

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

28 January 2008

Public Authority: Department for Business Enterprise and Regulatory Reform (BERR) (formerly the Department of Trade and Industry (DTI))
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant made a request to the Department of Trade and Industry (DTI) for the advice given by civil servants to the Energy Minister in relation to the decision to grant permission for a wind farm to be built at Cefn Croes, Ceredigion, West Wales. DTI refused to disclose the information, relying on the exemption in section 36 of the Act. After investigating the case the Commissioner is satisfied that the correct regime under which this matter should have been dealt with is the Environmental Regulations 2004 (EIR). The Commissioner's decision is that the public authority has not dealt with the complainant's request in accordance with Regulations 5, 12, and 14 of the EIR 2004. The Commissioner found that under the EIR the exception at regulation 12 (4)(e) was engaged in relation to the information withheld under section 36 but that in all the circumstances of the case the public interest in maintaining the exception did not outweigh the public interest in disclosure. The Commissioner is satisfied that the exceptions in regulations 12 (5) (b), and 13 apply to some of the requested information. The Commissioner requires the disclosure of advice given to the Minister subject to redaction of the information that can be withheld under regulation 12(5) (b) (The course of justice...), and regulation 13 (Personal data).

The Commissioner's Role

1. The Environmental Information Regulations (EIR) 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 EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 12 February 2005 the complainant made a request to the DTI (to which, for convenience, we refer throughout this report) for the advice given by civil servants in 2001 to the Energy Minister in relation to the decision to grant permission for a wind farm to be built at Cefn Croes, Ceredigion.
3. DTI replied on 16 March 2005, refusing to disclose the information and citing the exemption in section 36 of the Act. In that letter DTI did not explain how it had reached the decision that the public interest was best served by maintaining the exemption cited, nor was there any indication that an extension of time had been required in order to consider the application of the public interest test.
4. On 18 March 2005 the complainant wrote to ask for an internal review of the decision. The complainant subsequently wrote to the DTI on three separate occasions between 14 April and 24 June 2005 asking about progress of the internal review.
5. DTI finally replied on 1 August 2005. This letter neither acknowledged nor answered any of the complainant's interim letters, but did uphold the original decision to withhold the information. The letter contained a brief consideration of the public interest arguments in favour of disclosing the information and more detailed arguments in favour of withholding it. There was no evidence to show that any balancing of these arguments had been carried out.

The Investigation

Scope of the case

6. The complainant wrote to the Commissioner on 31 August 2005 to complain about the way in which her request had been dealt with by DTI. The complainant asked the Commissioner to look at the failure to acknowledge her request of 18 March 2005 for an internal review, together with the subsequent failure to provide progress reports on the matter.
7. The complainant also asked the Commissioner to look at the reasons given for non-disclosure. Her view was that these reasons were unconvincing as the public interest test had not been conducted appropriately. She wanted to know the extent and nature of the consideration that had been given to the application and whether or not the Minister had ignored the recommendations of officials.

Chronology

8. On 13 October 2006 the Commissioner wrote to the DTI asking for a copy of the information withheld from the complainant. On 5 January 2007 the Commissioner wrote to the DTI asking for confirmation of the name of the

