

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

Decision Notice

Date: 17 March 2008

Public Authority: Department for Environment, Food and Rural affairs
Address: Nobel House
17 Smith Square
London
SW1P 6JR

Summary

The complainant requested information from Defra in connection with the proposals for a South Downs National Park. Defra provided part of the information sought, but withheld much of the remaining information on the basis that the request involved the disclosure of internal communications and that the exception in regulation 12(4)(e) of the EIR applied. Defra considered that the remainder of the information should be withheld, on the basis that it was protected by legal professional privilege and the exception in regulation 12(5)(b) was applicable. In the light of the timing of the complainant's information request in relation to the National Park designation process the Commissioner found that Defra was entitled to rely on the exceptions in regulation 12(4)(e) and 12 (5)(b). The Commissioner nevertheless found that there was a small amount of information in relation to which the public interest in maintaining the exception in regulation 12(4)(e) was outweighed by the public interest in disclosure at the time of the information request, and that this should now be released. The Commissioner also found that Defra had acted in breach of regulations 14(2) and (3) of the EIR.

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. The Countryside Commission, which became the Countryside Agency (and is now Natural England), is sponsored by the Department for Environment, Food and Rural Affairs (Defra) and is funded by them by means of a grant-in-aid. It was formerly sponsored by the then Department of the Environment, Transport and the Regions (DETR). On 1 March 2005 the complainant emailed Defra asking for copies of all correspondence and any notes of meetings between the Secretary of State, Ministers and officials of Defra (including its predecessors) and the Countryside Commission and Countryside Agency since 1997 in relation to the proposals for a South Downs National Park. He said that, if this was too large a request to handle, he would be pleased to have copies of correspondence and notes of meetings between the Secretary of State and Ministers and the two bodies. If Defra needed to impose a charge he asked that this be discussed with him first.
3. On 27 April 2005 Defra replied, saying that it was withholding the information under regulation 12(4)(e) of the EIR relating to 'internal communications'. Defra said that it would be premature to release the information before the Planning Inspector's advice had been received and a decision announced. Defra further said that the release of the information might influence, or be thought to influence, the Inspector's advice or the Minister's decision. Defra concluded that it would not be in the public interest to release the information because Ministers and officials should be able to conduct free and frank conversations on policy still in development. Defra said that once the Minister's decision had been made, and the Inspector's report and the Minister's decision letter had been published, it would review the withheld documents to ensure that all relevant background and statistical information was in the public domain.
4. On 17 June 2005 the complainant applied to Defra for an internal review of that decision. He primarily argued that if Defra and the Countryside Agency had observed the protocol required by the relevant legislation, there could be no question of disclosure influencing the Inspector or the Minister. He said that, if that argument was not accepted, the information should be disclosed as soon as the Inspector's report was received rather than when the Minister's decision was published, since once the Inspector had submitted his report his role would be finished. The complainant also contended that, since the information he sought was already in the Minister's own files, it was difficult to see how a Minister's decision could be prejudiced or adversely affected by its disclosure. He said that the Minister's confirmation of a Designation Order was not a policy decision but quasi-judicial, and it was not clear what policy Defra considered was being developed. He contended that, if Defra had followed its statutory role and not entered into discussion about the merits of a National Park with the Countryside Agency, any documentation should be very bland and neutral. If, however, Ministers had exceeded their role and prejudged the issue, then he believed that there must be real questions about those Ministers' ability to take the decision confirming the Designation Order. He contended that there was a public interest in showing that Defra had followed its statutory role strictly. He said that specific arguments were needed rather than general assertions, and he questioned Defra's blanket refusal

to disclose new documents, saying that it was his understanding that a decision should be taken on each document on its merits, with any sensitive sections being blanked out.

5. On 12 August 2005 Defra replied, saying that it was now able to release some of the information sought, but that it was still withholding the remaining information under regulation 12(4)(e). Defra acknowledged that a blanket refusal could not be applied to the information in question, which was subject to the public interest test. Defra said that the withheld information consisted of communications such as funding discussions or comments on drafts; that it was important that officials felt confident of having a certain amount of private space where they could discuss issues freely and candidly; and that maintaining this space aided good policy development and implementation. Defra considered that the public interest was best served by withholding the information. Defra also said that a small amount of information was being withheld because of the concern that releasing it at that stage could be seen as attempting to influence the Planning Inspector's recommendation or the Minister's decision (but Defra said that it would review its decision once the Minister's decision had been announced). Defra said that it was nevertheless able to release some of the communications between it and the Countryside Agency and was still considering the public interest in respect of a few other communications on which it was consulting parties to the correspondence, following which it would contact the complainant again.

