

# Planning and access to information

## part 1



Gregory Jones, FIQ, LA (RTPI) is a barrister at 2 Harcourt Buildings, [GJones@2hb.law.co.uk](mailto:GJones@2hb.law.co.uk)

### Gregory Jones kicks off a three-part series explaining the effect of the Freedom of Information Act on planning.

**“Withholding information from someone is an act of intellectual imperialism. Not bothering to seek accurate information is an act of intellectual recklessness.”**

Nancy Kline, *Time to Think* (1999).

Some problems immediately posed by the Convention to practitioners are quite basic. How should it be spelt: Aarhus or Århus? How should one pronounce it? Helpfully, the university has issued the following guidance: A note on spelling: Århus is also from time to time written as Aarhus (as it was in the old days) - this is still used in, e.g., the name of the university. The name is pronounced more like Orhus - as in Oregon - than Arhus. (<http://www.au.dk/en/aarhus.htm#history>)

The Freedom of Information Act 2000 (“FOI”) has attracted much media publicity. It has domestic origins being a product of the New Labour Government. It is thanks to the FOI we now know who is invited to Chequers tennis parties. But it is the Environmental Information Regulations 2004, a product of international and EC law obligations, which will have the greatest impact for those involved in the planning process. This is because in respect of environmental information, it takes precedence over the FOI. Where the regulations differ from the FOI, they do so in way which favours disclosure.

This article addresses the scope of the Environmental Information Regulations 2004, their relationship with the Aarhus Convention, Directive 2003/4/EC “on public access to environmental information Directive...”, and the FOI.

#### Aarhus Convention

On 25 June 1998 just under forty countries gathered at the Jutland town of Aarhus to sign the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, more commonly known as “the

Aarhus Convention”. Both the UK and the European Communities are signatories to the Treaty. The consequence of this is that the UK is obliged to implement the terms under international law as a signatory to the Convention but also as a result of the obligations imposed upon it by the EC under the requirements of Directive 2003/4/EC. Accordingly, when one looks to the correct interpretation of the EIR one needs to look also at the terms of the Aarhus Convention as well as the requirement of directive 2003/4/EC.

#### Outline of the Aarhus Convention

United Nations Secretary General, Kofi Annan has described the Convention as “the most ambitious venture in the area of ‘environmental democracy’ so far undertaken under the auspices of the United Nations”. Sir Stephen Sedley speaking extra judicially observed “Aarhus is ...path breaking in the depth to which it seeks to democratise environmental debate and protection.” Professor Pring and Dr Noe have stated that “...it would be difficult to overstate the importance of the Treaty.”

The source of the Aarhus Convention can be traced to Principle 10 of the Rio Declaration on Environmental Development. The Convention came into force on 30 October 2001.

#### The meeting of the Aarhus convention in Jutland, Denmark



The Aarhus Convention is built on three pillars. Access to information, public participation and access to justice. But rather like charity, the greatest of these is access to information. This article deals only with the elements relating to access to information.

The reasoning behind the right to environmental information is set in the recitals to the Convention:

i) To help members of the public protect their right to live in an environment adequate to their health and well

- being (Recitals 1 and 8)
- ii) To enhance the quality and the implementation of environmental decisions (Recital 9)
- iii) To contribute to the public awareness of environmental issues
- iv) To further the accountability and transparency of decision-making by public authorities and to strengthen public support for decisions on the environment (Recital 10)
- v) To recognise the importance of the roles that individual citizens and NGOs can play in environmental protection. (Recital 13)
- vi) To acknowledge that public authorities hold environmental information in the public interest. (Recital 17)

These purposes are, of course, relevant when one seeks to interpret the provisions of the Aarhus Convention, in particular, the scope that should be given to the “public interest test” when deciding whether information should be disclosed to the public.

The access to information provisions in the Aarhus Convention are mainly contained in article 4. These provisions are based upon but also extend the scope of the 1990 Directive. The substance of these provisions are addressed later in this article in the section dealing with the EIR.

Article 5 imposes obligations requiring public authorities to take particular steps to collect, update and disseminate environmental information.

Article 9 is concerned with access to justice. It makes specific provision for providing access to justice in the case of refusal of a request for information or other default in a way that is “free of charge or inexpensive” and is expeditious” (Article 9(1)). This article is in part the justification for the use of the Information Commissioner (and tribunal) within the scheme set up by the EIR in place of recourse only to judicial review.

#### *Implementing Aarhus*

Section 74 of the FOI contains a power to allow the access to environmental information provisions of the Aarhus Convention to be transposed into the law in England, Wales and Northern Ireland.

The European Community is also a signatory to the Convention. Directive 2003/4/EC “on public access to environmental information and repealing Council Directive 90/313/EEC”

provides the mechanism by which the EC seeks principally to implement its obligations as a signatory to the Convention. Indeed, the Aarhus Convention is somewhat unusual since it requires compliance not merely in respect of the various member states but also within the institutions of the European Communities.