- qualified person and for clear evidence that a balancing exercise had been carried out in the assessment of the complainant's request: he also asked for DTI's detailed considerations of the public interest test in respect of section 36(2)(b). Following the issuing of a number of reminders, DTI replied on 19 March 2007.
9. On 5 April 2007 the Commissioner wrote again to DTI with further enquiries. DTI replied on 25 April 2007 providing some of the information and promising to provide the remainder as soon as possible. The Commissioner wrote to DTI on 5 July 2007 reminding it that a reply was still outstanding following earlier reminders dated 11 May, 25 May, and 6 June 2007. In this letter the Commissioner sought additional information in relation to the process by which the qualified person was consulted on the application of section 36. He also reminded DTI that the date of receipt of the actual request was still required in order to assess the department's compliance with the Act. A further written reminder was sent on 25 July 2007. No response was received and the matter was escalated within the Commissioner's office. Following two further reminders on 6 and 13 September 2007, some of the outstanding information was received on 27 September 2007. DTI could not however provide the Commissioner with the date on which the original request for information was received.
 10. While awaiting this further information from DTI the Information Tribunal issued its decision in the matter of *Lord Baker v The Information Commissioner (ICO) and The Department for Communities and Local Government (DCLG) EA/2006/0043*. In that case, the Tribunal ruled that civil servants' advice to Ministers on major planning decisions should be disclosed to anyone who asks for it once the decision is taken. The decision substituted that made by the Commissioner in Decision Notice FER86629 dated 13 June 2006.
 11. In the past, where the outcome would have been the same whether a complaint was dealt with under FoIA or the EIR, the Commissioner has determined the complaint by reference to FoIA. However, in the matter of *Archer v The Information Commissioner and Salisbury District Council EA2006/0037*, the Tribunal found that, although the request had been considered and refused under the Freedom of Information Act by the public authority and determined under the Freedom of information Act by the information Commissioner, it was the Environmental Information Regulations that actually applied to the information in question. In the light of the Tribunal's decision the Commissioner is required to decide on the appropriate regime based on his assessment of whether the information is environmental information. The information requested by the complainant related to planning permission for the construction of a wind farm and therefore would appear to fall within the Regulations under 2(1) (c): *measures such as policies, ..., plans, affecting or likely to affect the elements and factors referred to in (a) and (b)*. The Commissioner agrees that the information requested falls within this broad definition and that the public authority should, on this basis, have considered the request for information under the EIR.
 12. The Commissioner therefore wrote once again to DTI on 19 October 2007 to invite its opinion on which exception(s) under the Regulations might apply. The Commissioner also suggested, in the light of the Tribunal's decision in the Lord

Baker case, that DTI might reconsider the possibility of releasing the information to the complainant.

13. DTI replied on 22 November 2007, DTI agreed that the request should have been considered under the EIR and provided the Commissioner with arguments to support its revised application of the following exceptions: 12(4)(d) – unfinished documents; 12 (4) (e) internal communications; 12 (5) d confidentiality provided by law and 13, personal data. DTI takes the view that, while some parts of the submissions deal with matters impacting on elements of the environment (in which case the EIR apply), some do not (in which case FoIA applies). DTI's view is that this makes the case what is in effect a hybrid one. DTI also agrees that some, but not all, of the requested information might now be released to the complainant.
14. On the matter of the legislation the Commissioner takes the view that, as the main substance of the information withheld concerns the construction of a wind farm, and as the arguments provided for withholding the majority of the information under regulation 12(4)(e) EIR and s36 FoIA are very much the same, it would be most appropriate to consider the complaint under the EIR, which is what he has done.

Findings of fact

15. The Commissioner has reviewed the information provided in this case within the following background context.
16. In July 2000 a company applied to the Secretary of State for Trade and Industry for consent under sections 36 and 37 of the Electricity Act 1989 (EA 1989) for the construction and operation of a 60MW wind farm and associated overhead line connection at Cefn Croes, Ceredigion, West Wales. Cefn Croes is now the largest consented wind power station constructed in the UK.
17. The application went to the Secretary of State because, at 60MW, the proposed farm was large enough to come under the “section 36” planning procedures applying to major power stations. Due to its size Cefn Croes was therefore the first development of its kind to be approved by central government rather than by a local planning authority.
18. A public inquiry is mandatory where a relevant planning authority objects to such an application. In this case the relevant authority was the Ceredigion County Council. There were no objections from that authority or from any other relevant bodies. The EA 1989 provides for the Secretary of State to call for a discretionary public inquiry if he or she considers it to be necessary. The Cefn Croes Action Group (CCAG) is a group which was formed to oppose the construction of the wind power station at Cefn Croes, Ceredigion.
19. On 10 December 2001 the Energy Minister announced that the Secretary of State was minded to grant consent subject to the satisfactory conclusion of the planning conditions and planning obligation. On 23 May 2002 the then Secretary of State for Trade and Industry gave approval for the Cefn Croes Wind Power Station development to proceed without a public inquiry. Copies of the decision letter and consent were sent to the local planning authority for

deposit on the planning register. In addition DTI sent copies to those who had expressed an interest in the application, e.g. supporters and objectors (both the complainant and the CCAG fell into this category). A list of consents was also published on the DTI website.

