has said a 'living instrument', but when new rights are developed on the basis of civil-political ones, these new rights are limited in their essence by the initial right from which they stem. To summarise, environmental information in the European human rights context intends to protect other individual rights enshrined in the ECHR. It aims to protect individuals.

On the contrary, when the right to environmental information arises under EC law or the Aarhus Convention, it is not intended to protect any individual rights whatsoever. Both the Information Directive<sup>884</sup> and the Aarhus Convention<sup>885</sup> directly aim to protect the environment itself by recognising new procedural rights for individuals. In this context, even though it is a right granted to the individual, it aims to protect the environment and not any other substantive individual right (as the right to life, family etc), even if these amenities can be also protected indirectly.

These two rights might or might not coincide, but in any case they are of different nature, since they aim to protect different things. Thus, we can safely conclude that the right to environmental information as it is recognised in ECHR law (and in EC human right law), has clearly a civil-political dimension. This is not the case when this right aims to protect the environment, where there it is of social nature.

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<sup>884</sup> See the preamble to the Directive 30/313: 'Whereas access to information on the environment held by public authorities will improve environmental protection'.

<sup>885</sup> The Aarhus Convention is the first binding international instrument to recognise a right to both every person and future generations to a healthy environment, though it limits its protection to procedural rights. See Thornton and Tromans, above n. 865, at page 37.

Because the right to environmental information, in practice, encompasses these two different natures, we believe it could be safely said that the fundamental right to environmental information is a *sui generis* right, not being able to be categorised **exclusively** in any of the three generation of human rights.

What can the practical consequences of this finding be? This can be useful when public authorities are weighting confidentiality concerns before granting or refusing access to information. When fundamental human rights are at stake and information is to be given to protect such a right, confidentiality concerns should be taken into consideration, but in most circumstances should not be allowed to prevail. On the contrary, when information is to be disclosed “for the environment’s sake”, confidentiality concerns should most of the times prevail, since they are protected by human rights (right to home and family life as explained above) and in contrast the environment is not yet being protected in Europe at human rights level. However, the situation might change if the right to a decent environment is recognised directly as a human right, like article 37 of the Charter of Fundamental Rights is trying to do but incompletely. In such a case, when confidentiality concerns would arise, there would be a conflict between two human rights: the fundamental right to a home (or other similar provisions protecting confidentiality) and the fundamental right to a decent environment, under which would arise the right to environmental information. This would be a delicate conflicting situation of two human rights.

In any case, the fundamental right to environmental information, as it is today consecrated in ECHR law, is more similar to a general right to access information than to the right to access environmental information as recognised by the EC Information Directive and Aarhus.

#### **4) The similar aim of the fundamental right to environmental information and the general right to access information.**

As we have seen, the fundamental right to environmental information is quite different than the right to environmental information present in EC, international and English national laws. We feel the fundamental right to environmental information is more similar to the general right to access information held by public authorities as recognised in England by the Freedom of Information Act 2000.

When the right to access and receive information is based on articles of the ECHR (like articles 2, 8 , or 3), the provision of information intends to relieve anxiety and suffering of people whose fundamental rights are affected. Information is considered as a means that would help affected people assess the risks they face in one of ECHR protected amenities (their, home, their family, or their life). **Information in this human rights context is an end in itself.** It is granted in order to minimise interferences with protected human rights. On the contrary, when the duty to

provide environmental information arises under the Information Directive or the Aarhus Convention, then this is considered as a means to an end: a mechanism that would increase environmental protection.

This is the reason why ECtHR cases are so restricted and the right to environmental information only arises when there is another individual human right at stake. As long as there is not a fundamental right to a decent environment, environmental information will always be dependent on individuals' human rights. In that sense, we believe that the fundamental right to environmental information is closer to general Freedom of Information legislation than to the Environmental Information Directives and Regulations, which aim to protect the environment. Both the general right to access information and the fundamental one to environmental information use the provision of information as an end in itself: it is the provision of information itself that is the aim of the legal provisions, and not the protection of the environment.

## **CHAPTER 4) The French Approach on Environmental Information**

In this chapter we shall describe the difference between the legal rules regulating access to environmental information that operate in France and England. More precisely, we shall compare the differences in the transposition of the Directive 90/313/EEC in French and English national law. After doing this we shall consider which of these two transpositions was the most 'successful', by being the most compatible with the aim of the Information Directive. It should be noted that although this 1990 Directive has been replaced by the new 2003/4/C Directive with effect from January 1, 2005, the present chapter is still of interest, because beyond the technicalities of transposing a directive in national law, one can notice a different understanding in France and England in the role and aim of the right to environmental information. This different philosophy will most probably remain after the 2003 Directive comes into full force and thus, it is still interesting to examine the situation under the 1990 Directive. Although the UK Government has now transposed the new 2003 Directive with the Environmental Information Regulations 2004, the French one has not yet done so, so it would not have been correct to compare the 2004 Regulations to the French system, as they are not equivalent.<sup>886</sup> Thus, in this chapter we focus on a comparison of the French and English legal provisions that have transposed the 1990 directive, even if the English provisions (the Environmental Information Regulations 1992) are no longer in force. Sometimes, however, references will also be made to the new 2003 Directive and the Environmental Information Regulations 2004, for the sake of clarity and completeness.

Various studies have already dealt with the transposition of the Environmental Information Directive in the legal systems of member-states,<sup>887</sup> though all these studies are outdated where French and English law are concerned, since they do not take into consideration the legislative modifications that have taken place in both countries during the last three years. Moreover, they do not examine in a comparative perspective the English and French transposition of the Directive; they just describe each legal system separately without making any comparisons.

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<sup>886</sup> See *inter alia* Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law*, Oxford 1992, Ch. III: The Method of Comparative Law.

<sup>887</sup> Ralph E. Hallo (ed.), *Access to Environmental information in Europe – The Implementation and Implications of Directive 90/313/EEC*, Kluwer Law 1996, and also M. Prieur (dir.), *Le Droit à l'information en matière d'environnement dans les pays de l'Union européenne*, Presses Universitaires de Limoges, Limoges 1997 (in French).

Both in France and in England the transposition of the 1990 Environmental Information Directive introduced for the first time in national law a specific right to access environmental information. The Directive was transposed in France in 2001, almost ten years after it was transposed in England in 1992.

In this chapter, we shall not repeat in every detail the provisions of English law, since they have already been described previously and in any case are now repealed. Instead we shall analyse the transposition of the 1990 Directive in France and then try to show the differences of the French approach with the English one.

## **A) Comparative overview of the French and English legal systems**

Before examining in detail the difference between the legal rules regulating access to environmental information that operate in France and England, it is important to analyse the two different legal systems that are practiced in both countries, civil law in France and common law in England, as this can help understand why the rules on environmental information are different.

### **1) Civil law, common law and mixed legal systems.**

Civil law systems can be defined as legal systems of countries with a private law predominantly based or influenced by Roman law, as codified in the *Corpus Juris Civilis* of Justinian.<sup>888</sup> Civil law has been subsequently developed in Continental Europe and around the world, especially through the French Civil Code of 1804, which was used as a source of inspiration for other Civil Codes (like the German BGB). Civil law is highly systematized and structured and relies on declarations of broad, general principles, often ignoring the details. Also, although civil law sources apply to private law, the civil methodology and way of thinking permeates the whole legal system. It is important to note that today the majority of EU member states follow the civil law tradition and thus share the main characteristic of civil law: their law is extensively codified. Of the 25 EU member states, only 4 are common law countries: the UK (as far as England and Wales are concerned), Ireland, Cyprus and Malta.

Common law is the legal tradition that evolved in England from the 11th century onwards.<sup>889</sup> Common law is the foundation of private law, not only for England, Wales and Ireland, but also in most countries, which first received that law as colonies of the British Empire and which, in many cases, have preserved it as independent States. Its principles appear for the most part in reported judgments, usually of the higher courts, in relation to specific fact situations arising in disputes which courts have adjudicated. One of the main characteristics of the common law is that it is usually much more detailed in its prescriptions than the civil law.

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<sup>888</sup> See William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*, (2000) 60 *Louisiana Law Review* 677-738, at 683.

<sup>889</sup> *Ibid.*, at 684.

Alongside common law and civil law legal systems, there are some that can be described as mixed legal system, which are the ones in which the law in force is derived from more than one legal family. For example, the EU legal system was initially based on the civil law system (and especially French and German law). However, since the UK joined in 1973, it has been influenced by Common law, and thus could be referred to as a mixed legal system.

## **2) Main differences between common law and civil law legal systems**

Examining the main differences between common law and civil law legal systems is important, as these also reflect the differences between the French civil legal system and the English common law legal system.

### **a) Extensive and integrated codifications**

Civil law systems can be identified through the presence of Codes (like the civil code, commercial code, criminal code and others) containing the legal rules that are applicable. On the contrary, in a common law system, the applicable legal rules are to be found in “precedents”, which are judicial decisions that create the law.

Although, in common law countries there are Codifying statutes which seem identical to civil law codes, the basic difference is that most civil law codes are comprehensive documents laying down general rules applicable to the whole of a legal area (i.e. the principles found in the Civil Code are applicable to all private law). They are comprehensive general provisions that can be complemented by subsequent more detailed legislation or by case law.

However, since the UK has joined the EU, EU legislation has had to be incorporated into English law, and since European laws are most of the times general in nature, this has brought the English legal system closer to the French one.

### **b) Different mode of legal thinking**

This is probably the most important difference, as it can lead to incomprehension between lawyers from a common law and a civil law background. The civil law is marked by a tendency to use abstract legal nouns and to have a well-defined system of describing different areas of law. It can be said that civil law is more based on logic than experience. The writings of legal authors are also recognised as a source of law in civil law countries, whereas in the common law it is still not a source of law, although things seem to be changing.

This is, of course, in great contrast to the situation in the common law legal family, which is based more on experience than logic, since law has been created by judges. As a consequence, civil lawyers tend to think deductively, whereas common law lawyers think empirically. However, these differences have been shrinking, probably because of the influence of European law.

### **c) The distinction between public and private law: the existence of a special administrative court system.**

Another difference between the two legal systems is the distinction between public and private law.

Public and private law have been separate for a long time in the civil law and administered in different courts. For example in France, almost all public law cases are heard in specialised administrative courts. Although there has always been administrative law in England, the recent blossoming of this branch of the law may well be due to some extent to the educational function of Community law. The concepts, for example of legitimate expectation and proportionality as remedies in English public law, come from France and Germany respectively and were first adopted by EU law before being incorporated into English Law.

### **d) Style of drafting of laws**

Civil law codes and statutes are concise, stating principles in broad terms, while common law statutes are precise and are very detailed and lengthy.

This difference in style is linked to the function of statutes. In civil law countries statutes need to be broad because they are intended to be exhaustive. On the contrary, in common law countries statutes must be precise and detailed, because the common law courts restrict rules to the specific field of the law they are intended to cover.

### **e) The interpretation of statute law.**

In the civil law the doctrine of separation of powers, when taken to an extreme, led to the conclusion that courts should be denied any interpretive function and should be required to refer problems of statutory interpretation to the legislature itself for solution. The legislature would then provide an authoritative interpretation to guide the judge. In this way, defects in the law would be cured, courts would be prevented from making law, and the state would be safe from the threat of judicial tyranny.

Nevertheless in practice, judges in civil law countries have departed from this traditional understanding of their role towards statutes, and have been interpreting statutes in light of the changing social needs by filling gaps and resolving conflicts in the legislative scheme. Like common law judges, civil law judges have been adapting the law to changing social conditions.

### **f) Different sources of law: doctrine and jurisprudence**

A major difference between the civil law and common law is that in civil law priority is given to doctrine (writings of legal scholars) over jurisprudence (case-law).<sup>890</sup>

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<sup>890</sup> *Ibid.*, at 701.

### **g) No rule of *stare decisis* in civil law countries**

In the civil law world, court decisions are not binding on lower courts but may be looked to in order to identify trends, particularly in areas where there is scarce legislation. For example, in French administrative law the decisions of the French *Conseil d'Etat*, the highest administrative courts, are very important as there is no administrative law code. On the contrary, the English doctrine of *stare decisis* compels lower courts to follow decisions rendered in higher courts, referred to as “precedents”.

