

## Freedom of Information Act 2000 (Section 50) The Environmental Information Regulations 2004 Decision Notice

**Date: 19 March 2008**

**Public Authority:** Chief Constable of Warwickshire Police  
**Address:** Warwickshire Police Headquarters  
PO Box 4  
Leek Wootton  
Warwickshire  
CV35 7QB

### Summary

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The complainant requested information regarding an investigation carried out by the public authority into allegations that the decision to grant planning permission for ground close to the complainant's property was made improperly. The public authority refused the request, on the basis that Regulation 12(5)(b) applied. The Commissioner finds that this exception is engaged and that the public interest favours the maintenance of the exception. The Commissioner also finds that the public authority failed to comply with Regulation 14 when initially refusing the request, but that remedial action is not required.

### The Commissioner's Role

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1. The Environmental Information Regulations (the "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

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2. The complainant made the following information request on 2 March 2005:  
*"...we wish to look at the file of the investigation into our allegations regarding the land at the end of Mercia Way, now owned by Marshall Developments.*

*We asked if you would retain any exhibits collected during the investigation and we should also like to see these please."*

The complainant clarified the request on 2 April 2005, asking for:

*"...a copy of any list of weaknesses in the case highlighted by the CPS"*

*"...material or information in the file of a geographical nature or any legal documentation concerning our area, particularly our flood-bank"*

3. The public authority responded initially on 16 March 2005. In this response, the public authority refused the information request on the grounds that the exemptions provided by sections 30 (investigations), 40 (personal information) and 41 (information provided in confidence) of the Freedom of Information Act 2000 (the "FOIA") applied to the information requested.
4. The public authority responded further, on 13 April 2005, stating that the information requested by the complainant on 2 April 2005 was exempt by virtue of sections 30 and 42 (legal professional privilege). Section 42 was cited specifically in relation to the information requested by the complainant concerning the Crown Prosecution Service.
5. Following a further exchange of correspondence, the complainant requested in a letter dated 27 April 2005 that the public authority carry out an internal review of its handling of the information request. The public authority responded to this on 16 May 2005. This response upheld the decision to refuse the information request on the grounds given in the refusal notice. The complainant was advised that if she remained dissatisfied at that stage, she should contact the Commissioner.

## The Investigation

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### Scope of the case

6. The complainant and other residents of a particular part of Warwick have had extensive dealings with the public authority and other public authorities because they have concerns about a housing development in their area. They believe that this housing development compromises a floodbank. The complainant believes that the land in question was illegally registered and that the building that subsequently took place contravenes a covenant that was placed on that land. They have also alleged to the public authority that there was corruption involving a councillor and others to facilitate the approval of planning permission.
7. The complainant contacted the Commissioner on 13 June 2005. In this letter, the complainant specified the grounds for the complaint as the refusal of the public authority to provide all the information requested.
8. The nature of this case has evolved during the case handling process. Initially, this was considered under the provisions of the FOIA. The complainant had specified the FOIA in the information request and the public authority refused the request on the basis of exemptions in the FOIA.
9. At the time of receipt of this complaint by the Commissioner it was apparent that

some, or all, of the information withheld may be environmental information and thus would fall under the remit of the EIR. Following internal discussions within the Commissioner's office, it was concluded that the information withheld was all environmental information and that this case should be handled under the EIR.

10. The Commissioner has established that some of the information held by the public authority which was within the scope of the request was provided to the complainant during 2003. In addition, following the Commissioner's intervention further information relevant to the request was disclosed to the complainant. These disclosures are referred to in the chronology section below. Where information has been released to the complainant it has not been considered further by the Commissioner. Therefore the analysis and conclusions communicated in this decision notice relate only to the information that has not been released to the complainant.

### Chronology

11. The Commissioner contacted the public authority initially on 2 November 2006. In this correspondence, the basis for the complaint was set out. The public authority was also advised that consideration was being given to whether some, or all, of the withheld information was subject to the EIR. In response, the public authority was asked to provide copies of the information withheld and clarification of its arguments as to why each exemption cited was considered to apply.
12. The public authority responded initially on 8 December 2006. With this response, the public authority provided copies of the information withheld. The information withheld from the complainant consisted of the following:
  - The file of the investigations into the allegations made by the complainant and others, which includes a list on any weaknesses in the case highlighted by the CPS and witness statements;
  - Appendices to the investigation file, which includes exhibits collected during the investigation, materials of a geographical nature and legal documentation on the area in question, including the flood-bank.
13. The public authority responded further on 21 December 2006. With this response, the public authority provided its detailed arguments about the exemptions that were considered to apply.
14. The Commissioner contacted the public authority further on 20 February 2007. In this correspondence, the public authority was asked to specify which information requested by the complainant had been disclosed to her. The public authority was advised that this information could then be discounted from the scope of this case.
15. The public authority responded on 26 February 2007. In this response, the public authority confirmed that the complainant had previously been supplied with the following information:
  - *"a copy of the forensic report"*
  - *"two copy e mails between Ordnance Survey and [name redacted]"*

- “copy of two Warwick District Council maps with measurement details, and explanatory note from [name redacted]”

The public authority provided copies of this information to the Commissioner.