- 20 CCAG subsequently initiated proceedings in the High Court of Justice in the summer of 2002 in an attempt to halt the development at Cefn Croes through a judicial review of the decision. This application failed in November 2002.

Analysis

Procedural matters

Regulation 14

21. Regulation 14 (1) EIR provides that, where a request for information is refused upon the basis of an exception under regulation 12(1) or 13(1), the public authority must explain what exception or exceptions have been relied upon. Regulation 14 (3) requires a public authority to state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. DTI issued a Refusal Notice under the FoIA, which has a similar requirement with regard to an explanation of the public interest factors, however no statement of reasons was given in that Notice. Technically therefore, DTI did not produce a Refusal Notice under the correct legislation, but more significantly it failed to provide an adequate Notice by not stating its reasons for withholding the information, and it has therefore breached regulation 14.

Application of the exceptions

Regulation 12(4) (d) Unfinished documents

22. This exception was cited in respect of draft consent letters to the Developer, draft answers to anticipated Parliamentary Questions and draft Press Releases. DTI considers that there is a public interest in not making draft documents available to EIR applicants. Draft documents are, by definition, still “work in progress” and may not reflect the detail of the final decisions that were eventually taken. They may therefore contain misleading information. DTI goes on to suggest that, by their very nature, draft documents do not represent the settled view of the Secretary of State and that their disclosure does not therefore further any greater understanding of the matters under discussion. As the draft documents in this case were eventually finalised, and these versions are in the public domain, this heightens the public interest in withholding drafts. DTI is willing to disclose the final versions to the complainant (but they are, of course, already in the public domain).
23. The Commissioner has considered the matter carefully but does not accept DTI's contention that regulation 12(4) (d) can be correctly applied to the drafts in question. A draft is not necessarily, in his view, an unfinished document: it may be complete in itself, even though it may be replaced by another version or versions, and later versions may differ substantially from the first one. There may of course be other exceptions under which it would be appropriate to

withhold a draft document. In this particular case the draft documents that DTI describes as unfinished actually formed part of the package that made up the submissions to the Minister and can therefore be considered with the other internal communications material (see below).

Regulation 12(4) (e) – internal communications.

24. DTI has applied this exception to both of the submissions. It had previously cited section 36 of the Act. The Commissioner accepts that both submissions are from Officials to Ministers and sees no difficulty in their being classified as internal communications under regulation 12 (4) (e).
DTI recognises the public interest in increasing transparency in the decision making process by publishing the advice given to the Secretary of State in that doing so would allow the public to see the factors that were taken into account when reaching the decision.
25. In its original response to the Commissioner dated 19 March 2007, DTI provided several arguments in support of its decision to withhold the information. Firstly, it argued that releasing information relating to individual departments' specific recommendations or discussions on applications would risk undermining the decision-making process. It stated that, when deciding on consents, the department weighs the reasoning behind, and relevant background to, the recommendations made and the various options available. If these recommendations and advice were to be released it would undermine the sense of collective responsibility of the various strands of DTI which deal separately with both policies and regulatory regimes. DTI considers that, on balance, release of the information would be likely to inhibit internal departmental debate in the future leading to less informed decisions and poorer quality consents, which could easily act to the detriment of those very interests arguing for disclosure in this particular case.
26. DTI has expanded its original arguments to explain that the submissions contain two broad types of information: a) a recounting of representations made by third parties and, b), DTI officials' own analysis of the factors for and against holding an inquiry. DTI is of the view that the public interest in favour of disclosing the first category of material is stronger than in the case of the second category. It has therefore proposed to release the relevant statistical and factual material in the two submissions to the complainant, but no more.
27. DTI's reasons for continuing to withhold parts of both submissions are that Government decision-making has to be based on the best advice available and a full consideration of all the options. Officials need to be able to set out factors in favour of or against a particular decision in the knowledge that they can express themselves fully and frankly without the possibility that what they say will be exposed to public scrutiny. If officials felt that their advice might become public there is a danger that they would become more circumspect about expressing their views thereby compromising the quality of their advice, or the recording of that advice. DTI takes the view that if internal arguments were exposed, disclosure of the information would make it easier for those with vested interests in the outcome of an application to apply political or public pressure.