### **3) Influences between the common law and the civil law systems and the European Union Legal system**

Today, it can be contended that there is a convergence under way in the EU between the common law and civil law legal systems, fuelled by the influence of EU law which applies in the same manner in all EU states regardless of their legal system.

These influences are evident in the style of judgments of the European Court of Justice. The older judgments of the European Court are in the short, concise style of the French Courts, whereas later judgements are more lengthy and refer to previous case law, similarly to judgements in common law countries and in England.

### **B) The place granted to the community system of environmental information in English and French law compared to the general right of access to information held by public authorities.**

One of the major differences between France and England with regard to the legal rules resulting from the transposition of the 1990 Information Directive, is the pre-existence or not of general freedom of information legislation prior to the transposition of the Directive.

In France, there had been for a long time a tradition of transparency when the 1990 Information Directive was adopted. On the contrary, in the United Kingdom, the Directive was the first legal instrument to create a general right of access to the benefit of anyone, even if it was limited to information concerning the environment.<sup>891</sup> It was only in the year 2000 that the British legislator enacted general freedom of information legislation, which only entered into force on the 1<sup>st</sup> January 2005.

Consequently, the general right of access to administrative information is governed, both in France and in the United Kingdom, by specific legislative provisions. However, in France, these

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<sup>891</sup> Of course there existed a multitude of specific legislative provisions that grant access to specific pieces of information, like the provisions on various registers examined in the relevant chapter.



general freedom of information provisions include the right of access to information concerning the environment (subject to certain adaptations), while in England environmental information is detached from the general right of access to administrative information. We shall try to examine this difference, which is one of the most interesting aspects concerning the way in which the 1990 Information Directive was transposed in France and England and is still present today, even after the enactment of the 2003 Directive.

### **1) In France: the use of a common set of rules regulating both the general right of access to information and the environmental one.**

In France, contrary to the United Kingdom, a general right to information had already been adopted for more than ten years when the Directive 90/313/EEC was enacted. Thus, it was considered that because general freedom of information legislation was already in place, there was no need to carry out any specific transposition in order to comply with the aims of the Directive.

France was nevertheless obliged to adapt its internal legislation to the Community requirements in 2001, the Commission having started proceedings in front of the Court of Justice of the European Communities.<sup>892</sup>

#### **a) The general right to access information held by public authorities.**

The French Act of Parliament which regulates access to administrative information is Law n° 78-753 of 17 July 1978<sup>893</sup> which sets out the principle that any citizen can have access to any administrative document (except those considered as exempt information), without having to justify any personal interest. This law is also supplemented by a series of Decrees and Ministerial Decisions taken for its application and regulating certain procedural details without modifying the principles posed by the law.<sup>894</sup>

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<sup>892</sup> These proceedings concern the *Commission v. France* case (see above n.184) which was lodged at the Court Registry on 13 June 2000.

<sup>893</sup> Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public, Official Journal of the French Republic (JO) 18 July 1978, page 2851. A recent reform was carried out by the law n°2000-321 of 12 April 2000, Loi no 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations, JO 88 du 13 avril 2000, page 5646. The French Official Journal is available online at <http://www.legifrance.gouv.fr>

<sup>894</sup> These are : Décret n° 78-1136 du 6 décembre 1978 relatif à la Commission d'accès aux documents administratifs ; Décret n° 79-834 du 22 septembre 1979 portant application de l'article 9 de la loi n° 78-753 du 17 juillet 1978 en ce qui concerne la liberté d'accès aux documents administratifs ; Décret n° 88-465 du 28 avril 1988 relatif à la procédure d'accès aux documents administratifs ; Décret no 2001-493 du 6 juin 2001 pris pour l'application de l'article 4 de la loi no 78-753 du 17 juillet 1978 et relatif aux modalités de communication des documents administratifs ; Arrêté du ministre du budget du 29 mai 1980.

These rules are applicable to the State, local authorities, Publicly-owned companies, and public or private bodies in charge of public services.

The law distinguishes two categories of documents: communicable documents and non-communicable documents. It should be noted that even though the law speaks about documents, these can be in any form (written, oral or computerised) thus the term document is equivalent to the term information, used in England.

The documents that can be communicated are enumerated in the law in a non-exhaustive way. These are all files, reports, studies, official reports, statistics, directives, instructions, circulars, notes and ministerial answers which comprise an interpretation of the substantive law or a description of the administrative procedures, opinions, forecasts and decisions.<sup>895</sup>

With regard to the non-communicable documents, there are two categories of such documents: confidential documents, and personal documents.

Confidential documents are enumerated in part I of article 6, and are totally excluded from any sort of communication because they concern matters related to the correct operation of public authorities or public interests, like national defence, public safety and in a general way, with confidential matters.<sup>896</sup> The authorities holding any of these documents are obliged to keep them secret and not to disclose them. It is interesting to note that before a reform operated in 2001, public authorities could exercise discretion over disclosing this kind of information. Thus, the system became less liberal after 2001.<sup>897</sup>

As for personal documents, these can only be communicated to people who have an interest in them. These are documents whose communication would undermine private life, the medical secrecy and commercial and industrial secrecy, any personal files, as well as documents carrying an evaluation or a value judgment on an identifiable individual

Parallel to the creation of a general right of access to administrative documents, the law of 17 July 1978 created a new independent administrative body, the *Commission d'Accès aux Documents Administratifs* (CADA), competent for hearing appeals against refusals to disclose documents under this law. We shall examine this institution in detail later on.

## **b) The right to access information relating to the environment.**

In France, contrary to England, there was not, until very recently, any specific set of legal rules transposing Directive 90/313/CEE and creating a general right to access information relating

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<sup>895</sup> « tous dossiers, rapports, études, comptes rendus, procès-verbaux, statistiques, directives, instructions, circulaires, notes et réponses ministérielles qui comportent une interprétation du droit positif ou une description des procédures administratives, avis, prévisions et décisions ». According to article 1 of the Law of 17 July 1978.

<sup>896</sup> For details see *infra*, 3) Categories of information exempt from disclosure: the distinction between absolute and discretionary exclusions.

to the environment. The general freedom of information legislation also covers information concerning the environment, as any other kind of information.

It was only in 2001 that the French law of 1978 underwent some adaptations in order to conform to the requirements of the 1990 Environmental Information Directive.

The first legal instrument that mentions a right to access information concerning the environment is the article L110-1 of the Environmental Code (*Code de l'Environnement*). This article states that the protection of the environment in French law is based on the "... principle of participation, according to which each one has access to information relating to the environment, including those relating to dangerous substances and activities, and the public is associated in the development process of the projects having a significant incidence on the environment or regional planning".<sup>898</sup> This provision (enacted in 1995) establishes a principle which appears to lack any binding effect, or in any event, which does not appear to have any great practical applications.

This sole legal assertion of the right to environmental information in such general terms, combined with the existence of the general freedom of information law of 1978, seemed to the European Commission insufficient to constitute a correct transposition of directive 90/313. As a consequence, the Commission brought enforcement proceedings in front of the Court of Justice of the European Communities for incorrect transposition of the 1990 Environmental Information Directive, and France had to enact specific legal provisions transposing the Directive, more than ten years after the end of the time limit provided by the Directive for its transposition in national law.<sup>899</sup>

It is title IV of the Ordinance No 2001-321 of 11 April 2001<sup>900</sup> which inserts a new chapter in the Environmental Code entitled: "Right to access information relating to the environment" and contains only one article, article L 124-1, that expressly transposes the Environmental Information

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<sup>897</sup> See on this point see Y. Gounin, L. Lалуque, *La réforme du droit d'accès aux documents administratifs*, Actualité Juridique – Droit Administratif, 2000, p. 486.

<sup>898</sup> « ... principe de participation, selon lequel chacun a accès aux informations relatives à l'environnement, y compris celles relatives aux substances et activités dangereuses, et le public est associé au processus d'élaboration des projets ayant une incidence importante sur l'environnement ou l'aménagement du territoire ». This text first appeared in the Loi 95-101 du 2 février 1995 relative au renforcement de la protection de l'environnement, JO no. 29 du 3 février 1995 p. 1840.

<sup>899</sup> As mentioned in the Rapport au Président de la République relatif à l'ordonnance n° 2001-321 du 11 avril 2001 relative à la transposition de directives communautaires et à la mise en œuvre de certaines dispositions du droit communautaire dans le domaine de l'environnement, JO du 14 avril 2001. This report presented to the French President and concerning the transposition of the Information Directive explicitly mentions that the Commission had brought an action for failure to transpose in front of the ECJ: « *La conformité des mesures nationales de transposition de la directive du 7 juin 1990 précitée fait l'objet d'un contentieux engagé par la Commission européenne devant la Cour de justice des Communautés européennes, qui sera bientôt clos.* »

<sup>900</sup> Ordonnance no 2001-321 du 11 avril 2001 relative à la transposition de directives communautaires et à la mise en œuvre de certaines dispositions du droit communautaire dans le domaine de l'environnement, JO no. 89 du 14 avril 2001 page 5820. Ordinances (*ordonnances*) are pieces of legislation enacted by the French President in cases of urgency and that have to be retrospectively approved by an Act of the French parliament.

Directive in French law. This article is divided into three parts and mainly refers to the provisions of the law of 17 July 1978, while laying down some adaptations.<sup>901</sup>

The first part of this article mentions that access to information relating to the environment and held by public authorities having responsibilities as regards the environment, is governed by the provisions of the law of 1978 concerning the general right to access information held by public authorities, subject to the provisions mentioned in the two other parts. It is also interesting to note that no definition of the term “information relating to the environment” is given.<sup>902</sup>

The second part of article L 124-1 of the Environmental Code, as we shall see in detail later on, mentions the categories of documents excluded from communication.

The third part of the article explicitly provides for partial communication of documents. When it is possible to take out from a document the data that is exempt from communication, then the rest of the document should be communicated.

It is therefore clear that the French legislator did not create as in England a specific set of rules covering information relating to the environment, but rather made clear that the scope of general freedom of information legislation applied to environmental information, while making some necessary adaptations in order to conform to the Community requirements and thus to avoid a negative ruling by the Court of Justice of the European Communities. However, France eventually lost its case, as the ECJ ruled that the French Government had failed to transpose the 1990 Directive in the time limits provided for.<sup>903</sup>

## **2) In England: the overlap between the environmental information regulations and general freedom of information legislation.**

As we examined before, the first piece of legislation which created a right of access to information relating to environmental matters, was the specific regulations that transposed in

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<sup>901</sup> Article L124-1 of the French Environmental Code reads as follows: “I. - L'accès à l'information relative à l'environnement détenue par les autorités publiques ayant des responsabilités en matière d'environnement s'exerce dans les conditions et selon les modalités définies au titre Ier de la loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal, sous réserve des dispositions ci-après.

II. - Ne sont pas communicables les informations relatives à l'environnement dont la consultation ou la communication porterait atteinte aux intérêts protégés énumérés aux sept premiers tirets du I de l'article 6 de la loi susmentionnée du 17 juillet 1978.

L'autorité peut refuser de communiquer une information relative à l'environnement dont la consultation ou la communication porterait atteinte :

1° A l'environnement auquel elle se rapporte ;

2° Aux intérêts d'un tiers qui a fourni l'information demandée sans y avoir été contraint par une disposition législative, réglementaire ou par un acte d'une autorité administrative, et qui ne consent pas à sa divulgation.

III. - Lorsque la demande d'accès porte sur une information relative à l'environnement qui contient des données relatives aux intérêts protégés en application du II et qu'il est possible de retirer ces données, la partie de l'information non couverte par les secrets protégés est communiquée au demandeur.”

<sup>902</sup> On this point see *infra*.

<sup>903</sup> *Commission of the European Communities v French Republic*, Case C-233/00, 26 June 2003, Official Journal C 184, 02/08/2003 p. 2, discussed in detail in the previous chapters.

English law Directive 90/313/EEC, namely the Environmental Information Regulations 1992. Then came the Freedom of Information Act 2000, which created a right for any person to access information held by public bodies.