The Investigation

Scope of the case

6. On 21 September 2005 the complainant contacted the Commissioner to complain about Defra's refusal to provide him with all of the information he had sought. The complainant said that he accepted that officials needed space in which to express their thoughts while drafting policy or advice, but that once the relevant document had been finalised the public interest must lie in disclosing the material. He commented that, if officials' initial views were contrary to those taken in the final document, then that difference could be explained and put into context. He reiterated his doubts as to the likelihood of the Inspector and/or the Minister being influenced by the withheld material. He feared that Defra's non-disclosure was based more around how the public might perceive the information and how that might influence the Minister's decision. He commented that, if the Minister could be shown to have a pre-determination bias, then there was a strong public interest in that position being known now.
7. On 12 December 2005 Defra sent the complainant the further documentation mentioned in its letter of 12 August 2005 but continued to withhold some information under regulation 12(4)(e) pending the Minister's decision. Defra offered some clarification of its 12 August response, saying that it might be read as implying that some of the information so far withheld could show that Defra had in fact been receptive to communications that could prejudice the Inspector's findings. Defra offered an assurance that this was not the case. Defra again emphasised

that it would review and reconsider the public interest in relation to the rest of the information once the Minister had made his decision on the proposed National Park. It is the handling of the complainant's information request, and the information that remains withheld following the 12 December 2005 letter, that is under consideration in this complaint.

Chronology

8. On 10 January 2007 the Commissioner contacted Defra to request its relevant papers, including the withheld information, and its comments. The Commissioner also asked whether or not the Minister had yet reached a decision on the proposed National Park.
9. On 14 February 2007 Defra replied. It explained that no Ministerial decision had yet been taken as the whole designation process was on hold following a High Court Judgment in November 2005, made in favour of a challenge to the New Forest National Park designation, which potentially impacted on any future national landscape designations such as the proposed South Downs National Park. In November 2006 Defra had appealed to the Court of Appeal against the Judgment. On 1 February 2007 the Court of Appeal had found against Defra, and Defra was now considering whether or not to pursue the appeal further. Defra said that only when the issue was resolved would the Secretary of State be able to decide how to restart the designation process for the South Downs. This would include deciding whether or not to invite further representations from the public on this and on recent legislative changes in the Natural Environment and Rural Communities Act 2006 plus any other issues arising from the Inspector's report, and then deciding whether to re-open the public enquiry. Defra said that, if the public enquiry was to be re-opened, the earliest that it expected the Secretary of State to be able to make a decision was Autumn 2008.
10. As to the withheld information Defra said that, in addition to the exception in regulation 12 (4) (e) (internal communications), it now considered the exception in regulation 12 (5) (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) to be engaged. Defra said that, while designation as a National Park (under the National Parks & Access to the Countryside Act 1949) was not a planning matter (although it did have planning implications), it was accepted as a quasi-judicial process in the sense that the Secretary of State had a role in whether to confirm a designation made by Natural England, having considered the report of his Inspector, who in turn conducted a public inquiry in keeping with the spirit of the Planning Inquiry rules. Defra also said that several of the documents referred to legal advice in relation to the designation process and were therefore covered specifically by legal professional privilege.
11. Defra said that it was aware that some of the relevant papers were a number of years old: it said, however, that it did not consider that 'the passage of time in this case affects their sensitivity and therefore the balance of public interest over their disclosure'. Defra still maintained that 'they should not be made public at this stage

because they contain information concerning policy and financial considerations on an issue that is still subject to Ministerial decision’.