28. DTI does not suggest that Ministers should not be held accountable for the decisions that they make. However, Ministers and civil servants should not be set against one another. Dissection of the advice given to Ministers, and the terms in which it is given, is likely to be detrimental to the quality of advice given in the future. The platform for criticising the final decision should not be the knocking down or holding up of the internal advice given to the Minister (unless it is plainly wrong). To do so may tend to either discourage or over-encourage civil servants in the future with the result that advice to Ministers would not be so even-handed. DTI claims that this point has even greater weight when the public has already been given full reasons for the decision which has been made.
29. Finally, DTI takes the view that the decision in *Lord Baker v ICO and DCLG* does not have general application to all cases involving planning applications. It suggests that this case is more complex as it involves an extra layer of complexity leading to the seeking of legal advice.

The public interest

30. The Commissioner has given careful consideration to the application of the public interest test set out in regulation 12 (1)(b), mindful of the requirement of regulation 12(2) namely, that a public authority shall apply a presumption in favour of disclosure.
31. The Commissioner agrees that the public interest in disclosing the requested information lies principally in creating accountability and transparency in respect of actions and decisions being taken by a public authority. It is important that the public knows the options and understands the reasoning behind decisions on topics of such paramount importance as the environment, particularly on a subject of substantial controversy such as the siting of wind farms.

The complainant's view

32. It is the complainant's contention that release of the information would give the public confidence that decisions are being taken on the basis of the best available information. She makes particular reference to two other wind development applications made to DTI subsequent to the Cefn Croes decision, both of which went to public inquiry. These proposed developments were in Whinash, Cumbria and Romney Marsh, Kent: the former was rejected while the latter was accepted. In both cases public access was given to the reports on which the inspectors had based their advice to the Energy Minister and the Secretary of State. The complainant points out that the Cefn Croes decision was viewed as a landmark case, described indeed as the first of its kind, yet the advice (in the absence of inspectors' reports) given by civil servants to the Ministers and the Secretary of State who took the decision has been withheld. In recent correspondence the complainant wrote "If we are to see a massive expansion of wind developments, it is surely in the "public interest" that there be full disclosure of the facts relating to this means of electricity generation".

The Commissioner's view

33. The Commissioner's guidance on the application of the exceptions recognises that Ministers and officials must be given space, privacy and adequate time in which to consider all the options put before them while determining the best approach to take to a particular issue. However it is the Commissioner's view that it would be very naïve of a public authority to expect, in the light of the fundamental purpose of the EIR/Act, that information held by it in relation to the decisions it makes will remain permanently exempt from disclosure.
34. The Commissioner has considered these arguments and is of the view that the public would be very much aware that the decision-making process in government is rarely free from difficulty: in reality, it would be unusual for a decision to be reached where all the parties concerned agreed with each other. It is only with the benefit of informed discussion and argument that an audit trail can be followed through to a well reasoned decision. In a case such as this, where a landmark decision was reached, the Commissioner is of the view that the public has a right to know what options were put before the decision-maker and what the reasons were for the decision eventually taken.
35. In this case the decision to approve the wind farm construction without recourse to a public inquiry is well documented publicly and has been the subject of press releases, parliamentary questions, High Court debate, House of Lords debates, and a dedicated website. The reason for approval of the wind farm application without a public inquiry is also well documented – the Minister has publicly stated that she gave full consideration to all of the facts, figures and objections put before her by her department, and that she chose the option that she felt was right. All that is missing, therefore, is an understanding of what the nature of the options were that were put before her by the DTI.
36. The Commissioner accepts that there is a very strong public interest in knowing the range of options considered by the Minister in relation to a matter which is the subject of considerable public concern and controversy. He has considered whether disclosure of such information would inhibit future internal departmental debate but he does not, in this case, accept the department's view that it would. The Commissioner takes the view that to enable the public to have a closer understanding of how the decision-making process works in public authorities is part of the reason for the introduction of the Act.
37. The Commissioner is also of the view that it would not inhibit free and frank discussion in the future for the public to know that a decision reached in 2001, on a matter of substantial public interest, had been arrived at only after a careful consideration which incorporated alternative options.
38. In coming to this view the Commissioner has taken into account the Tribunal's decision in EA2006/0043 dated 1 June 2007 (Lord Baker v ICO and DCLG). In this case the Tribunal decided that written submissions by officials to the Deputy Prime Minister should have been released. The issue was whether the advice to the Minister, including any opinions expressed within that advice, should have been made available to the appellant in response to a request under the Environmental Information Regulations 2004. DCLG relied on an