The Freedom of Information Act 2000 is applicable to all the information held by public bodies or bodies considered as equivalent by the Act, with the exception of information contained in the categories excluded from disclosure.

As we have seen, section 39 of the FOIA provides that information included in the field of the specific regulation on access to information concerning the environment made under section 74 and adopted in order to transpose in national law the provisions on environmental information of the Aarhus Convention, is exempt and thus cannot be disclosed under the Act. The aim of the legislator is to prevent, as much as possible, any overlap between the Act and the Environmental Information Regulations 2004. However, the FOIA preserves a subsidiary role on the matter.<sup>904</sup> This is because the exemption concerning information relating to the environment is not an absolute exemption and thus public authorities must carry out a balancing test between the public interest of disclosure and the public interest of secrecy, before taking any decision. If the information asked for is communicable under the terms of the environmental information regulations, then public authorities will have to disclose it in accordance with these regulations and the aforementioned balance test of the Freedom of Information Act 2000 will not be applied.<sup>905</sup> On the other hand, if the information asked for cannot be communicated pursuant to the regulations, then the authorities holders of information will still have to carry out this balancing test under s. 2 of the 2000 Act and according to the result of it, to proceed or not with disclosure. However, since the exemptions under the Regulations are narrower than under the FOIA and since the weighing of the public interest is similar, it is hard to see in which cases a request could be refused under the Regulations but not under the FOIA.

In any case, section 39 of the FOIA does not completely exclude the applicability of the Act when environmental information is concerned, thus allowing for an overlap to exist between the Act and the applicable Environmental Information Regulations 2004.

It is therefore interesting to see that in French law there are no dangers of any overlap, since access to information, both environmental and non-environmental, is governed by a single piece of legislation: the law of 1978 as amended, to which the specific rules on environmental information refer to.

Consequently, the French solution demonstrates that it is not necessary for the correct transposition of the Information Directive to provide for two separate legal instruments and that the Directive could have been transposed through the provisions of the Freedom of Information Act 2000. This would have made the system less complex and would have eliminated any danger of overlap.

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<sup>904</sup> See Paul Stanley, *Current Law Statutes*, Vol. 2, 2000, London : Sweet & Maxwell, 2000, p. 36-50.

<sup>905</sup> *Ibid.*

The English approach can be explained by the fact that in Great Britain, the governmental authority responsible for the right to environmental information, is the Department of the Environment, Food and the Rural Affairs (DEFRA). However, it is the Home Office which laid before Parliament the Freedom of Information Bill which resulted in the Freedom of Information Act 2000. DEFRA for its part insisted that information concerning the environment would have to be completely excluded from the applicability of the Act, because the Act was considered as too limited compared to the Environmental Information Regulations.<sup>906</sup> In consequence of these views, section 39 of the Act was adopted, which creates the aforementioned overlap.

### **C) The different definition of information relating to the environment in France and England.**

It has been shown that in France there is only a single legal instrument that governs access to information, since the legislative provisions adopted in order to transpose Directive 90/313/EEC almost entirely refer to the provisions of the general freedom of information legislation. In England, on the contrary, the application of the Environmental Information Regulations almost totally exclude the application of the Freedom of Information Act 2000.

Consequently, it is interesting to examine how in these two legal systems the concept of "information relating to the environment" was transposed in each national law since the existence of such information in the hands of a public authority, conditions the application of the specific provisions on access to environmental information.

#### **1) In France: the total absence of any definition.**

French law is characterised by a total absence of a definition of the concept of information relating to the environment. Indeed, article L124-1 of the Environmental Code refers only to "access to information relating to the environment",<sup>907</sup> without giving any additional explanation on the extent and the contents of this concept.

This absence of any definition is explained by the fact that in France such a definition was not considered to be necessary. As the Report presented to the President of the Republic before the adoption of this Ordinance states, such a definition is not necessary because the concept of environment is self-explanatory and that in the event of any difficulties, it will be interpreted in the

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<sup>906</sup> According to Daniel Wilsher, *Right to environmental Information : Recent Developments and Future Prospects*, 2001 *European Public Law* 671, p. 692-3.

<sup>907</sup> In French: l'accès à l'information relative à l'environnement.

light of the directive.<sup>908</sup> However, the absence of a precise definition will certainly create difficulties in practice, since it will be necessary to determine whether the specific exemptions to disclosure which only apply to information relating to the environment are applicable or not.<sup>909</sup>

## **2) In England: the use of the definition given by the Directive.**

As we analysed before, the definition of environmental information adopted by the Environmental Information Regulations almost completely repeats the terms of the definition given by the Environmental Information Directive. This true for both the 1992 and the 2004 Environmental Information Regulations. This It is thus clear that, contrary to France, in England the government wanted to stick as close as possible to the definition given by the Directive.

A possible explanation for this might be that a clear and precise definition of the concept of information relating to the environment is necessary in the English context, where contrary to the French system, two different set of rules on access to information coexist which compete with each other, since the application of the environmental information rules excludes the application of general freedom of information legislation. In such a context, the extent of the concept of information relating to the environment must be clear in order to make possible the delimitation of the field of application of each set of rules. Consequently, it is interesting to note that a broad definition of the concept of information relating to the environment, would lead, in the English system, to an increase of the situations where the Environmental Information Regulations are applicable, and automatically to a decrease of the applicability of the Freedom of Information Act 2000. This is also the case *vice versa*.

In the English system, where specific regulations on environmental information exclude the general Act, the adoption of the French solution (i.e. the choice not to define the term "environmental information"), would have led to a great uncertainty with regard to the applicable legal rules.

On the contrary, in France, owing to the fact that there is only one set of rules, always the same rules will be applicable (subject to certain minor distinctions with regards to information excluded from disclosure) regardless of a broad or narrow definition of environmental information.

### **D) The transposition in French and English law of the procedural provisions of Directive 90/313/EEC.**

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<sup>908</sup> On this Report see *supra* n. 899.

<sup>909</sup> On this point see *infra*, 3) Categories of information exempt from disclosure: the distinction between absolute and discretionary exclusions.

It is also interesting to compare how the provisions of the 1990 Information Directive concerning various procedural aspects of the exercise of the right to access environmental information have been transposed into French and English law, since they present striking differences.

### **1) The payment of the costs of disclosure: the difficult question of the reasonable amount.**

Both Directives 90/313 and 2003/4 provide that the States can require any communication of information to be conditional on the payment of a sum, which cannot exceed a "reasonable amount". It is undoubtedly a very vague term that can be interpreted in various ways.

The solution adopted by the English legislator in the Environmental Information Regulations 1992 is simple: it is not to define the term of reasonable amount, but to simply provide that public authorities can require any communication of information to be conditional on the payment of the reasonable costs caused by any disclosure of information. Consequently, it can be noted that in England the problem of the definition of this term is not solved but is simply 'passed over' to the public authorities dealing with requests to access information. As already mentioned, this solution has already led in different appreciations between various authorities of what sum can be deemed as reasonable. As seen, the position is the same in the Environmental Information Regulations 2004.

In France, quite to the contrary, the costs are fixed in a centralised way by the government. The law of 17 July 1978 provides in its article 4 that the costs of reproduction of the required documents are to be entirely covered by the applicant and that these costs cannot exceed the cost of reproducing the documents. This article also provides that the details of this provision will be regulated by a Decree. The decree No 2001-493 of 6 June 2001<sup>910</sup> and taken for the application of article 4 of the law, provides that the expenses corresponding to the cost of reproduction and, if necessary, for posting any documents "can" be billed to the applicant and that public authorities can ask for an advance payment. This decree also provides that a Ministerial Decision (*arrêté ministériel*) will determine the maximum amount of these reproduction costs, which cannot include costs of personnel time, but only the expenses of reproduction on paper or electronic means. This Ministerial Decision<sup>911</sup> uniformly fixes the cost for each photocopied page at 0.18 euros per page, at 1.83 euros for computer disks and at 2.75 euros per Cd-roms. It should be noted that the French *Conseil d'État* has accepted that it is lawful for public authorities to charge for postal costs and to

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<sup>910</sup> Décret no 2001-493 du 6 juin 2001 pris pour l'application de l'article 4 de la loi no 78-753 du 17 juillet 1978 et relatif aux modalités de communication des documents administratifs. J.O 133, 10 Juin 2001 page 9246.

<sup>911</sup> Arrêté du 1er octobre 2001 relatif aux conditions de fixation et de détermination du montant des frais de copie d'un document administratif, J.O n° 228 2 octobre 2001 page 15496



require advance payment of the costs.<sup>912</sup> This clear solution has the merit to avoid diverging interpretations of the term "reasonable amount" and thus avoids the disadvantages of the English system.

The French solution, compared to the English one is simple and clear, though it does not take into consideration the fact that for some public authorities the cost of providing the same amount of information might be greater than for others, and that some disclosures might cost more than others.

## **2) Appeals procedures: the choice between an administrative or a jurisdictional appeal.**

Concerning appeals against rejections of requests for information, the 1990 Directive provided that the dissatisfied applicants had to be allowed to bring a legal or administrative action against any decisions, in accordance with the national legal order on the matter. The Directive thus allowed the States to choose between organising an appeal procedure in front of an administrative body (an administrative appeal) or in front of a judge (a jurisdictional appeal). The new Directive on the contrary has removed this choice and obliges the States to organise both an administrative procedure as well as a jurisdictional one.

In England the Environmental Information Regulations 1992 did not expressly mention any specific appeals procedure. Therefore, under these Regulations the only possibility of appeal was the traditional jurisdictional procedure of judicial review. Thus, the English government opted by its silence for the existence of a jurisdictional appeal only, under the 1992 Regulations.

Quite to the contrary in France, there always existed both an administrative appeal procedure and a jurisdictional one. Administrative appeals are brought in front of the *Commission d'Accès aux Documents Administratifs* (Commission for the Access to Administrative Documents, hereinafter CADA)<sup>913</sup> which is an independent administrative authority being competent for the correct application of freedom of information laws. Anyone confronted with difficulties of communication, or any public body confronted with a request for communication, can seize the CADA and ask for an opinion on the communicability or not of the required document or on the methods of its communication. The opinions rendered by the CADA are not obligatory for public authorities, which are free to ignore them.<sup>914</sup> However individuals planning to initiate legal

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<sup>912</sup> Conseil d'Etat, decision N° 237203, 9ème et 10ème Sous-Sections reunites, 13 décembre 2002, Inédit au Recueil Lebon. Available from <http://www.legifrance.gouv.fr>

<sup>913</sup> For more details on the role and powers of this administrative body, see its website at <http://www.cada.fr>. See also the article by de J-P Costa, *La CADA*, *Revue Française de Droit Administratif*, 1996, page 184 (in French).

<sup>914</sup> It should be noted that even if public authorities are legally free to take into consideration or not CADA's opinions, as a matter of policy they usually do follow them. For instance between 1995-1998 74.3% of its

proceedings in the administrative courts must first ask the CADA to render an opinion, otherwise their appeal is inadmissible. Once the CADA has issued its opinion and independently of its contents, in favour or not of disclosure, if the public body refuses to communicate a document, an appeal is possible in front of the administrative judge.

While this solution seems very different to the English one, the new 2004 Environmental Information Regulations, adopt the administrative procedure provided by the Freedom of Information Act 2000: the possibility of appealing to the Information Commissioner. The powers of the Information Commissioner are very wide, since contrary to the French CADA which only renders non-mandatory opinions, it can substitute its decision for that of the public authority concerned. Moreover, the Act grants to the Commissioner very strong powers of investigations and even allows him to bring criminal actions against public authorities that fail to execute its decisions. A jurisdictional appeal procedure is also instituted against the decisions of the Information Commissioner in front of the Information Tribunal, a special administrative tribunal. A further appeal is possible in front of the High Court on points of law. In this case, it is the traditional procedure of the judicial review which is applicable.

Consequently, even if today in England as in France there is both an administrative appeal procedure as well as a jurisdictional one, the English administrative procedure is different from the French one, since the decisions taken within this framework in France are not mandatory for public bodies.

