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Government obtains the right to add or substitute exceptions to avoid disclosing information

Information may relate to European Commission's imminent infraction decision on PM₁₀

The Upper Tribunal (Administrative Appeals Chamber) has made a landmark decision on an access to information appeal involving the Home Office and the Information Commissioner's Office. The decision gives the Government the right to add or substitute exceptions to avoid disclosing information requested under the Freedom of Information Act (FOIA). This case was heard at the same time as a Defra appeal which involves the Campaign for Clean Air in London (CAL) and the Information Commissioner's Office.

The Upper Tribunal ruled then in the Defra appeal that public authorities have the same right under the Environmental Information Regulations as it has found them to have under the FOIA. See:

<http://www.osspsc.gov.uk/Aspx/view.aspx?id=3160>

The effect of the latest decision is to make it easier for Defra to try to keep secret information requested by Simon Birkett, on behalf of CAL, in January 2009. This is because Defra is belatedly seeking to rely on 'legal advice privilege' and 'litigation privilege' to withhold the information. Given the information requested relates to air quality in London it is highly likely that Defra is hiding information which relates in some way to the European Commission's imminent decision on infraction action and a time extension to comply with the daily limit value for dangerous airborne particles (PM₁₀) in London. The public interest in favour of disclosure is therefore overwhelming.

CAL is consulting its legal advisers, Friends of the Earth's Rights and Justice team and barristers Gerry Facenna and Laura Elizabeth John, before deciding whether to lodge an application to appeal the Upper Tribunal's decision to the Court of Appeal or try to obtain the information more quickly at the First Tier Tribunal (Information Rights).

The European Commission's imminent decision on the PM₁₀ time extension request may be a relevant factor in CAL's decision which must be made by the end of February.

Note:

Defra appealed to the Upper Tribunal after:

- i. missing unlawfully the deadline to respond to Simon Birkett's request, on behalf of CAL, for information in January 2009;
- ii. appealing against the decision by the Information Commissioner's Office that all the information requested should be released to CAL; and
- iii. appealing against a decision by the First Tier Tribunal (Information Rights) that the late use of exceptions would not be allowed in the case.