exception in regulation 12(4) (e) i.e. that the request involved the disclosure of internal communications.

39. Before the Tribunal was the question of whether or not the Information Commissioner was right to decide that, even after the Minister's decision had been promulgated, the public interest still supported the withholding of the advice and opinions of the officials making the submissions. It had to decide against the presumption in favour of disclosure (regulation 12 (2)) and, taking into account all of the circumstances, regulation 12 (1) (b). The Tribunal found that the fact that the Secretary of State's decision represented the final stage in a planning permission case (subject to appeals to the Courts or Judicial Review) "seems to us, if anything, to increase the desirability of full disclosure, rather than to decrease it". The Tribunal went on to say; "Similarly, we consider that full disclosure of the deliberations underlying a decision on a complex matter is arguably more important than in the case of a simple one, where the issues may be more immediately evident."
40. The Tribunal continued "the disclosure after the date when the Minister's decision has been promulgated, of the advice and opinions of civil servants in question, will not undermine to any significant extent the proper and effective performance by civil servants of their duties in the future." In this case the consent for the construction of the wind farm and associated overhead power lines at Cefn Croes was given in May 2002 and the request for information was made in February 2005.
41. The Commissioner does not accept DTI's argument that this case does not fall to be similarly considered. The fact that this case is said to contain an extra level of complexity lends, if anything, more weight in favour of disclosure. The Commissioner takes into particular account that part of the decision that states: "It seems to us, however, that one reason for having a freedom of information regime is to protect Ministers and their advisers from suspicion or innuendo to the effect that the public is not given a complete and accurate explanation of decisions; that the outcome is in some way "spun". Disclosure of internal communications is not therefore predicated by a need to bring light to any wrongdoing of this kind. Rather, by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point".
42. Having taken into account all of the circumstances of this particular case the Commissioner finds that the public interest in maintaining the exception in regulation 12(4)(e) does not outweigh the public interest in disclosing the information, in respect of the decision to approve this particular planning application without the need for a public inquiry.

Regulation 12 (5) (d) Confidentiality of the proceedings

43. DTI has explained that both submissions contain material explaining and reflecting the legal advice given by its lawyers on the options open to Ministers and their relative merits. DTI's view is that this legal advice is interwoven with policy advice and is therefore difficult to separate out. DTI has however been able to identify specific paragraphs within the submissions in recent correspondence with the Commissioner. DTI takes the view that this information is protected by legal and professional privilege and is therefore

excepted from disclosure by virtue of regulation 12(5) (d). It goes on to say that lawyers need to be able to set out the factors which led them to reach their conclusions but that, in so doing, this may expose potential weaknesses in their client's position. It believes that the public interest dictates that advice from a lawyer to a client should be kept confidential and should not therefore, be disclosed pursuant to an EIR request. DTI also considers that the legal advice forms part of the internal communication and that it could therefore also be protected under regulation 12(4) (e).

44. In the case of *Kirkaldie v the Information Commissioner and Thanet District Council* (EA/2006/0091), the Council had claimed that the requested information was exempt by virtue of section 42 of the Freedom of Information Act 2000. The Tribunal found that the information requested by the applicant was environmental and that both the Commissioner and the Council were therefore incorrect in dealing with the request under the provisions of the Act rather than the EIR. In looking for an equivalent provision for section 42 in the EIR the Tribunal decided that the exception in regulation 12(5) (b) (The course of justice...) is most similar to the exemption in the Act. It expressed the view that the purpose of the exception was reasonably clear, stating that it "exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial". It continued that to do this the exception "covers legal and professional privilege, particularly where a public authority is or is likely to be involved in litigation". The Commissioner, having seen the information, takes the view that it is in fact more likely to fall within the exception in regulation 12 (5) (b) rather than 12(5) (d) and therefore has considered the matter under 12 (5) (b).