### **3) Categories of information exempt from disclosure: the distinction between absolute and discretionary exclusions.**

The right to access information does not apply to all the information held by public bodies. The principle posed by the Directives is that all information is communicable except information covered by a specific exemption to disclosure.

As we have already examined, the 1990 Directive contained in its article 3, paragraph 2, a list of reasons being able to justify a refusal of communication (mainly state secrets and private life secrets). The essential point is that the 1990 Directive indicated that the states "can" reject a request for information when it involves information considered to be exempt from disclosure. Thus, member states remain free to limit or not on these grounds the right to information.

Both France and England had adopted all of the reasons for refusal present in the 1990 Directive, even if they were formulated in a different way in their respective national legislation. But what is interesting to note is that both countries created two types of exemptions: absolute

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opinions were followed by public bodies and 65.7% in 2000 (Source: *Rapport d'activité de la Commission d'Accès aux Documents Administratifs de juin 2001*, page 73, available on [www.cada.fr](http://www.cada.fr)).

exemptions and discretionary exemptions, a distinction not encountered in the 1990 Directive. The difference is due to the discretion granted to public authorities. When these bodies receive a request for access to information in relation to any discretionary exemption they are not obliged to refuse disclosure but they have discretion as to disclose or not. On the contrary, concerning absolute exemptions, they are bound to refuse disclosure.

Even if the two examined countries had adopted these two categories of exemptions to communication, an attentive examination of the exceptions contained in each category shows that the English system was more liberal.

**a) In France: a majority of absolute exemptions and a classification of exemptions completely different from the English one.**

The second part of article L 124-1 of the Environmental Code distinguishes the exceptions to communication, as in the English Environmental Information Regulations 1992, in two categories. The first category includes information exempt from any sort of disclosure (absolute exemptions). The article states that these exceptions are the ones provided in the law of 1978 on the general right to information. They are contained in article 6 of the law of 1978, and with the exception of the exclusion of "secrets protected by the law", (considered by the Commission and the ECJ as extending to the discretion of the national legislator the right to access information) are in the field of the exceptions expressly mentioned in the 1990 directive. These exclusions cover information concerning the currency; public credit; commercial and industrial secrecy; research of tax or customs offences; secrecy of deliberations of the Government and the authorities responsible for the executive power; safety of the State; public safety or personal safety and the control of the foreign policy of France.

It is interesting to note that while these exceptions are classified in France in the category of absolute exemptions, in England they were all classified in the category of discretionary exemptions. Thus the English system would have allowed in certain cases the disclosure of information related to these exclusions.

The second category of exemptions provided by article L124-1 relates to data provided by a third party without being legally obliged to do so and for which he has not granted consent for disclosure, and also to information whose disclosure could cause harm to the environment to which it refers. In these two cases, public bodies "can" allow disclosure (discretionary exemptions). The French legislator thus grants to the authorities holding this type of information discretion whether to communicate or not, but does not mention, as in the English Environmental Information Regulations 1992, some criterion which could help in the exercise of this discretion.

It is interesting to note that the French solution is totally opposed to the one adopted by the Environmental Information Regulations 1992, **which classify these two same exemptions as absolute exclusions**. Thus the English government wanted to protect in an absolute manner the data provided by third parties and the environment itself, by denying any possibility for public bodies of communicating these kinds of information.

**b) Exceptions to disclosure under the Environmental Information Regulations 1992: a greater number of discretionary exemptions.**

As we have seen before, the Environmental Information Regulations 1992 distinguish two categories of information excluded from communication.

The first category, contains information which is not to be disclosed in any case (absolute exemptions). It consists of personal information contained on files relating to an individual; information whose disclosure would have as a consequence the breach of a duty of confidentiality; information provided by third parties without being legally bound to do so and finally information whose disclosure could harm the environment.

The second category, contains information whose disclosure is possible at the discretion of the public body holding it (discretionary exemptions). It consists of information concerning international relations; national defence or public security; legal or other proceedings; confidential deliberations of any relevant person or internal communications and information in the course of completion.

It is clear from what has been said, that the 1992 English system of environmental information contained less exceptions to disclosure than the French system. Even today, the Environmental Information Regulations 2004 are very liberal, as they only contain discretionary exemptions, all subject to a public interest test.

**E) Conclusion: the different approach of each national legal system, analysed under the prism of environmental protection.**

In conclusion, after having examined the way in which the 1990 Environmental Information Directive was transposed in English and French law, one arrives at two significant conclusions. These conclusions, are still valid today, even after the enactment of the 2003/4/EC Directive.

**1) The use of a distinct set of legal rules from the ones establishing a general right to access information: towards a better protection of the environment in England than in France.**

An examined before, the legal basis of the Information Directives, articles 174 and 175 of the EC Treaty, show that the purpose of these directives is to increase environmental protection. This legal basis of the right to access to environmental information is the fundamental element, which distinguishes the right to environmental information from its general equivalent. *A priori*, one could estimate it is merely a formal difference.

However, even if in both cases information obtained on the basis of either regime (either the one on environmental information or the general one) can be used by its holders in a way that will protect the environment, the existence of legal rules specific to environmental information is a better guarantee for environmental protection than the sole existence of legislation on a general right to access information held by public bodies. This is due to the fact that when national judges will be asked to interpret the national provisions founded on the Information Directives, they will have to use the provisions of articles 174 and following of the EC Treaty and thus will be brought to adopt an interpretation of national law in conformity with the aim encompassed by the Directive: environmental protection. Thus, between different possible interpretations of national legal rules transposing the Directive, they will have to choose the solutions which will be the most beneficial for the environment, even if they can lead to a restriction of the right to information itself. Such an approach would be unthinkable in respect of general freedom of information legislation which does not aim to protect the environment and which does not take it into account. The best illustration of this idea is the exemption from disclosure of information whose communication would rather cause harm to the environment to which it refers. First, it should be noted that such an exception does not exist in general freedom of information legislation (neither French nor English). Moreover, as examined before, there is a principle that exceptions to the right to access information must be interpreted in a restrictive way in order not to deprive this right of its substance. However, this specific exception which aims to protect the environment must be interpreted in a broad way since the substance of the environmental right to access information is the protection of the environment.

Consequently, it becomes clear that a specific right to access information applying only to environmental information allows a better protection of the environment than a general right to access information, as was the case in France at least till 2001. In France, the legislator waited until the Commission initiated legal action in front of the European Court of Justice before transposing Directive 90/313. This transposition, took place almost ten years after the time-limit fixed by the Directive.

Previously, the French government considered that the general law of 1978 was sufficient in order to transpose the objectives of Directive 90/313 into French law. However, the Commission had the last word.

If this French approach is analysed under the prism of environmental protection, one can conclude that the law of 1978 was insufficient to include the protection of the environment, since this general statute is not based on the specific provisions of the EC treaties on environmental protection. Moreover, the French system of 1978 does not contain an exemption for information whose disclosure is likely to harm the environment.<sup>915</sup> Therefore, the non-transposition of the Directive on environmental information during more than one decade, shows that environmental protection was regarded as less important than the establishment of a general right to access information. Interestingly, Roseline Letteron had considered in a article published in 1995,<sup>916</sup> that the community Directive on environmental information posed a threat to the French system of access to information as established in 1978, since the latter is more liberal than the Directive. This point of view demonstrates an attitude according to which the existence of a general right to access information should prevail over environmental considerations.

On the contrary, in England, the government estimated that environmental protection was to be the intrinsic element of any set of rules on freedom of information. As examined before, the legislator expressly refused to include access to environmental information in the scope of the Freedom of Information Act 2000, even if undoubtedly it would have been much simpler than having two distinct legal instruments overlapping each other. However, such a solution was justified in the name of environmental protection. This English approach, compared with the French attitude described above, shows how the right to environmental information always took precedence over the general right to access information and ultimately, how environmental protection was regarded as more important than the dedication of a right to access to administrative information.

Another illustration of this different approach, is the exemption from disclosure of information whose communication could harm the environment. In France, it is a discretionary exclusion, which means that public bodies can decide that the disclosure of information can override considerations of environmental protection. On the contrary, in England, since it was an absolute exemption in the Environmental Information Regulations 1992, it means that the protection of the environment must always take precedence over freedom of information. Indeed, one should not forget that in the context of Directive 90/313 the right to access information is just an instrument whose only reason of existence is environmental protection.

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<sup>915</sup> Of course it should be noted that since the Information Directive is EC law, the Act of 1978 would had to be interpreted in conformity with EC law principles, though having a specific transposition is a source of greater certainty.

<sup>916</sup> See Roseline Letteron, *Le modèle français de transparence administrative à l'épreuve du droit communautaire*, Revue Française de Droit Administratif, 11 (1) janv.-févr. 1995, p. 183 (in French).

This difference in approach still exists today in England, even after the enactment of the Environmental Information Regulations 2004, as it is DEFRA who is responsible for these Regulations and who has insisted (as seen before) that environmental information should be totally removed from the scope of the FOIA 2000.

## **2) A transposition more in conformity with the aim of the 1990 Directive in England than in France.**

The major disadvantage of the English approach is the increased complexity of the system, since there is no uniform legal instrument that governs access to information. Thus there is also a risk of overlaps between the Freedom of Information Act 2000 and the Environmental Information Regulations. This seems to be the view of Hughes *et al.* according to which *'there is much to be said for the practice of some countries of maintaining a single regime for access to information, whether environmental information or otherwise. Their implementation of the 1990 directive extended to all information and avoids the fragmented and over-complex range of regimes available in the UK'*.<sup>917</sup>

However, as a whole, the transposition carried out in England can be considered as being more in conformity with the aim of the Information Directive (which is environmental protection) than the French transposition, and this for several reasons.

Firstly, the English solution establishes a more liberal and more open right to access to environmental information than the French solution. Indeed, this right in England is limited by a smaller number of absolute exemptions, contrary to the French system where the great majority of exemptions to communication are absolute. So, public authorities receiving requests for communication maintain the possibility in the major part of cases to exercise their discretion to disclose the information required even if it is covered by an exemption.

Secondly, in France before starting legal action against a decision of refusal of disclosure, it is necessary first to seize the CADA, an administrative authority whose decisions are not mandatory. Consequently, even if the CADA decides in favour of the applicant, the public body concerned is free to persist in its refusal and the applicant must still go in front of the administrative judge to dispute the decision of refusal. So, the administrative procedure in front of the CADA only results in unnecessary delays before the aggrieved citizen can obtain a mandatory decision for the public body.

On the contrary, in the English system under the 1992 Regulations, the citizen can directly bring judicial review proceedings in the event of difficulties, a process which is faster and

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<sup>917</sup> David Hughes, Tim Jewel, Jason Lowther, Neil Parpworth, Paula de Prez, *Environmental Law*, 4th edition, London: Butterworths 2002, at page 160.

effective. In any case, after the enactment of the 2004 Environmental Information Regulations, even if an appeal to the Information Commissioner is obligatory before any appeal to a court of law, its decisions are mandatory for public authorities.

Thirdly, as already considered, the French system does not give any definition of the concept "environmental information" contrary to the English system which adopts the definition of the Directive. This creates a strong element of uncertainty with regard to the limits of the right to environmental information, going in the opposite direction wanted by the Community legislator which is to ensure an identical right to environmental information through the various Member States.

Thus, the national transposing measures of the 1990 Directive are more in conformity with the aim and the spirit of this Directive in England than in France. It remains to be seen whether this will change as far as the 2003 Directive is concerned, especially since we have identified many aspects of the Environmental Information Regulations 2004 that seem to breach the requirements of this new Directive. However, at the present time, it is too early to compare the French to the English solution, as there has been no transposition yet of the 2003 Directive in France.



## **GENERAL CONCLUSION**

### **A) Overview of our examination**

We have by now examined the legal rules that govern access to environmental information at UK level, EC level and international level.

In our introductory chapter we set the limits of our examination by stating that we would mainly examine the legal rules that grant a right to individuals to access information about the environment upon request. It was also made clear that, although our examination would include EC law, we would not analyse the EC law provisions on access to documents held by the EC institutions and thus, we would only examine the legal rules creating a duty for state public authorities to grant access to environmental information to any person requesting it.

