

Freedom of Information Act 2000 (Section 50)

Environmental Information Regulations 2004

Decision Notice

Dated 28 September 2006

**Public Authority: Office of the Deputy Prime Minister
(now Department for Communities and Local Government)**

**Address: Eland House
Bressenden Place
London
SW1E 5DU**

Summary Decision and Action Required

The Information Commissioner's (the 'Commissioner') decision in this matter is that the public authority has not dealt with the Complainant's request in accordance with Regulation 5 of the Environmental Information Regulations 2004. Therefore, the Commissioner requires that the authority disclose the requested information.

- 1. Freedom of Information Act 2000 (the 'Act'), Environmental Information Regulations 2004 (the 'Regulations') – Application for a Decision and the Duty of the Commissioner**
 - 1.1 The Commissioner has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part 1 of the Act.
 - 1.2 Because the information requested is environmental, the Commissioner has made a decision as to whether the request was dealt with in accordance with the requirements of Part 2 of the Regulations. This is discussed further in section 4.2 of this notice below.
 - 1.3 The Regulations were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the Commissioner shall enforce the Regulations. In effect, the enforcement provisions of Part 4 of the Act are imported into the Regulations.
 - 1.4 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

The Commissioner is under a duty to make a decision.

- 1.5 The Commissioner shall notify the complainant either that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

- 2.1 The complainant has advised that on 4 March 2005 they wrote to the Government Office of the East Midlands (GOEM) to request the following information:

- 2.2 The recommendations made by the Government Office for the East Midlands to the First Secretary of State, Office of the Deputy Prime Minister (ODPM – subsequently renamed the Department for Communities and Local Government, DCLG), which subsequently led to two linked planning applications being ‘called in’.

- 2.3 GOEM issued a refusal notice on 29 March 2005. Having assessed the request under the Act GOEM sought to rely on the exemption set out in section 35 of the Act, which states that,

...information ‘is exempt if it relates to -

- a) the formulation or development of government policy,
- b) Ministerial communications,
- c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- d) the operation of any Ministerial private office.’

- 2.4 On 31 May 2005, the complainant wrote to the GOEM asking for clarification on the particular subsection being claimed. The GOEM responded on 1 June 2005 informing the complainant that where exemptions are applied it refers to the legal team in the ODPM for advice and guidance and that it had referred to them regarding this particular request.

- 2.5 In a letter dated 9 June 2005, the complainant stated that as the GOEM had referred to the ODPM, they now wished to exercise their right to a full review under the ODPM’s internal review procedure.

- 2.6 The ODPM replied to the complainant on 11 August 2005. The review process looked at all aspects of the request and the response and concluded that the request should have been dealt with under the Regulations as the information requested fell within the definition of environmental information as set out in regulation 2(1). The review went on to explain that the information fell within

exception 12(4)(e), that the authority can refuse to disclose information to the extent that it would involve the disclosure of internal communications. All the exceptions in the Regulations are subject to the public interest test, and the authority explained why it felt that the public interest in maintaining the exception outweighed the public interest in disclosing.

- 2.7 On 23 August 2005, the complainant wrote to both the ODPM and the Information Commissioner indicating that they wished the Information Commissioner to consider the handling of the request.

3. Relevant Statutory Obligations under the Regulations

Regulation 2(1), states that -

"the 'Directive' means Council Directive 2003/4/EC[4] on public access to environmental information and repealing Council Directive 90/313/EEC;

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely 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);

Regulation 5(1) provides that –

“...a public authority that holds environmental information shall make it available on request.”

Regulation 12(1) provides that -

“...a public authority may refuse to disclose environmental information requested if –

- a) an exception to disclosure applies under paragraphs (4) or (5); and
- b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

Regulation 12 (2) provides that –

“A public authority shall apply a presumption in favour of disclosure.”

Regulation 12(4)(e) provides that –

“...a public authority may refuse to disclose information to the extent that –

- e) the request involves the disclosure of internal communications”

Regulation 12(8) provides that –

“For the purposes of paragraph (4)(e), internal communications includes communications between government departments.”

Regulation 14 provides that –

- (3) The refusal shall specify the reasons not to disclose the information requested, including -
 - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulation 13(2)(a)(ii) or 13(3).

4. Review of the case

4.1 The complainant asked the Commissioner to consider firstly whether the information requested was environmental information, and therefore the Regulations applied, or, whether the request should have more properly continued to be assessed under the Freedom of Information Act and secondly, whether or not it was exempt from disclosure.

4.2 Access Legislation

4.2.1 Following the public authority’s internal review, the complainant wrote to the public authority to express their doubt about the validity of the decision that the

information was 'environmental'. The authority responded on 1 September 2005 with a further explanation as to why the definition of environmental information, as set out in the Regulations, applied to the information requested.