12. Defra commented that, in determining the public interest in this case, it needed to take account of two additional factors: accountability and proportionality. It said that the designation process provided for a public decision making process including a proposal from Natural England (previously the Countryside Agency); the opportunity for the public to comment on the proposal; a public inquiry (or hearing); a report from the planning inspector; a decision taken by the Secretary of State and, ultimately, for the process to be challenged if there is dissatisfaction with how it has been conducted. In Defra’s view, taken together these provide a significant system of accountability and the right of access to information, arguably, was intended to work within the existing mechanisms and systems that provide public accountability and not provide an additional or supplementary system.
13. On 25 October 2007 the Commissioner made further enquiries of Defra, seeking a more detailed explanation as to how the release of papers in the Minister’s/departmental files could influence the Inspector’s recommendation or the Minister’s decision. The Commissioner also asked Defra to clarify what constituted the ‘small amount of information’ mentioned in its 12 August 2005 letter, the release of which Defra considered could be seen as an attempt to influence either the Inspector or the Minister.
14. On 16 November 2007 Defra replied. It repeated that designation of the South Downs as a National Park followed a specific process: namely a public inquiry, the Inspector’s Report and a determination by the Minister, which was effectively analogous to the way in which planning matters were undertaken. The conduct of an inquiry, and thus the formulating and reporting of recommendations, were strictly matters for the Inspector. Defra had no communication with the Inspector, but would liaise with the Planning Inspectorate over organisational matters.
15. Defra said that, once an inquiry was closed, the public would normally have no further opportunity to comment: the Inspector reported and the Minister determined. If anyone was unhappy there was a clear process for mounting a legal challenge. The Minister was not to receive any representation or lobbying from anyone, but had to form his own view based upon the Inspector’s report (the Inspector having accorded everyone due opportunity to comment during the public inquiry).
16. Defra commented that, if the disputed information were to be disclosed, it was concerned that public statements or lobbying might then be made in respect of that information which could appear to influence the Minister’s decision outside the forum of the public inquiry. If such statements were issued or such lobbying occurred then, Defra said, the Inspector’s role would have been undermined, and his view might then have to be sought. Potentially, the whole process would then become open-ended and would provide ammunition for a legal challenge on the grounds that the proper procedure had not been followed. In short, the process created by the public inquiry and the Inspector’s Report is designed to provide certainty and boundaries in order to facilitate good decision making.

17. Defra said that the quasi-judicial ministerial role in this process was taken extremely seriously. Ministers were advised of the need for extreme caution in discussing proposals to designate new National Parks. By way of illustration, the then Deputy Prime Minister had already been precluded from making the decision in this particular case because it was he who had announced the Government's intention to create new National Parks.
18. As to the current status of the designation process, Defra advised that the inquiry would be re-opened early in 2008 to consider four specific issues. To facilitate the consideration of one of these issues the Inspector's report had been made public. This was considered necessary because of an incomplete recommendation which entailed commissioning further work on a particular part of the proposed boundary. Interested parties needed to be able to comment on this detailed work and, to do so properly, they needed to be able to understand the Inspector's thinking. Defra said that this was an unusual departure but that there were exceptional reasons for it in this case. Any comment on the original Inspector's report would be referred to the new Inspector who, ultimately, would produce a further report taking account of anything relevant or appropriate.
19. On 10 December 2007 Defra also identified for the Commissioner the 'small amount of information' mentioned in its letter of 12 August 2005.

Findings of fact

20. A summary of the designation process for a National Park can be found at Annex B to this Decision Notice. The Commissioner finds that the papers provided by Defra include documents that are already in the council's possession, such as core documents at the original public enquiry and papers for working groups on which the council was represented. The Commissioner does not consider these documents to form part of this information request. The remaining withheld information, which he does consider to fall within the scope of the request, comprises:
 - a. documents relating to the governance and planning of the proposed South Downs National Park, namely:
 - i. drafts of, and comments on, Countryside Agency Board papers, the final versions of which were published on the Agency's website; and
 - ii. drafts of, and comments on, other reports prepared by the Countryside Agency/DETR Planning Group, the final versions of which were issued;
 - b. Drafts of notices/orders, the final versions of which were published;
 - c. Financial/budgetary information;
 - d. Legal advice and opinion;
 - e. Information relating to the designation criteria and the public inquiry;

- f. Other internal correspondence and general policy advice and discussion.

Analysis

21. The full text of the relevant legislation, the salient points of which are discussed below, can be found in the legal annex to this Decision Notice.