Moreover, in the introductory chapter we have examined the historical evolution of the right to access to environmental information. Although, in the 19<sup>th</sup> century secrecy of information held by public bodies was the general rule, it has been gradually evolving towards the current position, which is that access to environmental information is not simply a right, but sometimes it can be a right of a Constitutional rank. We also examined the policy reasons in favour and against granting a right to access environmental information upon request to anybody. Our conclusion was that, although there are valid arguments for both sides, today national and international legislators undoubtedly favour openness, which is an indication that the arguments in favour of openness have prevailed, at least for the time being.

Then, in Chapter 1, which is the core chapter of the present work, we have explained in detail the substantive provisions of the legal instruments granting a right to access environmental information upon request: the Aarhus convention, the 2003/4/EC Environmental Information Directive on public access to Environmental Information and the Environmental Information Regulations 2004, which transpose into UK law this Directive and the information provisions of the Aarhus convention. It should be stressed that we have analysed in parallel the equivalent provisions of EC law, international law and UK law, thus avoiding repeating the identical parts of these instruments. This parallel examination of all legal rules that grant a right to access environmental information is also a feature that renders the present work original, since there is no other written work on the subject adopting such an approach. We also examined how the 2004 Regulations try to stay as close as possible to the equivalent provisions of the FOIA 2000.

In chapter 2 we have examined other specific UK enactments that grant a right to access specific kinds of environmental information. Our analysis has highlighted one problem: that although there is one general enactment regulating access to environmental information (the Environmental Information Regulations 2004), these specific enactments on registers containing

environmental information remain as they have not been repealed. So, although the 2004 Regulations prevail as they stem from EC law, this goes against the principle of legal certainty in EC Law,<sup>918</sup> as it is not always certain and clear which rules should be applied. This is especially true for registers which also contain information that is not environmental information. Moreover, we have highlighted the fact that the statutory provisions on registers serve a different function than the environmental information regulations, as they also create a statutory duty for some public authorities to collect and compile certain types of environmental information and place it on registers.

In chapter 3 we have examined the relevant ECHR articles which have been interpreted by the Court of Strasbourg as including a right to access environmental information. Thus, we examined how in some limited circumstances the right to access environmental information can be of a fundamental nature. We also concluded that the fundamental human right to access environmental information implied under certain ECHR articles, is different from the right to access environmental information enshrined in the Aarhus Convention and the 2003 Environmental Information Directive. This is because the former is a means to protect specific human rights (such as the right to life, to respect for private and family life and the prohibition of inhuman or degrading treatments), whereas the latter aims to protect the environment.

Finally, in chapter 4 we analysed how the 90/313/EEC Directive was transposed in French law, in comparison with England. We concluded that the English method of transposition has been more in conformity with the aim of the right to access environmental information: environmental protection. We also concluded that this important finding is also of some relevance today, even after the enactment of the 2003 Directive and the Environmental Information Regulations 2004.

### **B) The problem with trying to align the Environmental Information Regulations 2004 with the Freedom of Information Act 2000**

As we analysed before, the UK Government decided that the best way to implement the 2003/4/EC Directive was to align the transposing Regulations, as far as practicable, with the equivalent provisions of the FOIA 2000. This is why the procedural provisions on access to information and the appeal procedures of the FOIA 2000 were almost copied in the Environmental Information Regulations 2004.

In chapter 1 we found that the new Environmental Information Regulations 2004, by trying to stay as close as possible with the FOIA 2000, have adopted some provisions that are not compatible with the equivalent provisions of the Directive. This result is logical since the 2003 Directive is more liberal than the FOIA 2000.

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<sup>918</sup> See Juha Raitio, *The Principle of Legal Certainty in EC Law*, Kluwer Academic Publishers: Dordrecht, 2003.

However, although one can only agree that it is positive to align as much as possible the new Regulations with the FOIA for the sake of simplicity when applying these two regimes, this should not have been done at the expense of a correct transposition of the 2003 Directive. This not only leads to a violation of EC law, but also of the Aarhus Convention, as the 2003 Directive also aims to transpose this Convention in EC law. Of course, it could be argued that the inconsistencies with EC law that have arisen by trying to model the Environmental Information Regulations 2004 with the FOIA were unavoidable if one wanted to preserve the coherence and similarity between these two instruments. However, this approach fails to acknowledge the fundamental difference between a general access to information regime and one on environmental information, which is the fact that the latter aims to protect the environment. Thus, by trying to bring as close as possible the Environmental Information Regulations 2004 to the FOIA 2000, the Government failed to recognise, at least to some extent, that the protection of the environment might not be compatible with the provisions of the FOIA.

In consequence, if the Government had wanted to act in conformity with the central goal of Aarhus and the 2003 Directive, it should have tried to draft the 2004 Regulations as closely as possible to these instruments, instead of trying to adapt the access to information scheme created by the FOIA to the requirements of the 2003 Directive. Alternatively, the Government could have tried to modify the FOIA itself by bringing it to the Aarhus and the 2003 Directive's standards of openness. However, it has been sufficiently demonstrated this would have required opening up the files of public bodies even more, something that the Government has been constantly trying to avoid, despite many declarations to the contrary.

In any case, the current approach of the Environmental Information Regulations 2004 has the disadvantage of breaching in many points the 2003 Directive, thus allowing possible challenges in the Courts based on the principles of direct effect of EC law and of state liability for breaches of EC law.

### **C) The problem of legal complexity**

Another issue with the current regime on access to environmental information as stemming from the Environmental Information Regulations 2004, is that their correct application is extremely complex in practice because of the huge amount of other texts that have to be read in conjunction with these Regulations. These texts can be put into two categories: binding legal texts, and non-binding ones.

#### **1) Legal complexity because of overlapping legal instruments**

There is an issue that the current English regime on access to environmental information is extremely complex. This is first due to the Environmental Information Regulations 2004 themselves. These Regulations cannot be read independently of the FOIA 2000, because of the constant references to the relevant sections of this Act that have to be applied under the Regulations, either with or without modifications. To this extent, the draft Environmental Information Regulations issued by the Government in 2002 were different, because instead of containing a reference to the section of the FOIA that is also applicable under the Regulations followed by the necessary modifications (as in the 2004 Regulations), they repeated these sections in the Regulations with all modifications incorporated in the text. So, the draft 2002 Regulations could have been used as a sort of ‘codifying statute’ without the need to constantly refer back to the FOIA in order to understand each provision, as in the Environmental Information Regulations 2004.

Moreover, the 2004 Regulations have also to be read in conjunction with the 2003 Directive, since reg. 2(3) mentions that ‘expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive’. Thus, to correctly understand the 2004 Regulations, one has to constantly refer to the FOIA 2000 and the 2003 Directive. Still, this would not be enough to understand the applicable English regime on access to environmental information, as one would still have to examine the relevant enactments on registers containing environmental information. Even then, one would still need to see whether some of the ECHR articles are not applicable in order to get the full picture.

Although it can be contended that the human rights issues are nowadays unavoidable because of the importance that the ECHR has acquired not only in UK law but also in the whole of EC law, it is certain that the Environmental Information Regulations 2004 could have been drafted in a less complicated manner. This could have been certainly possible, by incorporating the provisions of the FOIA in the 2004 Regulations, instead of merely containing references to specific sections that have to be read in conjunction with the Regulations. Even though legal norms always tend to be complex, there is no reason to try and avoid this fact whenever this is possible.

## **2) Legal complexity because of overlapping non-binding instruments**

Understanding the Environmental Information Regulations 2004 is also rendered unnecessarily complex by the multitude of non-binding texts that accompany these Regulations and try to explain them in simpler terms to officials of public authorities that have to apply them in practice.

These texts are: 1) the Explanatory Note accompanying the Environmental Information Regulations 2004, as with any UK enactment.

2) the Code of Practice providing guidance to public authorities as to the practice which it would, in the Secretary of State's opinion, be desirable for them to follow in connection with the discharge of their functions under the 2004 Regulations. This Code of Practice is still in draft form.

3) the Governmental Guidance to the Environmental Information Regulations 2004. This Guidance is still in draft form. Although the Government acknowledges this text is not legally binding, it considers it is a statement on the approach public authorities will be expected to follow when applying the 2004 Regulations. The Government also indicates that this Guidance should be read alongside the Code of Practice accompanying the 2004 Regulations.<sup>919</sup>

It should be noted that since the 2004 Regulations can only be applied in conjunction with the FOIA 2000, one has, therefore, to also refer to the non-binding instruments that explain this Act: the Code of Practice accompanying the FOIA 2000 and the Explanatory Notes to this Act.

The Government has impliedly recognised that all this can be very confusing, as it has proposed that it might be possible to have a single Code of Practice for the FOIA 2000 and the Environmental Information Regulations 2004, with separate paragraphs only where unavoidable differences exist.<sup>920</sup>

Of course, one could argue that all the aforementioned instruments can safely be ignored by public authorities who focus on the applicable binding legal provisions, the Environmental Information Regulations 2004 and the FOIA 2000, provided they apply them correctly. However, such a position is not an option, as if the Codes of Practice are not followed, then the Information Commissioner can issue practice recommendations, something that public authorities will undoubtedly try to avoid.

Finally, it should be stressed that all the aforementioned texts, are not very useful as, first, they tend to repeat each other, and second, they do not provide any real help in solving the fundamentally important issue arising when applying the Regulations: how the public interest test has to be applied when environmental information is concerned. This is especially difficult, since this test cannot be the same as under the FOIA 2000, since when applying this test under the 2004 Regulations, the aim of the environmental information regime, which is environmental protection, has to be taken into account.

#### **D) The right to access environmental information upon request: a 'multi-layered' right**

Before ending the present work, one idea that underpins it from the first page to the last page should be stressed. We have not just been examining how the 2003 Directive and the Aarhus

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<sup>919</sup> See paragraphs 1.7 and 1.9 of the Draft Governmental Guidance on the 2004 Environmental Information Regulations (as of 24 July 2004), <http://www.defra.gov.uk/corporate/consult/envinfo/index.htm>

international Convention (both creating a right to access upon request environmental information held by public authorities) have been transposed into English law by the Environmental Information Regulations 2004. Rather, we have demonstrated that this right of access to environmental information is what could be called a 'multi-layered' right, which stems from various legal instruments of different levels (the EC level, international level and UK national level). This is the reason why the right to environmental information is a right with uncertain boundaries and content, since, although all these instruments go into the same direction of recognising a right to access environmental information to any person, they all contain different limitations and exceptions to the scope of this right.

Additionally, as shown all along the present work, it should be acknowledged that the right to access environmental information is fundamentally different from the general right to access information held by public bodies, since it aims at achieving better environmental protection. Similarly, the right to access environmental information enshrined in the Aarhus Convention and the 2003 Environmental Information Directive, is different from the fundamental human right to access environmental information recognised under certain ECHR articles, since its aim is to protect the environment.

As a consequence, it is clear that the correct approach to any analysis of the right to access environmental information is to understand and acknowledge that, first, this right stems from various European, national and international legal instruments, and second, that although it is a right similar to the general right to access information, it is conceptually different as it aims to protect the environment since access to information is used as a means to achieve the goal of environmental protection.

