Response to the UN Special Rapporteur on Climate Change Call for Inputs: Access to Information on Climate Change and Human Rights

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There are many types of information that can support the protection and exercise of human rights in the context of climate change. This includes, but is not limited to, information on land use and management, planning and development proposals, the issuing of licences for fossil fuel projects, and scientific data on climate change, as well as information to support the development, maintaining, repairing, and supporting of new technologies to mitigate against and adapt to climate change. Information is necessary to support effective and meaningful participation in environmental decision-making, to prevent human rights abuses, and to support effective redress where human rights have been violated. Moreover, the right to information is increasingly recognised as a human right, in large part due to the fundamental role it plays in supporting the exercise of other fundamental rights, such as the rights to freedom of expression and to private and family life.

However, the scope of access to information laws is often limited to public authorities or, in some cases, to private actors that perform public functions. This means that private actors are not typically under any legal obligation to provide information that they hold for other purposes. Moreover, some freedom of information laws, including the UK's Freedom of Information Act 2000 (FOIA) and the Freedom of Information (Scotland) Act 2002 (FOISA) include exemptions on the disclosure of information that would prejudice the commercial interests of any party, including the public authority that holds the information.[1] Therefore, it can be challenging to access information held by private actors, as well as commercial information held by public authorities. Our responses to Questions 5 and 6 provide specific examples of how this works in practice in the United Kingdom.[2]

Question 5: Are there specific examples of State regulation that have significantly improved access to information held by private actors on climate change and human rights?

Within the UK, the Environmental Information Regulations 2004 (EIR) and the Environmental Information (Scotland) Regulations 2004 (EISR) govern public access to environmental information in general (not limited to information on climate change and human rights). Both incorporate the EU Directive 2003/4/EC on public access to environmental information, which in turn implements the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[3]

Neither the Aarhus Convention nor the EIR/EISR apply to private actors in general. However, both were drafted with the challenges of privatisation in mind and in recognition of the need to ensure

[1] Freedom of Information Act 2000, s 43; Freedom of Information (Scotland) Act 2002, s 33.
[2] Both respondents are based in the United Kingdom and are primarily familiar with the legal framework for access to information in the UK. However, the challenge of accessing information held by private actors is experienced in other jurisdictions, as many domestic freedom of information laws are limited to public authorities.
[3] The Aarhus Convention defines 'public authorities' broadly to include 'natural or legal persons performing public administrative functions under national law', as well as persons 'having public responsibilities or functions, or providing public services, in relation to the environment' and under the control of a public authority.

that information rights are not diminished when public services are privatised. Therefore, the EIR apply to private actors that carry out 'functions of public administration'[4] as well as to organisation under the control of public authorities that either have public responsibilities relating to the environment, exercise public services relating to the environment, or provide public services relating to the environment.[5] This means that some private actors, such as private water companies in England, must provide information falling within the scope of the EIR.[6]

To some extent, this functional approach to coverage has improved access to information held by private actors as it has introduced a legally enforceable process where previously information would only be disclosed voluntarily. At a time when public services are delivered by a range of private and hybrid bodies, this approach helps to ensure that privatisation does not interfere with information access. However, it is limited by the fact that it does not apply to private actors generally. Moreover, the judicial approach to interpreting which bodies fall under the EIR/EISR has led to the creation of a series of tests to determine whether a private actor falls within the scope of either Regulation 2(2)(c) or Regulation (2)(2)(d).[7] The result is that many private bodies that deliver apparently public functions and hold information that would help the public understand and contribute to environmental decision-making do not meet the tests and therefore and not subject to the EIR. This point is expanded on below.

Question 6: What are the impacts on human rights of inadequate access to information from public authorities and/or business?

Inadequate access to information can make it more difficult for people to exercise other rights that depend upon access to information, such as the right to freedom of expression, the right to vote, and the right to participate in environmental decision-making. Likewise, journalists, civil society organisations, and others performing social watchdog functions require sufficient information to expose human rights abuses and facilitate informed public discussion on climate change, including climate solutions.