16. The Commissioner contacted the public authority again on 22 March 2007. In this correspondence, the public authority was advised that the Commissioner had concluded that the information withheld was, in its entirety, environmental information. This meant that this information was subject to the provisions of the EIR and the public authority should consider its stance with regard to the EIR. The public authority was asked to respond, confirming whether the information withheld was considered exempt under the EIR. If it did consider the information exempt, the public authority was asked to specify which exception from the EIR was considered to apply and to include details of its consideration of the public interest. The public authority responded to this on 18 April 2007. In this response, the public authority stated that the information was considered exempt, with Regulation 12(5)(b) cited. This Regulation provides that environmental information is exempt if its disclosure would adversely affect 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. The public authority went on to give details of its considerations of the public interest.
17. The public authority specified the following public interest arguments in favour of disclosure:
  - disclosure would enhance the accountability of the public authority. This would enable public scrutiny of the conduct, efficiency and effectiveness of the public authority.
  - disclosure would contribute to the quality and accuracy of public debate concerning the work of the public authority.
18. The public authority specified the following public interest arguments against disclosure of the information requested:
  - The importance of distinguishing between information that is in the public interest and what is of interest to the public. The public authority recognised that, where an investigation had concluded that there had been corruption on the part of public officials, there would be a strong public interest in the disclosure of this information.

The public authority stressed that, in this case, the conclusion of the investigation had been that there had been no corruption on the part of public officials. The public authority felt that this reduced the public interest argument in favour of the disclosure of this information and that the details of this investigation would be more a matter of interest to the public than of public interest.
  - The public authority cited a previous ruling of the Information Tribunal (EA/2006/0046) where the Tribunal had given weight to the factual context within which an information request was made. The public

authority believed that in this case the request had been made in the context of the complainant wishing to embark on private litigation, an action in which the information requested would be of assistance. The public authority believed disclosure in the context of the complainant's intention to take private litigation would not be in the public interest.

- The public authority stressed that it had attempted to be open and accountable separately from the requirements of the EIR. It referred to a letter to the complainant dated 16 October 2003 in which the complainant was advised that relevant information had already been made available. The public authority also referred to a letter dated 15 January 2004 in which the public authority advised the complainant that, if any information that supported her case existed, it would have been supplied to her.
  - The public authority believed that disclosing information relating to a specific criminal investigation could compromise the effective conduct of future investigations. The public authority argued that the existence of an exception for information relating to investigations indicated the intention of the authors of the EIR to protect the investigatory process. The public authority referred to a previous Decision Notice issued by the Commissioner that had referred to the content of the Freedom of Information White Paper that recognised the importance of the information access regime not prejudicing effective law enforcement. The public authority felt that the public interest would be in favour of releasing information relating to the investigatory process only where this would disclose details of corruption or where this would show weaknesses in the investigatory procedure. The public authority stated that the conclusion of the investigation was that there had been no corruption and that the complainant had previously complained about the conduct of the investigation and the conclusions of this complaint had been explained to the complainant on multiple occasions.
19. The public authority believed that, on the basis of the above factors, the public interest in this case favoured maintaining the exception.
20. The Commissioner contacted the public authority further on 30 April 2007. In this letter, the Commissioner explained that, in order for information to be withheld under Regulation 12(5)(b), two tests must be met. The second of these tests was that the public interest would favour maintenance of the exception. The public authority had given its arguments about the public interest in its previous response.
21. The first test that must be met was that disclosure of the information would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature. It was stressed that the test to be met here was that disclosure *would* adversely affect these factors and that this test was stronger than that in the Freedom of Information Act, which allows that an exemption is engaged if prejudice would be *likely* to result from disclosure. The public authority was asked to respond with its reasoning as to what adverse effect would be

caused through disclosure in this case.