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<sup>920</sup> See the public consultation paper on the *Draft Environmental Information Regulations Code of Practice*, DEFRA, July 2004, at Annex B, available at <http://www.defra.gov.uk/corporate/consult/envinfo/index.htm>

## ANNEX 1: TABLES OF EQUIVALENCE OF PROVISIONS

<b>The Environmental Information Regulations 1992 [Applicable to Great Britain (reg. 1(3))] S.I. 1992/3240</b>	<b>The Environmental Information Regulations (Northern Ireland) 1993 S.R. 1993/45</b>
<b><u>REGULATION No:</u></b>	<b><u>REGULATION No:</u></b>
1 Citation, commencement and extent	1 Citation and commencement
2 Construction of Regulations	<u>2 Interpretation</u>
-	2(1)
2(1)	3 Application
2(2)	2(3)
2(3)	2(4)
2(4)	2(2)
<u>3 Obligation to make environmental information available</u>	<u>4 Obligation to make environmental information available</u>
3(1)	4(1)
3(2)	4(2)
3(3)	4(3)
3(4)	4(4)
3(5)	4(5)
3(6)	4(6)
3(7)	4(7)
<u>4 Exceptions to right to information</u>	<u>5 Exceptions to right to information</u>
4(1)	5(1)
4(2)	5(2)
4(3)	5(3)
4(4)	5(4)
4(5)	5(5)
5 Existing rights to information	6 Existing rights to information

<b>Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment [Official Journal L 158 of 23.06.1990]</b>	<b>Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [Official Journal L 41 of 14.02.2003]</b>
Article 1	Article 1(a) Article 1(b)
Article 2(a) Article 2(b) — — — —	Article 2(1) Article 2(2) Article 2(3) Article 2(4) Article 2(5) Article 2(6)
Article 3(1) Article 3(2) Article 3(3) Article 3(4) — — —	Article 3(1) and Article 3(5) Article 4(2) and Article 4(4) Article 4(1)(b), (c), (d) and (e) Article 3(2) and Article 4(5) Article 4(1)(a) Article 3(3) Article 3(4)
Article 4 —	Article 6(1) and Article 6(2) Article 6(3)
Article 5 — —	Article 5(1) Article 5(2) Article 5(3)
Article 6	Article 2(2)(c), Article 3(1)
Article 7 — — —	Article 7(1), (2), and (3) Article 7(4) Article 7(5) Article 7(6)
—	Article 8
Article 8	Article 9
Article 9	Article 10
Article 10	Article 13
—	Article 11
—	Article 12

Source: table accompanying the Directive 2003/4/EC in the OJ L 41 of 14.02.2003



<b>Directive 2003/4/EC</b>	<b>Environmental Information Regulations 2004</b>
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<b>Provision of Directive</b>	<b>Provision of Regulations</b>	<b>Comment</b>
Article 2: Definitions.	Regulations 2 and 3.	
Article 3: Access to environmental information. Paragraphs (1) and (2)(a) – the duty to make available environmental information and the timescale to comply.	Regulation 5.	
Article 3: Access to environmental information. Paragraph (2)(b) – extension of time to comply with request	Regulation 7.	
Article 3: Access to environmental information. Paragraph (3) – requests formulated in too general a manner.	Regulation 9(2).	
Article 3: Access to environmental information. Paragraph (4) – form and format of information.	Regulation 6.	
Article 3: Access to environmental information. Paragraph (5) – assistance to the public.	Regulations 9 and 16.	
Article 4: Exceptions to the duty to make available environmental information.	Regulations 8(4) and (5) (advance payment required) and 12 to 14.	1. To the extent that the information requested is the personal data of the applicant then by Regulation 5(3) that information is not covered by these Regulations and falls to be dealt with under

		<p>section 7 of the Data Protection Act 1998 (c.29).</p> <p>2. Regulation 12(3) provides that to the extent that the information requested is the personal data of a person other than the applicant, then those data shall not be disclosed otherwise than in accordance with the provisions of regulation 13. Those provisions are equivalent to those in section 40(2) to (6) of the Freedom of Information Act 2000 (c.36).</p> <p>These limited circumstances in which personal data may be disclosed are provided for in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Data Protection Directive).</p>
Article 5: Charges	Regulation 8.	
Article 6: Access to justice.	Regulations 11 and 18.	Regulation 18(3) applies the enforcement and appeal provisions in Parts IV and V of the Freedom of Information Act with modifications.
Article 7: Dissemination of environmental information.	Regulation 4.	
Article 8: Quality of environmental information.	Regulations 5(4) and (5).	
Article 10:		These Regulations were

Implementation. Required by Member States by 14 February 2005.		made on **** 2004 and come into force on **** 2005.
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Source: EXPLANATORY MEMORANDUM accompanying the Environmental Information Regulations 2004 and submitted to Parliament on the 22/7/2004.

## **ANNEX 2: REGISTERS CONTAINING ENVIRONMENTAL INFORMATION MAINTAINED BY LOCAL AUTHORITIES**

### **Register of stray dogs seized by local authorities**

Environmental Protection Act 1990 S. 149(8)

### **Register of Litter Control Areas (LCAs)**

Environmental Protection Act 1990 S. 95

### **Register of Street Litter Control Notices (SLCNs)**

Environmental Protection Act 1990 S. 95

### **Noise Abatement Zone Register**

Control of Noise (Measurement and registers) Regulations 1976 in respect of the Control of Pollution Act 1974

### **Integrated Pollution Control (IPC) Register**

The Environmental Protection (Applications, Appeals and registers) Regulations 1991 (in respect of Section 20 Part 1 of the Environmental Protection Act 1990)

### **Local Authority Air Pollution Control (LAAPC) Register**

The Environmental Protection (Applications, Appeals and registers) Regulations 1991 (in respect of S. 20 Part 1 of the Environmental Protection Act 1990)

### **Register of improvement and prohibition notices having environmental implications**

Environmental Safety Information Act 1988, in respect of the Health and Safety at Work etc. Act 1974, Food and Environment Protection Act 1985, Fire Precautions Act 1971.

### **Register of radioactive substances**

Radioactive Substances Act 1993

### **Register of Private Water Supplies**

Water Industry Act 1991, Private Water Supplies Regulations 1991

### **Register of licensed waste disposal sites**

Environmental Protection Act 1990 S 64

### **Register of Common Land & Village Greens**

Commons Registration Act 1965 S3(1) and (2)

### **Environmentally Sensitive Areas (ESAs)**

The Agriculture Act 1986

ESAs appear as land charges in the Local Land Charges Register

### **Register of Hazardous Substances Consents**

Planning (Hazardous Substances) Act 1990 S28

### **Register of details of manufacturers/sites subject to the CIMAH Regulations**

Control of Industrial Major Accident Hazards (CIMAH) Regulations 1984

### **Register of enforcement notices concerning Pesticides**

Food and Environment Protection Act 1985; The Control of Pesticides Regulations 1986.

Maintained by Local authorities and the Health and Safety Executive

**Register of maps, statements and orders relating to public rights of way**  
Wildlife and Countryside Act 1981 S57(5)

**Register of Sites of Special Scientific Interest (SSSIs)**  
Wildlife and Countryside Act 1981  
Maintained in the Local Land Charges Register

**Register of Notifications of intended Works on Trees in Conservation Areas**  
Section 4(2) of the Model Order contained in the Town and County Planning (Tree Preservation Order) Regulations 1969

**Register of applications for Work on Trees covered by Tree Preservation Orders (TPO)**  
Town and Country Planning Act 1990 S 214

**Register of drinking water quality in 'supply zones'**  
Water Supply (Water Quality) Regulations 1989

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### **ANNEX 3: REGISTERS CONTAINING ENVIRONMENTAL INFORMATION MAINTAINED BY THE ENVIRONMENT AGENCY**

The following list has been provided by the Environment Agency, and is an extract from the document "*The Environment Agency's Freedom of Information Publication Scheme - Approval Documentation*" which sets out how the Environment Agency is meeting its statutory requirement to provide a Publication Scheme under the Freedom of Information Act 2000. It is available also on the Environment Agency Website at:

[http://www.environment-agency.gov.uk/other/help/310151/310367/319450/?version=1&lang=\\_e](http://www.environment-agency.gov.uk/other/help/310151/310367/319450/?version=1&lang=_e)

Class	Definition	Availability	Charge
About the Publication Scheme	Documents produced to inform the public about the Agency's approach to providing a publication scheme, provided to the Information Commissioner seeking approval [and associated papers produced prior to approval] and any formal Agency plans to develop the scheme.	Internet; Customer Contact (CC)	X
The Agency's Structure	Current constitution and overviews of the structure of the Agency.	Internet	X
Agency Offices	Location and contact details of Area Offices	Internet/ 'What's in Your Backyard' (WYBY)	X
The Agency's Board	Up to date membership of the Agency's Board and brief resumes	Internet	X
Board Meetings	Agendas of future meetings, minutes of past meetings excluding information that the Agency deems to be confidential	Internet	X
Annual Reports, Plans and Strategies	Major annual corporate reports, including the annual report and accounts, corporate plan and corporate strategy	Internet	X
Agency Position Statements	Specific position statements that outline the Agency's position on certain key issues.	Internet	X
Agency Policies	Formal Policy statements and explanatory notes as defined in the Agency Management System.	Internet	X
Consultations	Current and closed national consultations. Consultation responses where produced.	Internet	X
Municipal Incinerators	A Document prepared by the Agency that accompanies decisions to permit new municipal waste incinerators.	Internet; Area Offices	X
Standards of Service	Major standards of service as set out in the Customer Charter	Internet CC	X
FoI Notices	Any Information or Enforcement notices issued by the Information Commissioner to the Agency	Internet	X
Job Vacancies	All current job vacancies	Internet	X
Legislation under which the Agency operates	A list of the major legislation that the Agency operates under	Internet	X
Research and Development	A strategic view of the Agency's needs, proposed new-starts for the R&D Programme and easy access to details of all of the R&D outputs produced	Internet	✓/X
News Publications	Press Releases and news publications issued by the Agency	Internet	X

Learning Resources	A series of national resources that have been produced specifically to meet formal and informal educational needs	Internet; various	✓/X
Bathing Water Data	The Bathing Waters Directive database which contains details on designated coastal and inland bathing waters within England and Wales. Details consist of analysis data on monitoring samples taken for each site which are then used to classify the bathing waters. sampling results are available to the public within approximately two weeks of the sample being taken	Internet/ WTYBY	X
Discharges to Sea Data	Data collected for the OSPAR Convention (an agreement signed by a number of European countries (including the United Kingdom) to protect the quality of the North East Atlantic). The load of contamination to the sea is measured at over 300 sites around the coast of England and Wales.	Internet/ WTYBY	X
Groundwater Protection Zone Data	As defined by the Environment Agency for groundwater sources (wells, boreholes and springs) used for public drinking water supply.	Internet/ WTYBY	X
Indicative Floodplain Map Data	Maps that shows the natural river and coastal floodplains in England and Wales. For flooding from rivers the maps indicate the extent of flooding for a one in one hundred (or a one per cent) chance of flooding each year. For flooding from the sea and tidal estuaries, the maps show a one in two hundred (or 0.5 per cent) chance of flooding each year. The maps are normally updated annually.	Internet/ WTYBY	X
Flood Warning Area Data	Maps that show where a full flood warning service is currently available in England and Wales.	Internet/ WTYBY	X
Current Landfill Location Data	Maps that show the locations of current landfill sites in England and Wales	Internet/ WTYBY	X
Pollution Inventory Data	Those details on the amount and nature of releases from large industrial sites within England and Wales that constitute the Pollution Inventory (excluding those sites run by individuals or partnerships for data protection reasons).	Internet/ WTYBY	X
OPRA Score Data	Banded scores of relevant sites/processes for Operator Performance Appraisal and Pollution Hazard Appraisal (excluding those sites run by individuals or partnerships for data protection reasons).	Internet/ WTYBY	X
River Quality Data	The Chemical General Quality Assessment of relevant sites	Internet/ WTYBY	X
River Quality Target Data	River Quality Objectives for rivers in England and Wales	Internet/ WTYBY	X