The draft version of the Environmental Information Regulations (“EIR”) was purportedly to be made under both s.74 of the FOI and s.2 (2) of the European Communities Act 1972 (“ECA 1972”). However, in their final form the EIR 2004 were adopted pursuant only to s.2 (2) of the ECA 1972. As a result, the references to the implementation of the Aarhus Convention in the explanatory memorandum have been removed. Indeed, presently there are no specific regulations made under s.74 of the FOI to implement the Aarhus Convention. This should not make a substantive difference since the EIR are intended to implement Directive 2003/4/EC which is explicitly intended to implement the Aarhus Convention. The EIR should still be interpreted in accordance with the provisions of the Convention. However, in terms of transparency it is somewhat unfortunate that the EIR are no longer expressly stated to be in part the UK’s fulfilment of its obligations as signatory to the Convention.

The Directive and the EIR will need to be interpreted in accordance with the UN “Implementation Guide”. It is highly authoritative in assisting in the interpretation of the Convention. A proper understanding of the information provisions of the Convention is vital to understanding and complying with the EIR because:

- i) the EIR are the means by which the UK seeks to comply with the provisions of Aarhus; and
- ii) The Directive is, in part, the EU’s mechanism for the implementation of the Aarhus Convention.

#### *Directive 2003/4/EC*

It would be a mistake to assume that the new directive is simply an Aarhus product. The EC had already adopted Council directive 90/313/EEC on 7 June 1990 on the freedom of access to information on the environment. That directive is repealed. In “the interest of increased transparency” a decision was taken to replace the directive rather than to amend it, “so as to provide interested parties with a sin-

gle, clear and cogent legislative text.”

When interpreting the scope of the EIR it will be important to have regard to the origin and purpose of the particular provision contained within the Directive. The recitals record a general favouring of the disclosure of official information “to the widest extent possible”. Increased public access to environmental information is said to 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 (Recital 1)

Generally, the meaning of the Directive will have to be interpreted having regard to the twenty official languages of the EU. However, since part of the purposes of the Directive is the implementation of the EU Convention obligations, in those respects it may be important to have regard to the authentic UN language text version of the Convention, namely, English, French and Russian.

Recital 24 of the Directive makes clear that its requirements as to disclosure are not intended to dissuade any member state from requiring more extensive disclosure regimes than that required pursuant to the Directive.

Other parts of the Directive go beyond the implementation of the Convention. Indeed, the purpose of the Directive includes addressing the disparities in the laws of member states concerning access to environmental information which can affect equality of the condition of competition within the Community.

#### *Relationship between the EIR and the FOI*

Section 1(1) of the FOI states: “Any person making a request for information to a public authority is entitled

- (a) to be informed in writing by the public authority whether it holds information of that description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

This right is not confined to any particular subject matter, any particular person or a showing a recognised need to know. However, the rights contained in section 1(1) are subject to section 2. In respect of the right to communication of information, section 2 disapples the right in relation to any information that is “exempt information” by virtue of either an

for more on *Planning in London* please go to:  
[www.planninginlondon.com](http://www.planninginlondon.com)



“absolute exemption” (listed at section 2(3)) or an exemption that is not absolute, provided that in all the circumstances the public interest in maintaining the exemption outweighs the public interest in disclosing the information (Section 2(2)).

The classes of “exempt information” are listed in Pt II (ss 22-44) of the FOI. Some refer to a class other require that disclosure should have a likelihood of causing a specific harm. Section 39 deals with “environmental information.”

Section 39(1) FOI originally read: “Information is exempt information if the public authority holding it-

(a) is obliged by regulations under s.74 to make the information available to the public in accordance with the regulations, or  
 (b) would be so obliged but for any exemption contained in the regulations.”

Regulation 20 of the EIR replaces “regulations under s.74” with “environmental information regulations”. This reflects the fact that the EIR are made under s.2(2) of the ECA 1972 rather than s.74 FOI.

The subordination of the FOI is not quite comprehensive: section 39 is not an absolute

exemption (see s.2 (3)). This means that “environmental information” could be retrieved from a public authority:

(a) under the EIR; and  
 (b) whether or not exempted from disclosure by the EIR, under the FOI, unless in all the circumstances of the case the public interest in maintaining the s.39 exemption outweighs the public interest in disclosing the information.”

The exceptions under the EIR are generally narrower than the exemptions given under the FOI. It is difficult to think of examples where a request under the EIR for environmental information could be refused but granted under the FOI. Put simply, this means that for any request for information relating to the environment, the more extensive EIR trumps the FOI.



The next part of this article will address the scope and requirements imposed upon public authorities by the EIR. It will be published in *PiL* 55, October 2005.



“Street furniture”

From *The Dictionary of Urbanism*  
 by Robert Cowan, Streetwise Press £29.95