Procedural matters

22. Under regulations 14(2) and (3) of the EIR where, as in the present case, a public authority is refusing to provide information under regulations 12(1) or 13(1), the refusal should be made as soon as possible, and no later than 20 working days after the date of receipt; it should specify the reasons for non-disclosure, including details of any exception relied on under regulations 12(4), 12(5) or 13, and the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b). The complainant made his information request on 1 March 2005. Defra replied on 27 April 2005, which exceeded 20 working days. Defra has therefore breached the requirements of regulation 14 (2). Moreover, in its refusal notice, Defra only relied on the exception in regulation 12(4)(e) as its basis for withholding the information in question: in none of its correspondence with the complainant did it specify that it likewise considered regulation 12(5)(b) to be applicable to that information, which exception it first cited in correspondence with the Commissioner's staff. In *Bowbrick v the ICO (Tribunal reference: EA/2005/0006)* the Information Tribunal stated, in relation to the equivalent provision in the Act, namely section 17(1), that *"If a public authority does not raise an exemption until after the section 17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect, it is giving part of its notice too late"*. The Commissioner considers that the Tribunal's reasoning is likewise relevant to the EIR and, thus, that Defra was in breach of regulation 14(3) as a result of its failure to notify the complainant of its reliance on regulation 12(5)(b) within the prescribed time period.

Exceptions

23. In considering the application of the exceptions cited by Defra in support of its refusal to provide the relevant information, the Commissioner is mindful of the general presumption in favour of disclosure contained in regulation 12(2) of the EIR.

Regulation 12(4)(e) – internal communications

24. Defra has sought to withhold much of the information in question under regulation 12(4)(e), which provides that a public authority may refuse to disclose information where the request involves the disclosure of internal communications. The Commissioner is satisfied that the information contained in the drafts of documents mentioned in paragraphs 20 (a) and (b) above, the financial and budgetary

information mentioned in paragraph 20(c), the information relating to the designation criteria and the public inquiry (paragraph 20(e)) and in the other internal correspondence and general policy advice and discussion (paragraph 20(f)) all fall within the terms of the regulation and that the exception is therefore engaged.

Public interest test

25. However that is not the end of the matter. Regulation 12(4)(e) is subject to the public interest test in regulation 12(1)(b), and Defra may only rely on it as a basis for withholding the relevant information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Drafts of documents (paragraphs 20(a) and (b)), Financial/budgetary information (paragraph 20(c)) and other internal correspondence and general policy advice (paragraph 20(f))

26. In relation to the drafts of documents, and the financial information, other internal correspondence and general policy advice, Defra has contended that it was important that officials felt confident of having a certain amount of private space where they could discuss issues freely and candidly and that maintaining this space aided good policy development and implementation. Defra considered that the public interest was best served by withholding the information. Defra recognised that some of the relevant papers were a number of years old: however, it did not consider that, in this case, the passage of time had affected their sensitivity and, therefore, the balance of public interest in respect of their disclosure. Defra maintained that the relevant information, which comprised financial information and other internal correspondence and general policy advice, ought not to be made public at this stage because it related to an issue that was still awaiting a Ministerial decision.
27. The complainant has accepted that officials need space in which to express their thoughts while drafting policy or advice but contends that, once the relevant documents were finalised the public interest must lie in disclosing the material. He commented that, if officials' initial views were contrary to that taken in the final document, the difference could be explained and put into context. While the Commissioner recognises that the public interest in withholding information in draft documents should diminish once the final version of that document is published, that is only likely to be the case where the issue that generated the information is no longer live and there is little or no prospect that release of the relevant information could influence the decision-making process. In the present case, the subject matter of the draft documents, the financial information and the majority of the other internal correspondence and general policy advice was, at the time of the information request, and still is, very much current, with the public inquiry having been reopened into certain aspects and the Minister's decision still to be made. In *Lord Baker v the Information Commissioner and the Department for Communities and Local Government (Tribunal reference: EA/2006/0043)* the Information Tribunal concluded (paragraph 29) that:

“The disclosure, after the date when the Minister’s decision had been promulgated (my emphasis), of the advice and opinions of civil servants in question would not undermine to any significant extent the proper and effective performance by civil servants of their duties in the future”.

28. The Commissioner recognises that factors favouring the disclosure of such information include the promotion of accountability and transparency by public authorities for decisions taken by them and the fostering of a better understanding of those decisions among those affected by them. However, it is clear from the above decision of the Tribunal that the timing of an information request is a crucial factor in considering where the balance of the public interest should lie. In this particular case, on the basis of the stage the designation process had reached at the time of the request, the Commissioner considers that the public interest in maintaining the exception in relation to the content of the drafts (and the comments on them), the financial information and the majority of the other internal correspondence and general policy advice, outweighs the public interest in disclosing the information at this time. The Commissioner nevertheless considers, in relation to a small amount of information (identified in the letter to the Permanent Secretary of Defra which accompanies this Decision Notice) falling within the categories of internal correspondence and general policy advice, that the public interest in maintaining the exception did not outweigh the public interest in disclosing the information at the time of the information request, and that Defra should now release it.