<p>Flood Warning and Advice</p>	<p>In format on that the Agency has prepared specifically to inform the public on:</p> <ul style="list-style-type: none"> <li>• Preparing for a Flood,</li> <li>• What to do when flooding occurs,</li> <li>• What to do after a Flood,</li> <li>• General Flooding Knowledge,</li> <li>• Press Information,</li> <li>• the Agency's role in Flooding.</li> </ul>	<p>Internet; Floodline Call Service</p>	<p>X</p>
<p>Current Flooding Information</p>	<p>Flood warnings issued by the Agency.</p>	<p>Internet, telephone etc.</p>	<p>X</p>
<p>Property Search Service</p>	<p>A range of information included in a service tailored specifically for the requirements of people involved in the property transactions. This service is currently in development and is at a pilot stage. The aim is that the full service will be included in the Publication Scheme early in 2003</p>	<p>Internet; Call Service;</p>	<p>✓</p>
<p>The Register of Radioactive Substances Information</p>	<p>Documents and records received and issued under any provision of the Radioactive Substances Act 1993, which are required by that Act to be held by the Agency in the form of a register, under section 39 of the Act (<i>since 1 January 1991</i>)</p> <ul style="list-style-type: none"> <li>• applications for registration or authorisation including supporting material, eg. maps and photographs</li> <li>• certificates of registration or authorisation</li> <li>• notices of variation or cancellation</li> <li>• enforcement and prohibition notices</li> <li>• letters notifying those served with an enforcement notice due to a breach of the conditions of the registration or authorisation, that the conditions are being complied with</li> <li>• notices advising those served with a prohibition notice that the notice is now withdrawn</li> <li>• notices advising the variation or cancellation of a registration following a determination of an appeal</li> <li>• notices advising the variation or revocation of an authorisation following a determination of an appeal</li> </ul> <p>Prescribed records under SI No.1685 The Radioactive Substances (Records of Convictions)</p>	<p>Offices; summary details on internet.</p>	<p>X</p>



	<p>Regulations 1992 (since 11 August 1992)</p> <ul style="list-style-type: none"> <li>• records of convictions, specifically the offence, the name of the offender, the date of the conviction, the penalty imposed and the name of the Court</li> </ul> <p>Further details specified in DoE Circular 22/92 and Welsh Office Circular 43/92 (issued 28 August 1992)</p> <ul style="list-style-type: none"> <li>• copies of annual reports of the Agency's monitoring programmes of authorised discharges of radioactive wastes in England and Wales</li> <li>• detailed monitoring data held by the Agency (this information is not distributed to local authorities)</li> <li>• monitoring data provided to the Agency by operators of major sites where it is required as a condition of the authorisation</li> <li>• certificates of notification, certificates of agreement (previously known as noting letters or letters of approval) issued to the Ministry of Defence and Visiting Forces</li> <li>• variations or cancellations to certificates of notification or agreement</li> </ul> <p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>	
<p>The Integrated Pollution Control Public Register</p>	<p>A register maintained under section 20 of the Environmental Protection Act 1990 and prescribed by SI No. 507 (Applications, Appeals and Registers) Regulations 1991 (since 1 April 1991) and SI No. 1996/979 (since 24 April 1996) Information required to be on this register which comprises:</p> <ul style="list-style-type: none"> <li>• all particulars of applications for authorisation, or for variation of the conditions of an existing authorisation</li> <li>• all particulars of any published advertisements in relation to an application</li> <li>• all particulars of Schedule 1 notices requiring further details, issued by the Agency and any information provided in response by the operator</li> <li>• all particulars of any representations made by any person required by statute to be consulted</li> <li>• all particulars of any representations made by any person in response to a published advertisement except those representations requested not to be placed in the register</li> <li>• where representations are omitted from the register at the request of the person who made them, a statement by the Agency that such representations have been made (without identifying</li> </ul>	<p>Offices; summary details on internet.</p> <p>X</p>

- any such person)
  - all particulars of any authorisation granted by the Agency
  - all particulars of any written notice of the transfer of an authorisation
  - all particulars of the Agency's opinion on action to be taken following the issue of a variation notice
  - all particulars of any revocation of an authorisation made by the Agency
  - all particulars of any variation notice, enforcement notice or prohibition notice issued by the Agency
  - all particulars of any notice issued by the Agency withdrawing an enforcement notice or a prohibition notice
  - all particulars of any notice of appeal against a decision by the Agency, the documents relating to the appeal, any written notification of the Secretary of State's determination of such an appeal and any accompanying report
  - details of any conviction of any person for an offence relating to an authorised or non-authorised process, including the name of the offender, the date of conviction, the penalty imposed and the name of the Court
  - all particulars of any monitoring information obtained by the Agency as a result of its own monitoring, supplied to it as a condition of the authorisation or notice issued seeking further information
  - where monitoring information is omitted from the register because it is commercially confidential, a statement by the Agency indicating whether or not there has been compliance with any relevant condition of the authorisation
  - all particulars of any other information provided to the Agency (on or after 1 April 1996) in compliance with a condition of the authorisation, a variation notice, enforcement notice, prohibition notice, or notice seeking further information
  - reports published by the Agency relating to an assessment of the environmental consequences of a prescribed process operating in the locality of the authorised premises
  - all particulars of any direction (other than a direction relating to matters of national security) given to the Agency by the Secretary of State
- Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.

The Pollution Prevention and Control Public Register

A register maintained under regulation 29 of the Pollution Prevention Control Regulations 2000 as specified in Paragraph 1 of Schedule 9 of those Regulations as amended by Paragraph 16 of Schedule 5 of the Landfill (England and Wales) Regulations 2002. Information required to be on this register which comprises:

NB: any reference to regulations or schedules should be taken to mean the PPC 2000 Regs unless expressly stated otherwise.

- all particulars of any application made to the regulator for a permit or for a variation of the conditions of a permit;
- all particulars of any notice to the applicant by the regulator under paragraph 4 of schedule 4 and paragraph 2 of schedule 7 and of any information furnished in response to such a notice;
- all particulars of any advertisement published pursuant to paragraph 5 of schedule 4 or paragraph 4(B) of schedule 7 and of any representations made by any person in response to such an advertisement, other than representations which the person who made them requested should not be placed in the register;
- in a case where any such representations are omitted from the register at the request of the person who made them, a statement by the regulator that representations have been made which have been the subject of such a request (but such statement shall not identify the person who made the representations in question);
- all particulars of any representations made by any person required to be given notice under paragraph 9 of schedule 4 or paragraph 4(5)(c) of schedule 7;
- all particulars of any permit granted by the regulator;
- all particulars of any notification of the regulator given under regulation 16(1)
- all particulars of any application made to the regulator for the variation, transfer or surrender of a permit
- all particulars of any variation, transfer and surrender of any permit granted by the regulator;
- all particulars of any revocation of a permit granted by the regulator;
- all particulars of any enforcement notice or suspension notice or closure notice issued by the

Offices

X

regulator;

- all particulars of any notice issued by the regulator withdrawing an enforcement notice or a suspension notice;
- all particulars of any notice of appeal under regulation 27 against a decision by the regulator or a notice served by the regulator and of the documents relating to the appeal mentioned in paragraph 1(2)(a), (d) and (e) of schedule 8;
- all particulars of any representations made by any person in response to a notice given under paragraph 3(1) of schedule 8, other than representations which the person who made them requested should not be placed in the register;
- in a case where any such representations are omitted from the register at the request of the person who made them, a statement by the regulator that representations have been made which have been the subject of such a request (but such statement shall not identify the person who made the representations in question);
- all particulars of any written notification of the Secretary of State's determination of such an appeal and any report accompanying any such written notification;
- details of any conviction of or formal caution given to any person for any offence under regulation 32(1), or regulation 17(1) of the 2002 Regulations, which relates to the operation of an installation under a permit granted by the regulator, or without such a permit in circumstances where one is required by regulation 9, including the name of the person, the date of conviction or formal caution, and, in the case of a conviction, the penalty imposed and the name of the Court;
- all particulars of any monitoring information relating to the operation of an installation under a permit granted by the regulator obtained by the regulator as a result of its own monitoring or furnished to the regulator in writing by virtue of a condition of the permit or under regulation 28(2);
- in a case where any such monitoring information is omitted from the register by virtue of regulation 31, a statement by the regulator, based on the monitoring information from time to

time obtained by or furnished to them, indicating whether or not there has been compliance with any relevant condition of the permit;

- all particulars of any other information furnished to the authority in compliance with a condition of the permit, a variation notice, enforcement notice or suspension notice, or regulation 28(2), or a closure notice under the 2002 regulations;
- where a permit granted by the regulator authorises the carrying out of a specified waste management activity, all particulars of any waste management licence (within the meaning of regulation 19(13)) which ceased to have effect on the granting of the permit in so far as they may be relevant for the purpose of determining under regulation 19 whether any pollution risk results from the carrying out of such an activity on the site covered by the permit;
- all particulars of any report published by a regulator relating to an assessment of the environmental consequences of the operation of an installation in the locality of premises where the installation is operated under a permit granted by the regulator; and
- all particulars of any direction (other than a direction under regulation 30(2)) given to the regulator by the Secretary of State under any provision of the PPC Regulations;
- all particulars of any site conditioning plan or notification that the operator does not propose to continue to accept waste after the 16<sup>th</sup> July 2002 submitted to the Agency;
- all particulars of any notice requiring a landfill to close (in whole or part);
- all particulars of any notification or report submitted to the Agency as required before the definitive closure of a landfill.

Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.

The Water Abstraction and Impounding Register	<p>A register maintained under section 189 of the Water Resources Act 1991 and prescribed by SI No.534 The Water Resources (Licences) Regulations 1965 (since 1 April 1965) Information required to be on this register which comprises:</p> <ul style="list-style-type: none"> <li>• name and address of the applicant, date of the application and brief details of its proposal</li> <li>• the Agency's decision, date of decision and brief details of any licence granted or revocation or variation</li> <li>• in relation to an appeal or application made directly to him, the Minister's decision, date of decision and brief details of any licence granted or revocation or variation</li> <li>• where a transfer of the licence or change in the occupation of the land occurs, details of the person's name and address, date of notification to the Agency and the serial number of the relevant licence</li> <li>• an index to the register in the form of a map</li> </ul> <p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>	Offices; summary details on internet.	X
The Water Quality and Pollution control Public Register	<p>A register maintained under section 190 of the Water Resources Act 1991 and prescribed by SI No.2971 The Control of Pollution (Applications, Appeals and Registers) Regulations 1996 (since 31 December 1996), and previously SI No.1160 The Control of Pollution (Registers) Regulations 1989 (since 1 September 1989). Information required to be on this register which comprises</p> <ul style="list-style-type: none"> <li>• notices of water quality objectives</li> <li>• applications for consents to discharge or for variation of an existing consent, and supporting material</li> <li>• discharge consents, consent conditions and any variations</li> <li>• date and time of each sample of water or effluent taken by the Agency, the result of its analysis and any steps taken by the Agency as a consequence</li> <li>• date and time of each sample of water or effluent taken by any other person, the result of its analysis (by the Agency) and any steps taken by that person as a consequence</li> <li>• prohibition notices</li> <li>• enforcement notices</li> <li>• revocations of discharge consents</li> <li>• notices of appeal and relevant correspondence, decisions and representations, Secretary of</li> </ul>	Offices; summary details on internet.	X

	<p>State's determination and any accompanying reports.</p> <ul style="list-style-type: none"> <li>Secretary of State directions to the Agency in relation to its water pollution functions (except directions relating to matters of national security)</li> <li>details of convictions of consent holders, including the name of the offender, date of conviction, penalty imposed, the costs (if any) awarded against the offender and the name of the court</li> <li>returns and other information about the nature, origin, composition, temperature, volume and rate of discharges provided to the Agency as a result of consent conditions</li> <li>register entries made under the previous Control of Pollution (Registers) Regulations (SI No.1160/1989 since 1 September 1989)</li> <li>an index to facilitate access to particulars entered in to the register</li> </ul> <p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>		
Maps of Freshwater Limits	<p>Maps held under section 192 of the Water Resources Act 1991</p> <ul style="list-style-type: none"> <li>maps of freshwater limits (and any changes to those limits) of controlled waters, i.e. relevant rivers or watercourses</li> </ul>	Offices	X
Maps of Main Rivers	<p>Maps held under section 193 of the Water Resources Act 1991</p> <ul style="list-style-type: none"> <li>maps for each area covered by the Agency's Regional Flood Defence Committees</li> </ul>	Offices	X
Maps of Agency Waterworks	<p>Maps held under section 195 of the Water Resources Act 1991</p> <ul style="list-style-type: none"> <li>location of resource mains or discharge pipes vested in the Agency</li> <li>location of underground works vested in the Agency</li> </ul>	Offices	X
Maps of Sensitive Areas and High Natural Dispersion Areas	<p>Information held under SI No.2841 The Urban Waste Water Treatment (England and Wales) Regulations 1994 (since 30 November 1994)</p> <ul style="list-style-type: none"> <li>maps of estuaries</li> <li>maps of sensitive areas and high natural dispersion areas (HINDAs)</li> <li>certificates of exemption from Urban Waste Water Treatment Regulations</li> </ul>	Offices	X