- 4.2.2 The authority referred to regulation 2(1)(c), and explained that, "*Much of the information which relates to planning applications, in our view, falls within this definition because planning applications are plans which affect the land etc. In our view, one cannot divorce the planning application from the correspondence and advice which relates to that application. This is why we handled your client's request under the Environmental Information Regulation regime.*"
- 4.2.3 The Commissioner agrees with this assessment and is satisfied that, on the whole, planning applications and the planning approval process constitute administrative measures likely to affect the elements and factors listed in paragraphs a and b of the definition. For example, planning is likely to affect land use, landscape, waste generation and disposal, water provision and drainage, energy use and noise amongst others. The Commissioner is satisfied that most planning information will fall within the broad definition set out in regulation 2(1)(c). Indeed, the Information Tribunal also accepts that documents relating to planning applications fall within the definition of environmental information (see [Mr David Markinson v Information Commissioner](#) (28th March 2006) Appeal Number: EA/2005/0014 (FER0061168)).
- 4.2.4 The complainant has argued that because the information related to a '*simple planning application*' and '*does not concern any major development*', it will not be environmental. However, the definition of environmental information is not dependant on the complexity or scale of the subject of the information. The statutory definition does not state that any effect or likely effect on the environment needs to be significant in order for information to qualify as environmental information.

4.3 Internal Communication Exception

- 4.3.1 The next stage in the Commissioner's investigation was to establish whether the exception had been legitimately engaged. That is, would the recommendations from GOEM to ODPM classify as an 'internal communication'. Regulation 12(8) instructs that communications between government departments are internal. Therefore, central government must be viewed as a single body for the purposes of this exception.
- 4.3.2 Government Offices, such as GOEM are, in essence, central government in the regions. They represent ten Whitehall departments. Communications between a regional office and any government department are therefore necessarily internal. Furthermore, the Commissioner is advised that Government Offices are part of the DCLG. The Commissioner also accepts that the recommendations constitute a communication.

4.4 Public Interest Test

- 4.4.1 The Commissioner has given careful consideration to the application of the public interest test set out in regulation 12(1)(b), that, *'a public authority may refuse to disclose environmental information requested if, b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'*. In addition, the Commissioner has taken account of the requirement of regulation 12(2), namely, *'A public authority shall apply a presumption in favour of disclosure.'*
- 4.4.2 The refusal notice sent by GOEM stated that the reasons for refusal had been *'fully explained'*, however, it did not contain any reference to the public interest test, even though the original exemption relied upon, section 35 of the Act, is a qualified exemption to which the public interest test should be applied.
- 4.4.3 In the ODPM's internal review, the Appeals Officer wrote in relation to public interest considerations: *"I acknowledge that greater transparency can make government more accountable to the electorate and that knowledge of the way government works has the potential to increase public contribution to the policy making process and make it more effective.*

However, in my view, the release of this information would not be in the public interest. In particular, I hold the view that it is in the public's interest that decisions relating to planning matters should be based on the best advice available and a full consideration of all the options. Linked to this, I consider that the impartiality of the civil service should be protected. This might be undermined if advice was routinely made public, as there is the risk that officials could come under political or public pressure not to challenge ideas in the decision making process.

The decision making process depends on civil servants and Ministers being able to deliberate and consider the issues freely and frankly without the constraint that possible disclosure might place on the provision of advice."

- 4.4.4 There is no obligation on the complainant to present the public interest arguments in favour of disclosure.
- 4.4.5 In making his decision on the public interest test, the Commissioner has taken account of the relevant guidance documents published by his office, namely, [Awareness Guidance No 3](#) – Public Interest Test, and [Introductory Guidance on the Exceptions](#) in the Environmental Information Regulations. In addition, although this request for information is dealt with under the EIR, it also relevant to consider the exemption in the Act relating to the formulation of government policy, and therefore, the Commissioner's guidance on this exemption, [Awareness Guidance No 24](#) – Policy Formulation, Ministerial Communications, Law Officers' Advice and the Operation of Ministerial Private Office, since this was referred to by the authority. Furthermore, it is accepted that this exemption will deal with similar issues to that of the internal communication exception in the EIR. It is not suggested that section 35 of the Act is directly relevant to this case, rather that it may be reasonable to apply the same general approach to information held in relation to the formulation of government policy to information held in relation to an internal communication.

4.4.6 The Commissioner's basic approach to the public interest test to be applied under both the Act and the EIR is explained in Awareness Guidance No 3. Among the factors favouring disclosure are the following:

- promoting accountability and transparency by public authorities for decisions taken by them. By placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.
- allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.

