

21 December 2011

Court of Appeal decision: Government keeps new right to ‘rely as of right’ upon a different exception or exceptions in proceedings before the Information Commissioner and/or the First-tier Tribunal for refusing to disclose environmental information

‘Clean Air in London’ considers the judgment not fully consistent with the need for urgency implicit in case law of the Court of Justice of the European Union

Birkett seeking advice on whether to challenge the Court of Appeal’s decision or return quickly to the First-tier Tribunal to continue the fight against Defra’s appeal against the Information Commissioner’s decision that it must release all the information requested

Simon Birkett, Founder and Director of Clean Air in London (CAL), attended personally the Court of Appeal (Civil Division) on 28 and 29 November 2011. This case has implications for the Information Commissioner and every person who requests environmental information in future.

Birkett appealed against a judgment by the Upper Tribunal (Administrative Appeals Chamber) that the Department for Environment Food and Rural Affairs (Defra) could ‘rely as of right’ on a different exception or exceptions in proceedings before the Information Commissioner and/or the First-tier Tribunal for refusing to disclose environmental information subject to any case management direction or decision under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976). The Court of Appeal dismissed the appeal today. The Judgment can be seen at:

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1606.html>

The Information Commissioner joined Birkett in opposing Defra at the First-tier Tribunal. At the Upper Tribunal the Information Commissioner argued for a ‘middle way’ whereby he and/or the First-tier Tribunal had a discretion whether to allow reliance on a different exception or exceptions. He chose not to appear at the Court of Appeal. Birkett has argued that the deadlines are mandatory.

Birkett was represented by Gerry Facenna and Laura Elizabeth John of Monckton Chambers and Gita Parihar and Laura Gyte of Friends of the Earth’s Rights and Justice team.

Birkett said:

“The appeal was an important part of an ongoing three-year battle with Defra to obtain environmental information relating to discussions between the previous Government and the Mayor of London on matters of air pollution and the UK’s compliance with European Union air quality laws.

“Environmental information laws are very powerful. It is disappointing therefore that Defra has been able so far to: miss unlawfully both mandatory deadlines to respond to the request for disclosure of environmental information; fail to rely on the correct exception or exceptions for withholding the information (which would anyway have required a balancing of public interest); and then come up with new reasons for refusing to disclose the information – after the Information Commissioner had ruled against it. I am seeking advice on whether to challenge the Court of Appeal’s decision or return quickly to the First-tier Tribunal to continue the fight against Defra’s appeal against the Information

Commissioner's decision that it must release all the information requested.

"I remain of the view that the information Defra is still withholding may include an admission that the UK is in breach of EU air quality laws for dangerous airborne particles in London.

"Last but not least, I wish to thank my tremendous legal team, which includes barristers Gerry Facenna and Laura Elizabeth John from Monckton Chambers and Gita Parihar and Laura Gyte from Friends of the Earth's Rights and Justice team. They have generously provided *pro bono* advice throughout."

Chronology

2009

22 January	Birkett requests information relating to discussions between the previous Government and the Mayor of London on matters of air pollution and the UK's compliance with European Union air quality laws
1 April	Defra refuses disclosure on grounds information is 'internal communications'
1 May	Birkett requests 'Internal review' by Defra
15 September	Defra refuses disclosure on grounds information is 'internal communications'
3 October	Birkett complains to the Information Commissioner
2 November	Information Commissioner orders Defra to release all information requested. Defra complains the Information Commissioner did not wait for its response to the complaint, but the Information Commissioner was not obliged to do so
1 December	Defra appeals to First-tier Tribunal seeking to rely on the new exceptions of 'legal advice privilege' and 'litigation privilege' to withhold the information
24 December	Defra releases first tranche of information

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11 March	Defra releases second tranche of information
8 April	Defra release third tranche of information
11 May	First-tier Tribunal hearing. Tribunal refuses to allow new exceptions and 'stays' the case pending any appeal

Tribunal concluded, before the main hearing got underway, that:

"There is no obligation on the Tribunal to consider any new exception relied upon by a public authority that had not previously been relied upon; exceptions or exemptions raised for the first time before the Tribunal should only be considered if there is a reasonable justification."

Defra barrister admits in Court the decision means 'it does not have much of an appeal left'

15 July	Defra appeals to Upper Tribunal
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12 and 13 January	Upper Tribunal hearing
26 January	Upper Tribunal judgment
28 February	Birkett applies for permission to appeal to the Court of Appeal
28 and 29 November	Court of Appeal hearing
21 December	Court of Appeal judgment

The case has now been referred back to the First-tier Tribunal subject to any appeal.

CAL Campaign Updates with attachments

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28 April <http://cleanairinlondon.org/legal/clean-air-in-london-fighting-government-appeal-against-order-to-release-details-including-ministerial-briefings/>

11 May <http://cleanairinlondon.org/legal/clean-air-in-london-fighting-government-appeal-against-order-to-release-details-including-ministerial-briefings/>

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12 January <http://cleanairinlondon.org/legal/government-attempts-to-keep-london-air-pollution-information-secret/>

14 February <http://cleanairinlondon.org/legal/government-obtains-the-right-to-add-or-substitute-exceptions-to-avoid-disclosing-information/>

2 March Link not available