<p>The Register of Carriers of Controlled Waste</p>	<p>A public register maintained under section 2(2)(b) of the Control of Pollution (Amendment) Act 1989 and Regulation 3 of SI No. 1624 The Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991 and prescribed by Regulation 6 of SI No. 1991/1624 (since 14 October 1991). Information required to be on this register which comprises:</p> <ul style="list-style-type: none"> <li>• entries showing persons as registered carriers of controlled waste with their allocated registration number, including any letter</li> <li>• the date the registration takes effect and the date of expiry</li> <li>• registered person's business name, address of his principal business office and telephone, telex or fax numbers, and if an individual, date of birth</li> <li>• for corporate bodies, the names of each director, manager, secretary or other similar officers and their dates of birth</li> <li>• for companies registered in Great Britain, the registered number, otherwise the country in which it was incorporated</li> <li>• relevant conviction details including person's name, details of the offence, date of conviction, penalty imposed, the name of the Court and, if an individual, their date of birth</li> <li>• details of waste management licences held</li> <li>• date of renewal and revised expiry date</li> <li>• any other changes to registered details and the date of amendment</li> <li>• an index to allow members of the public to readily trace information on the register</li> </ul> <p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>	<p>Offices</p>
<p>The Register of Waste Management Licences</p>	<p>A public register held under section 64 of the Environmental Protection Act 1990 (Part II) and prescribed by Regulation 10 of SI No.1056 The Waste Management Licensing Regulations 1994 (since 1 May 1994) as amended by Paragraph 2(3) of Schedule 5 of The Landfill (England and Wales) Regulations 2002. Information required to be on this register which comprises:</p> <p>NB: any reference to regulations or schedules should be taken to mean the WML 1994 regs unless expressly stated otherwise.</p> <ul style="list-style-type: none"> <li>• current or recently current waste management licences and any related working plans</li> </ul>	<p>Offices</p>



- current or recently current applications for, or transfer or modification of, licences including supporting information from the applicant, written representations considered by the Agency, any decisions taken by the Secretary of State, notices of rejection by the Agency or emergencies resulting in the postponement of relevant references.
- notices of modification, revocation, suspension of licences
- notices of appeal and relevant documents
- conviction details of licence holders including the name of the offender, date of conviction, penalty imposed and the name of the Court for offences under Part II of the Environmental Protection Act or under reg 17(1) of the 2002 regulations;
- reports produced by the Agency including remedial or preventative action taken
- any monitoring information obtained by the Agency as a result of its own monitoring, or supplied to it as a condition of the licence
- Secretary of State directions
- summaries of special waste produced or disposed of
- register details and records provided under the Control of Pollution (Special Waste) Regulations 1980 or Special Waste Regulations 1996 where the licence has been revoked or surrendered;
- applications for the surrender of licences including supporting information and evidence, written representations, decisions by the Secretary of State and notices of determination and certificates of completion;
- inspectors' reports written after seizing or rendering harmless, any article or substance;
- records of where and when inspectors exercised their powers, what information was obtained and what action was taken on each occasion;
- statements of whether or not there is compliance with any condition of a licence where the information which shows compliance or not, has been excluded from the register because it is confidential;
- all particulars of any site conditioning plan or notification that the operator does not propose to continue to accept waste after the 16<sup>th</sup> July 2002 submitted to the Agency;
- all particulars of a notification to the Agency of an operators intention to cease accepting waste after 16<sup>th</sup> July 2002, and all particulars of any notice requiring a landfill to close (in whole or part);
- all particulars of any notification or report submitted to the Agency as required before the definitive closure of a landfill.

	<p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>	
<p>The Register of Exempt Activities</p>	<p>A public register held under and prescribed by Regulation 18(2) and 18(3) of SI No.1056 The Waste Management Licensing Regulations 1994 (since 1 May 1994). Information required to be on this register which comprises:</p> <ul style="list-style-type: none"> <li>• name and address of the exempt establishment or undertaking</li> <li>• activity which makes it exempt</li> <li>• place where the activity occurs</li> </ul>	<p>Offices</p> <p style="text-align: right;">X</p>

<p>Waste Management Guidance</p>	<p>Technical and regulatory guidance on the management of wastes and waste management licensing</p>	<p>Internet</p> <p style="text-align: right;">X</p>
<p>Strategic Management Assessments</p>	<p>Specific regional reports for England and Wales, that provide consistent, comprehensive, local information about amounts and types of waste produced and how it is managed.</p>	<p>Internet</p> <p style="text-align: right;">X</p>
<p>Environment Agency Charging Schemes</p>	<p>Environment Agency Charging Schemes for some of the regulatory regimes. 2002-2003</p>	<p>Internet</p> <p style="text-align: right;">X</p>
<p>Pollution Prevention Guidance Notes</p>	<p>Series of sectoral guidance notes on the prevention of pollution. This series deals mainly with the prevention of pollution to water courses and groundwater.</p>	<p>Internet</p> <p style="text-align: right;">X</p>
<p>NETREGS Agency Forms</p>	<p>Generic and Sector specific guidelines to help compliance with environmental legislation</p>	<p>Internet</p> <p style="text-align: right;">X</p>
<p>National Environmental Reports</p>	<p>IPPC and RSA application forms (internet), others (offices)</p>	<p>Internet</p> <p style="text-align: right;">X</p>
<p>Regional State of the Environment Reports</p>	<p>Series of national State of the Environment reports produced by the Agency, and associated publications of key facts and figures and environmental indicators</p>	<p>Internet</p> <p style="text-align: right;">✓/X</p>
<p>Environment Reports</p>	<p>Series of State of the Environment reports produced by the Agency on a regional or other political boundary</p>	<p>Internet</p> <p style="text-align: right;">✓/X</p>

<p>The Register of Professional Collectors and Transporters of Waste, and Dealers and Brokers</p>	<p>A public register held under Regulation 19 (as detailed in Schedule 4, para 12) of SI No. 1056 The Waste Management Licensing Regulations 1994 (since 1 May 1994). Information required to be on this register which comprises:</p> <ul style="list-style-type: none"> <li>• name and address of the establishment or undertaking</li> <li>• address of its principal place of business</li> <li>• address of any place at, or from which, it carries on its business</li> </ul> <p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>	<p>Offices</p>	<p>X</p>
<p>The Register of Brokers of Controlled Waste</p>	<p>A public register held under Regulation 20(7) (as detailed in Schedule 5, paragraph 2) of SI No. 1056 The Waste Management Licensing Regulations 1994 (since 1 May 1994). Information required to be on this register which comprises:</p> <ul style="list-style-type: none"> <li>• broker's registration number</li> <li>• date the registration takes effect and date of its expiry</li> <li>• broker's business name and address of the principal place of business including telephone number, telex or fax numbers and, if an individual, their date of birth</li> <li>• for corporate bodies, the names of each director, manager or similar position and their dates of birth</li> <li>• for companies registered in Great Britain, the registered number, otherwise the country in which it was incorporated</li> <li>• relevant conviction details including person's name, details of the offence, date of conviction, penalty imposed, the name of the Court and, if an individual, their date of birth</li> <li>• details of waste management licences held</li> <li>• date of renewal and revised expiry date</li> <li>• any other changes to registered details and the date of amendment</li> </ul> <p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>	<p>Offices</p>	<p>X</p>

<p>The Producer Responsibility Register</p>	<p>Offices</p>	<p>A public register maintained under Regulation 2.6 (as detailed in Schedule 7) of SI No.648 The Producer Responsibility Obligations (Packaging Waste) Regulations 1997 (since 1 September 1997). Information required to be on this register which comprises:</p> <p>Producer registrations</p> <ul style="list-style-type: none"> <li>• (for 1997 and 1998) the name and address of the registered office or principal place of business of the registered producer [and]</li> <li>• (for 1999 and subsequent years) a statement for each year as to whether a certificate of compliance has been furnished</li> </ul> <p>Scheme registrations:</p> <ul style="list-style-type: none"> <li>• (for 1997 and 1998) the name of the scheme, the name and address of the registered office or principal place of business of each operator of the scheme and the members of the scheme [and]</li> <li>• (for 1999 and subsequent years) a statement in relation to each scheme member and each year as to whether the scheme has discharged its recovery and recycling obligations</li> </ul> <p>For all registrations:</p> <ul style="list-style-type: none"> <li>• a note of any amendment made to any register entry and the date of amendment</li> <li>• an index to allow members of the public to readily trace information on the register</li> </ul> <p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>	<p>Offices</p>
<p>The Control of Major Accidents and Hazards</p>	<p>Offices</p>	<p>A register maintained under Regulation 21 (4) of the Control of Major Accident Hazards Regulations 1999. SI 1999 No. 743. Information required to be on this register which comprises:</p> <ul style="list-style-type: none"> <li>• Notifications to the Competent Authority under regulation 6;</li> <li>• Safety Reports;</li> <li>• Notifications under regulation 16 (2);</li> <li>• Communications under regulation 17 (1) (a);</li> <li>• COMAH improvement notices served under section 21 of HSW74;</li> <li>• COMAH prohibition notices served under regulation 18 (3).</li> </ul> <p>Apart from information that the secretary of state has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the</p>	<p>Offices</p>

	<p>public register on the grounds of commercial confidentiality.</p>		
Contaminated Land Public Register	<p>A public register held under Part IIA of EPA 1990 of remedial activities carried out for the purpose of risk management. Information required to be on this register which comprises:</p> <ul style="list-style-type: none"> <li>• Remediation statements</li> <li>• Remediation declarations</li> <li>• Remediation notices</li> <li>• Land identified as contaminated land under Part IIA but which is subsequently dealt with under other environmental controls</li> <li>• Designation of Special Sites</li> <li>• Notification of remediation steps claimed to have been taken</li> <li>• Statements on appeals</li> </ul> <p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>	Offices	X
Groundwater Register	<p>A public register held under the Groundwater Regulations 1998 (1998/2746) Regulation 22. Information required to be on this register which comprises:</p> <ul style="list-style-type: none"> <li>• Applications and information provided to the Agency to help determine these.</li> <li>• Authorisations and notices, including variations or revocations.</li> <li>• Monitoring data provided for authorisations and notices.</li> <li>• Any convictions for offences relevant to the Groundwater Regulations.</li> <li>• Discharges so small so as to obviate deterioration of groundwater quality.</li> <li>• Substances determined as inappropriate to list I and any summary of these.</li> <li>• Substances determined as appropriate to list II and any summary of these.</li> <li>• Any review by the Secretary of State of the Agency's determinations on list I and II substances.</li> <li>• Codes of practice approved for the purposes of the Groundwater Regulations.</li> </ul> <p>Apart from information that the Secretary of State has directed the Agency to withhold from the register for reasons of national security, or that the Agency has agreed to withhold from the public register on the grounds of commercial confidentiality.</p>	Offices	X
Technical Publications and Guidance Notes	<p>Technical and regulatory guidance for business regulated under Integrated Pollution Control (IPC) and Integrated Pollution Prevention and Control (IPPC). Also includes Guidance on PCB Regulations and substitute fuels protocol.</p>	Internet	X

## **TABLES OF AUTHORITIES**

### **TABLE OF STATUTES**

Access to Medical Reports Act 1988

Access to Personal Files Act 1987

Administration of Justice Act 1960

Audit Commission Act 1998

Copyright, Designs and Patents Act 1988

Courts and Legal Services Act 1990

Criminal Justice Act 1982

Data Protection Act 1998

Environment and Safety Information Act 1988

Environmental Protection Act 1990

European Communities Act 1972

Fire Precautions Act 1971

Food and Environment Protection Act 1985

Freedom of Information (Scotland) Act 2002

Freedom of Information Act 2000

Health and Safety at Work etc Act 1974

Housing (Homeless Persons) Act 1977

Intelligence Services Act 1994

Interpretation Act 1978

Local Government (Access to Information) Act 1985

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