Information relating to the designation criteria and the public inquiry (paragraph 20(e))

29. In correspondence with the Commissioner Defra has explained that this is the ‘small amount of information’ that it was withholding because of the concern that releasing it when requested could be seen as attempting to influence the Planning Inspector's recommendation or the Minister's decision.
30. As stated at paragraph 6 above the complainant has argued that, once the Inspector's role in the designation process had come to an end, there could be no question of the Inspector being influenced by the withheld material; that he could not see how the Minister could be adversely influenced by the disclosure of information contained in his own files; and that he feared Defra's non-disclosure was based more around how the public might perceive the information and how that could influence the Minister's decision. The complainant commented that, if the Minister could be shown to have a pre-determination bias, then there was a strong public interest in that position being known now.
31. While it is debatable whether the release of the withheld information would have influenced the decision of the Inspector had his role in the designation process been completed at the time of the complainant's initial information request in March 2005, the fact is that the Inspector had not, at that stage, submitted his report. The Inspector could thus have been open to any lobbying following the release of the information in question, which might have affected the outcome of his report. As to the Minister's position, Defra's concerns related to the possibility that public statements or lobbying might have occurred if any of the information had been released, giving the appearance of influencing the Minister's decision outside the

forum of the public inquiry. If the Minister were to be exposed to such statements or lobbying he would need to afford others an equal or further opportunity to comment, which could delay an already lengthy process (see Annex B) still further. The Commissioner accepts that, in order to maintain the integrity of the designation process, it is vital that the Minister is not in a position to be influenced by views expressed outside the framework of that process. Defra has already emphasised this in advising its Ministers of the need for extreme caution in discussing the proposal to designate new National Parks, and in precluding the then Deputy Prime Minister from making the decision because it was he who had announced the Government's intention that new parks would be created. Moreover, as found by the Tribunal in the *Baker* case (paragraph 27 above), the timing of the information request is highly significant when considering where the balance of the public interest lies in such matters. The information in question, relating as it does to the designation criteria and procedures before the public inquiry, is (as stated previously) very much a live issue (and was live at the time of the complainant's information request). The Commissioner considers that the public interest in maintaining the exception in relation to that information outweighs the public interest in disclosing it at this time. The Commissioner notes that Defra has already released to the complainant the information that it could safely issue without the risk of compromising the designation process and has agreed to reconsider the withheld information once the Minister's decision has been announced. The Commissioner welcomes that undertaking.

Regulation 12(5)(b) – the course of justice

32. Defra has argued that several of the documents referred to legal advice in relation to the designation process and are therefore covered by legal professional privilege, which is intended to protect the confidentiality of communications between lawyer and client: the exception in regulation 12(5)(b) therefore applies to that information. The EIR contain no direct equivalent of section 42 of the Act, an exemption which specifically covers legal professional privilege. However, in the case of *Kircaldie v the Information Commissioner and Thanet District Council* (Tribunal ref: EA/2006/0001; paragraph 22) the Information Tribunal decided that regulation 12(5)(b) is similar in purpose to section 42 and the Commissioner has followed that ruling.
33. Legal professional privilege has been described by the Information Tribunal in the case of *Bellamy v the Information Commissioner and the Department for Trade and Industry* (Tribunal ref: EA/2005/0023; paragraph 9) as “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers...”. There are two types of privilege – legal advice privilege and litigation privilege. Advice privilege will apply where no litigation is in progress or being contemplated. The communications in question must be confidential, made between a client and a professional legal adviser acting in a professional capacity and made for the sole or dominant purpose of obtaining legal advice.
34. Having examined the withheld information the Commissioner is satisfied that the information in the documents in question falls within the terms of legal advice

privilege. The Commissioner therefore considers that the exception in regulation 12(5)(b) is engaged. It is, however, a qualified exemption and therefore subject to the public interest test.