Public interest

45. The Commissioner accepts that the public interest in disclosing the requested information lies in creating a degree of accountability and transparency in respect of actions and decisions being taken by the public authority. In addition, the Commissioner also considers that disclosure of the legal advice may further public understanding of the basis on which the Secretary of State made her decision about this planning application. However, the Commissioner also accepts that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers after having full and frank disclosures. This is a fundamental principle in the legal system and there is a strong public interest in maintaining it.
46. The Information Tribunal has endorsed this principle. In its decision in *Bellamy v Information Commissioner* (EA/2005/0023) the Information Tribunal stated in paragraph 35 that "...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.....It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case."
47. The Commissioner is satisfied that in this particular case there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR

because the inherent public interest in protecting the established convention of legal professional privilege is not countered in this case by at least equally strong arguments in favour of disclosure. For this reason the Commissioner has seen no need to consider the application of regulation 12 (4) (e) to the material in question.

Regulation 13 Personal data

48. Regulation 13(1) provides that, to the extent that the information requested includes personal data of which the applicant is not the data subject a public authority shall not disclose the personal data where the information falls within the definition of data in section 1(1) Data Protection Act 1998 and disclosure to a member of the public would contravene any of the data protection principles; or section 10 of that Act.
49. DTI has explained that both submissions contain a small amount of personal data which it feels should be excepted from disclosure in reliance on regulation 13 of the EIR. The information comprises the names of non public-facing officials, below the senior civil service grades, and in DTI's view there is a public interest in preserving the anonymity of these people so that they are not susceptible to unsolicited calls, emails or letters.
50. The issue of personal data was raised in the Information Tribunal's decision in *DfES v the Commissioner and the Evening Standard EA/2006/0006*. Although the main arguments in that appeal were around the use of section 35 the Tribunal also considered matters such as the 'robustness of officials' and, in particular, 'junior officials' and 'names of civil servants'.
51. In relation to those latter two points the Tribunal commented that "a blanket policy on refusing to disclose the names of civil servants wherever they appear in departmental records cannot be justified..." That is not to say that there will not be situations where because of the particular sensitivity or controversial nature of the policy advice it should not be attributed to the official. "There must, however be a specific reason for omitting the name of an official where the document is otherwise disclosable". The Tribunal went on to say that, since there may be little to be learnt from disclosing the officials' name, the arguments for withholding names may not have to be compelling for the public interest to favour maintaining the exemption in relation to such names.
52. The Commissioner is satisfied that in this particular case, no public interest would be served by releasing into the public domain the names of more junior civil servants and that section 13 has been correctly applied. Accordingly, the names of the officials may be redacted from the submissions.

The Decision

53. The Commissioner's decision is that the public authority has not dealt with the request in accordance with the EIR. In failing to supply an adequate Refusal Notice the Commissioner finds that DTI was in breach of regulation 14. By failing to disclose the information, and relying on the exception in regulation

12(4)(e), DTI breached the requirements of regulation 5. The Commissioner is satisfied that the exceptions in regulations 12(5)(b) and 13 apply to some of the requested information.

Action Required

54. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Provide the complainant with a copy of the submissions made to the Secretary of State on 4 December 2001 and 3 May 2002. In doing so the department may suitably redact the legal advice and opinion it has identified within the submissions along with the names of officials.

The above information should be supplied within 30 days of the date of this notice.

Other matters

55. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
56. While the public authority appears to have replied to the request within the 20 working day statutory time limit the Commissioner, although recognising that this was in the early days of the legislation is concerned to learn that the public authority holds no record of the precise date of receipt of the original request dated 12 February 2005.
57. The Commissioner also wishes to record his disappointment over the length of time it has taken DTI to reply to his earlier enquiries in this matter.

Right of Appeal

58. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 28th day of January 2008

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
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SK9 5AF**

Legal annex

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person

- (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 13(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

Regulation 13(2) The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or
 - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 13(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Regulation 13(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Regulation 13(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.