22. The public authority responded on 15 May 2007. In this response the public authority gave the following arguments as to what adverse effect would be caused through disclosure of the requested information:

- The information withheld includes opinions given by the Crown Prosecution Service (the "CPS"). Disclosure of this would have an adverse effect on the ability of the CPS to provide full and frank opinions on witnesses, the collecting of evidence and the quality of evidence. Were full and frank opinions not provided due to a fear that these would be disclosed at a future date, this would adversely affect the ability of the public authority to conduct an inquiry of a criminal nature.
- Police officers give full and frank opinions which are recorded within the information withheld. Similarly to the above, if there were a fear that the details of these opinions would later be disclosed, the police officers giving these opinions may be inhibited from being full and frank when giving opinions in relation to future investigations. This would adversely affect the investigatory process.
- The possibility of disclosure of witness statements would discourage individuals from becoming witnesses. This would have an adverse effect on the ability of the public authority to conduct an inquiry of a criminal nature.
- The public authority also referred to a previous ruling by the Information Tribunal (EA/2006/0071) in which the tribunal gave weight to the possibility of prejudice caused to police investigations if information acquired in confidence during a police investigation was later subject to disclosure.

23. The Commissioner contacted the public authority again on 20 July 2007. In this letter, the public authority was asked to respond to the following:

- The investigation to which the complainant's request related is closed. Are there any circumstances in which this investigation could be re-opened, such as if new evidence was to come to light?
- The outcome of the investigation was that there was no evidence of corruption in relation to the decision to grant planning permission. If the outcome of the investigation had been that there was evidence of corruption, could this have led to the decision to grant planning permission being reversed?

24. The public authority responded to this on 25 July 2007. In response to the questions asked, the public authority responded as follows:

- The investigation could be re-opened if new evidence came to light.
- The decision to grant planning permission was made by the Planning Inspectorate. Had it been necessary for the Planning Inspectorate to take into account evidence of corruption when considering the planning



application, the outcome of these considerations could have been different. Had the Planning Inspectorate failed to take into account evidence of corruption, this would have been a ground for appeal against the decision of the Planning Inspectorate.

25. Having reviewed the information provided by the public authority, it appeared that a considerable amount of the material within the investigation file was in fact supplied to the public authority by the complainant. The Commissioner contacted the public authority regarding this information and it agreed to release this information to the complainant. The public authority wrote to the complainant on the 22<sup>nd</sup> August 2007 enclosing information that she had initially supplied to them.

- Conveyances dated 31/1/1966 and 23/6/1987
- A letter dated 11/02/2003
- A letter dated 20/12/2001
- Minutes of a meeting of Warwick District Council Plans Sub-committee held on 12/01/1998
- Statement compiled by DTZ Piedad Consulting on behalf of Bomford Carinthia Housing Association dated June 1998

### **Findings of fact**

26. The following information has been withheld from the complainant under Regulation 12(5)(b):

- The file of the investigations into the allegations made by the complainant and others, including advice provided by the CPS and witness statements;
- Some of the appendices to the investigation file, which includes exhibits collected during the investigation and materials of a geographical nature about the area in question, including the flood-bank.

27. The following information falling within the scope of the request has already been disclosed to the complainant:

- A forensic report;
- Two copy e mails between Ordnance Survey and the public authority;
- Copies of two Warwick District Council maps with measurement details, and explanatory note.
- Conveyances dated 31/1/1966 and 23/6/1987
- A letter dated 11/02/2003
- A letter dated 20/12/2001
- Minutes of meeting of Warwick District Council Plans Sub-committee held on 12/01/1998
- Statement compiled by DTZ Piedad Consulting on behalf of Bromford Carinthia Housing Association dated June 1998

## Analysis

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### Environmental information

28. The Commissioner recognises that there is an issue here as to whether the information would fall under EIR or FOIA. On the surface, the information requested here would not appear to be environmental information, rather it relates to a police investigation. However, the Commissioner has considered the content of the information itself and is satisfied that it falls within the definition of environmental information.
29. Regulation 2(1) requires that the information be in written, visual, aural, electronic or any other material form. In this case, the information that has been withheld is held in written and visual form.
30. Regulation 2(1)(a) includes within its definition of what is environmental, information relating to the state of the elements of the environment, such as the land and landscape. Regulation 2(1)(c) provides that measures, including plans and activities that would affect the elements referred to in 2(1)(a) would be environmental information.
31. The withheld information consists of the investigation file including witness statements and some of the appendices to the main investigation file. The material in the appendices falls within the scope of the complainant's request for exhibits collected by the public authority during the investigation and information relevant to the investigation of a geographical nature. More specifically these consist of the following:
  - maps
  - details about the decision to grant planning permission in relation to the area in question
  - correspondence between the Planning Inspectorate and representatives of the applicants for planning permission
32. The Commissioner is satisfied that the majority of the withheld information falls within regulation 2(1)(a) or (c). He also considers that a limited amount of the information falls within regulation 2(1)(f).
33. The Commissioner acknowledges that the information does not immediately appear to be environmental given that it relates to a police investigation. However, having reviewed the material, he is satisfied that a considerable amount of it falls within the definition because it is information on the state of the land or landscape for example in the form of maps.
34. Where the information arguably does not constitute information directly on the state of the land or landscape the Commissioner is satisfied that in any event it falls within regulation 2(1)(c). The investigation was about the granting of planning permission and alleged corruption in this process. It therefore necessarily refers to the planning system, the specific permission that was granted in this instance