In the Commissioner's view, each of these factors is relevant to this particular case.

4.4.7 The guidance on the exceptions includes, "*When refusing a request for information on the ground that it relates to internal communications, public authorities must be satisfied that disclosure would firstly cause some harm, for instance by misleading the public or making the formulation of policy difficult or impossible and, secondly, that there is not a stronger public interest in increasing public input into the formulation of policy.*"

4.4.8 The information requested, namely a submission made from the GOEM to the First Secretary of State, was in relation to the call in of two linked planning applications. The call in process is an established procedure, the policy for which is already clear and has been articulated in Parliament.

4.4.9 Richard Caborn made a statement in the House of Commons (Hansard 16 June 1999, col. 138) in which he said,

"[The First Secretary of State's] policy is to be very selective about calling in planning applications. He will, in general, only take this step if planning issues of more than local importance are involved. Such cases may include, for example, those which, in his opinion:

- *may conflict with national policies on important matters;*
- *could have significant effects beyond their immediate locality;*
- *give rise to substantial regional or national controversy;*
- *raise significant architectural and urban design issues; or*
- *may involve the interests of national security or of foreign Governments"*

4.4.10 In addition, the website of the Government Office for the South East

<http://www.gov.uk/gose/planning/planningCasework/departureApps/?a=42496> goes into some detail about the call-in of planning applications. It states, “*Each application referred to us is measured against national planning policies, rather than judging the planning permission on the particular circumstances of the case.*” As an example, included below is the detail given on the website in respect of Departure Applications.

4.4.11 “*Departure applications refer to applications for planning permission that breach local development plans. These applications are submitted to us by the local planning authority for our consideration.*”

These departure applications must meet the following criteria:

- *more than 150 homes or more than 5000 square metres of retail, leisure, office or mixed commercial development*
 - *the LPA has an interest in the land or is one of the developers*
 - *approval would significantly compromise the development plan*
- We also consider whether the Secretary of State’s intervention is needed and if necessary, prepare a submission summarising the planning issues for the Secretary of State to decide whether to call in the planning application.”*

4.4.12 It seems clear therefore, that the decision of whether to recommend call-in of a planning application does not involve the formulation of policy. It is about applying policy to particular circumstances and making a judgement. The officials concerned are exercising their professional expertise to assess factual information against established policy. The Commissioner does not believe that subsequent publication of these recommendations would result in officials being reluctant to comment nor would it lead to them not making recommendations on whether a planning application should be ‘called in’ in the future. If anything it would ensure that when they do recommend call-in, they do so properly and with good reason and can demonstrate the need.

4.4.13 The Commissioner also believes that release of the recommendations would further public understanding of a complex and difficult process and would increase public confidence that all relevant factors are considered fairly and appropriately. Greater clarity and transparency when taking decisions such as these are aims to which all public authorities should aspire.

4.4.14 The Commissioner accepts that there is already a rigorous and thorough process by which planning decisions at all stages of the process can be challenged. The timing of a request is an important consideration. If the request had been made before the call-in procedure had concluded and before the Secretary of State had made the decision whether to grant or deny permission, there is the possibility that releasing such information would re-open the debate, delaying the process, which would not be in the public interest. However, this request was made over four months after the Secretary of State’s decision was made. Therefore, release of the information would not have re-opened the debate nor delayed the process.

4.4.15 Clearly, there is a strong public interest in allowing officials within a public authority the ability to communicate amongst themselves. Broadly, the purpose of the exception is to protect the right of officials to think in private. The Information Commissioner accepts that this can be a persuasive argument when considering the public interest against disclosure in these cases and considers seriously any reasoned argument about withholding internal communications that reflects these concerns.

4.4.16 After careful consideration and taking into account that there is a presumption in favour of disclosure, the Commissioner is not convinced by the argument that, in this instance, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

5. The Commissioner's Decision

5.1 The Commissioner's decision in this matter is that the public authority has not dealt with the complainant's request in accordance with the following requirements of Part 2 of the Regulations:

Regulation 5(1)

- in that it failed to make available the environmental information requested, to which the complainant was entitled in accordance with the regulations because it incorrectly concluded that public interest in maintaining the exception provided by regulation 12(4)(e) outweighed the public interest in disclosing the information.

Regulation 14(3)(b)

– in that it refused the complainant's request for information but when originally informing the complainant failed to communicate the matters considered by the public authority when reaching its decision with respect to the public interest under regulation 12(1)(b).

6. Action Required

6.1 The Commissioner requires that the public authority release the information requested to the complainant within 30 days of this Decision Notice.

7. Right of Appeal

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 28th day of September 2006

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner
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SK9 5AF**