Public interest test

35. As stated above, the Commissioner accepts that there is a public interest in disclosing information which will help determine whether or not a public authority is acting appropriately. However, the Commissioner also recognises the strong inherent public interest in protecting confidential communications between client and legal adviser. It is certainly in the public interest for authorities to have the ability to consult openly with their legal representatives and that forthright views can be expressed without fear of that advice subsequently being made public.
36. In making his assessment of where the balance of the public interest lies the Commissioner is mindful of the Tribunal's decision in the case of *Bellamy v the Information Commissioner and the Department for Trade and Industry* (Tribunal ref: EA/2005/0023), which concerned the specific exemption relating to legal professional privilege in section 42 of the Act. In paragraph 8 of the decision the Tribunal observed that "*there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned.*"
37. In summing up, the Tribunal stated that "*there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest*". It concluded, at paragraph 35, that "*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 cut case...*".
38. In *Dr John Pugh MP v the Information Commissioner and the Ministry of Defence* (ref: EA/2007/0055) the Tribunal discussed the conclusion reached in the Bellamy case and in other Tribunal cases in which information covered by legal professional privilege had been considered. The Tribunal said at, paragraph 55, that, "*Unlike other exemptions, because of the body of judicial opinion from higher courts in relation to the importance of maintaining legal profession privilege, we accept that there is a strong element of public interest inbuilt into the exemption itself, but that this does not, in effect, convert the exemption into an absolute exemption. It makes no difference that legal professional privilege is a class exemption. For the Commissioner or the Tribunal to find that the public interest favours disclosure there will need to be equally weighty public interest factors in favour of disclosure in the circumstances of the particular case. This does not necessarily mean that it needs to be an exceptional case.*"
39. Notwithstanding the arguments of the complainant and the factors in favour of release referred to above, the Commissioner is of the view that those factors are not sufficiently strong in this case to override the public interest served by protecting confidential communications between client and legal adviser. While it will sometimes be appropriate to overturn legal professional privilege where weighty public interest factors favour disclosure it is the Commissioner's judgement

that, in all of the circumstances of this case, the public interest in maintaining the exception in regulation 12(5)(b) outweighs the public interest in disclosure, and that Defra is therefore entitled to withhold the legal advice contained in the documents in question.

The Decision

40. The Commissioner's decision is that Defra:

- breached regulations 14(2) and (3) by failing to issue a refusal notice within 20 working days of receiving the request and by failing to cite all of the exceptions on which it was relying within that period;
- correctly applied the exception in regulation 12(4)(e) to withhold the content of the drafts of papers, and the comments on them, and the financial information and the majority of the other internal correspondence and general policy advice, and the papers designated as relating to the designation criteria and the public inquiry;
- misapplied that exception in relation to small amount of information falling within the categories of internal correspondence and general policy advice (see paragraph 28 above), in respect of which the public interest in maintaining that exception does not outweigh the public interest in disclosure;
- correctly applied the exception in regulation 12(5)(b) to the legal advice in question.

Steps Required

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

to issue to the complainant the information set out in paragraph 28 above.

42. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

43. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

44. 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@tribunals.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 17th day of March 2008

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex A

Legal Annex

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), 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 circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

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

- (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. 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.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (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, regulations 13(2)(a)(ii) or 13(3).

Annex B

Summary of the designation process

Defra provided the Commissioner with the following overview of the process for designating an area as a National Park:

- Natural England (the Agency) considers from time to time which areas in England and Wales meet the criteria for designation. This is one of its duties in relation to National Parks under the National Parks and Access to the Countryside Act 1949 (as amended);
- the Agency then takes this forward, but the Minister can (under the 1949 Act) ask it to consider the programme for designation and he has a general power to give the Agency direction, though he should publish a notice informing those concerned of the direction;
- in the case of the South Downs the Minister asked the Agency to reconsider its approach to the designation criteria – it was for the Agency to do so, but is for the Inspector and Minister individually to subsequently decide whether or not the approach is right. The Minister's letter was published as a core document to the Inquiry;
- the Agency decides what it thinks the boundary should be, prepares a Designation Order on this basis and consults on that Order;
- if a local authority objects to the Order, the Minister calls a Public Inquiry and Defra publishes notice of that, otherwise a public hearing may be held;
- the Inspector conducts the Inquiry, to which the Agency presents evidence (and Defra also presents factual evidence if required);
- the Planning Inspectorate appoints the Inspector and runs the Inquiry Secretariat;
- the Inspector reports to the Minister;
- if the Minister decides to consider boundary additions he calls another hearing (with a different Inspector) into that;
- the Minister decides whether the Designation Order should be confirmed, with or without modifications; and, if appropriate, the Agency makes the Confirmation (of the Designation) Order;
- Natural England places copies of the Confirmation Order on deposit and issues notice of this to allow any legal challenge;
- if the Minister decides to establish a National Park Authority, Defra prepares an Establishment Order, which the Minister makes;
- if there is any legal challenge to the Confirmation, Defra responds.