As explained above, although the EIR/EISR have incorporated a mechanism to ensure the privatisation does not interfere with access to information (in line with the aims of the Aarhus Convention), the threshold for meeting the definition under Regulations 2(2)(c) and (d) is a high one that suggests the broad, functional approach is narrower than it first appears. Organisations like Heathrow Airport Ltd, National Grid Metering Ltd, Poplar Housing and Regeneration Community Association Ltd., and the National Trust are not subject to the EIR, despite the fact that they do hold environmental information that is relevant to climate change and human rights. This includes information on urban planning and regeneration, conservation, and operation of Europe's busiest

[4] Regulation 2(2)(c).
[5] Regulation 2(2)(d).
[6] Following the Upper Tribunal decision in *Fish Legal v Information Commissioner* [2015] UKUT 0052.
[7] These are the 'special powers', 'control' and 'entrustment' tests, as established in *Fish Legal*.

airport. The fact that access to information is still largely dependent on the identity and institutional characteristics of the information holder is a significant barrier when it comes to protecting the right to information in the context of human rights and climate change.

Additionally, intellectual property rights (copyright and database rights) and claims to trade secrets are also relevant here.[8] The development of this relationship and its nature, in the UK and in other countries, is important. There can arguments that IP and trade secrets have the benefit of the rights to property such as under article 1 Protocol 1 ECHR[9] and article 27(2) EU Charter; and there are also arguments that these rights should be balanced with rights to freedom of expression and in relation to the environment, climate change and health.

The EIR and EISR include provisions relating to intellectual property and trade secrets. These provide that public authorities may refuse to disclose information to the extent that its disclosure would adversely affect IP rights; subject always to the overriding question of the public interest and the presumption in favour of disclosure.[10] Further, a public authority may refuse to disclose information to the extent that this would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;[11] this is also subject to the overriding question of the public interest and presumption in favour of disclosure.[12] These differs from the provision in relation to Freedom of Information more generally – when legislation and case law confirms that the existence of IP rights does not mean that information should not be disclosed, however no commercial use should be made of the information.[13] Information is usually then released under Open Government Licences and there are also exceptions in IP legislation and case law, including in the public interest, relating to use which can be made of information and material which is the subject matter of IP rights.[14] We suggest that across the Special Rapporteur's work it is important to engage with the intersections at national, regional, and international level between private rights over information and the ability to access and use

[8] See generally Brown, A. et al *Contemporary Intellectual Property Law and Policy* (6ed, OUP 2023) , ch 2, 3, 5, 17 and Brown, A 'Intellectual Property and Climate Change' in Cooper, R. and Pila, J. *Oxford Handbook on Intellectual Property Law* (OUP 2017), UK CDPA s3(1) 3A and Copyright and Rights in Databases Regulations SI 1997/3032

[9] Note debate about whether this covers confidential information and *Veolia ES Nottinghamshire Ltd v Nottinghamshire CC* [2010] EWCA Civ 1214.

[10] EIR, 12(5)(c)), 12(2), 12(1)(b) and EISR reg 10(5)(c) and see Regulation 12(5)(c) – intellectual property rights | ICO.

[11] EIR, 12(5)(e)), EISR reg 10(5)(c); and see Commercial or industrial information (regulation 12(5)(e)) | ICO.

[12] This restrictive approach to interpretative of exceptions to the obligation to disclose has also been seen at EU level, *Stichting Greenpeace Nederland v European Commission* T- 545/ 11 2017 2 CMLR 16; Regulation 1367/2006—art.6(1) and Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents art 4(2) and Case C– 416/ 10 *Krizan v Slovenska*, [2013] 1 WLUK 146.

[13] Freedom of Information Act 2000, s43, and see Intellectual property rights and disclsoures under FOI (ico.org.uk).

[14] See eg CDPA s29-32, 171(3) and Database Regulations reg 20 and Schedule 1.

information which might be desirable or needed in the light of steps driven by climate change and human rights.[15]

Conclusion

Finally, whilst we recognise the importance of access to information, we are also aware of the limits of transparency. On its own, access to information is not sufficient to address the challenges of climate change, nor the impacts it has on human rights. Therefore, we stress that access to information is only one tool to protect human rights in the context of climate change and should be used to complement (but not substitute) substantive regulatory measures to mitigate against and adapt to climate change.

[15] See also A Brown 'Intellectual Property, Human Rights and Climate Change' in Torremans, P. (ed.). *Intellectual Property Law and Human Rights* (4th edn, Wolter Kluwer International 2020) and Brown, A 'Intellectual Property and Climate Change' in Cooper, R. and Pila, J. (eds) *Oxford Handbook on Intellectual Property Law* (OUP 2017).