and potential breaches of the system. Specifically it refers to alleged corruption carried out to ensure that land could be purchased and houses erected. Therefore the information is on measures affecting or likely to affect land and landscape.

35. The Commissioner's approach to this case has also been informed by the Information Tribunal's decision in the case of *Archer v. the Information Commissioner and Salisbury District Council (EA/2006/0037)*. At paragraph 32 of that decision, the Tribunal states that it is "*plainly right*" to conclude that information that "*relates to possible prosecution or enforcement action for breaches of planning legislation*" is environmental information under Regulations 2(1)(a) and (c).
36. In addition the Commissioner considers that a limited amount of information within the appendices falls within regulation 2(1)(f). Where the information refers to the risk of flooding of proposed and existing houses, he is satisfied that the information is about the state of built structures in as much as they are or may be affected by the state of the elements of the environment referred to in (a). In this case the relevant elements being the state of the air, atmosphere and water.

## **Procedural issue**

### **Regulation 14**

37. Where a public authority relies on Regulation 12 to refuse an information request, Regulation 14(1) requires that the public authority should provide a written refusal and Regulation 14(3) requires that the refusal should specify the exception believed to apply and the reasons for this. This refusal should specify which sub section of Regulation 12 is relied upon and state the reasons why the exception in question is considered to apply.
38. In this case, the public authority initially dealt with the information request under FOIA and did not specify any exception from the EIR when refusing the request. The public authority did not, therefore, comply with the requirements of Regulation 14 when refusing the request.

## **Exceptions**

### **Regulation 12(5)(b)**

39. The exception under the EIR that is considered by the public authority to apply to the information withheld here is Regulation 12(5)(b). This provides that information the disclosure of which would adversely affect 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 nature is exempt.
40. Consideration of whether this exception has been applied correctly is a 2 stage process. Firstly, it should be considered whether the disclosure of this information would adversely affect any of the interests protected by the exception. Secondly, where such an adverse effect would be caused, this exception is subject to the

public interest test. This means that unless the public interest in maintaining the exception outweighs the public interest in disclosing the information, the information should be disclosed.

### **Does the exception apply?**

41. The question here is whether an adverse effect would be caused through disclosure of the information requested. The public authority's arguments as to why an adverse effect would be caused are given above at paragraph 22.
42. The arguments of the public authority focus on the need to preserve the confidentiality of the investigatory process. The public authority believes that an erosion of this confidentiality would result in the CPS and police officers being less than free and frank in the opinions they express concerning an investigation and that potential witnesses would be less willing to participate in an investigation.
43. The Commissioner recognises that the inclusion of this exception in the EIR shows that the authors of the EIR recognised the potential for an adverse effect on inquiries of a criminal nature, were certain information to be disclosed. The counter argument to this is that the inclusion of organisations with such functions as public authorities within the scope of the regulations shows a recognition on the part of the authors of the EIR that there might be circumstances where information relevant to inquiries of a criminal nature should nevertheless be disclosed in the public interest.
44. The Commissioner notes here the guidance produced by the Department for Environment, Food and Rural Affairs, which is explicit that this exception covers law enforcement and investigations. This guidance can be viewed at: <http://www.defra.gov.uk/corporate/opengov/eir/pdf/guidance-7.pdf>.
45. There are two separate strands to the arguments about adverse effect relevant to this case, the first concerning information held for the purposes of criminal investigations, the second concerning information which may be subject to legal professional privilege. The first issue is dealt with immediately below, the second in paragraphs 56 and 57.
46. The first issue is that the withheld information relates to a criminal investigation and that the disclosure of this information would prejudice this investigation or future investigations. This information includes witness statements. The Commissioner is not persuaded by the argument that disclosure would inhibit the exchange of views between police officers. Such exchanges are necessary in order to carry out a full and thorough investigation and he does not consider that police officers would be dissuaded from exchanging their views if information about their investigations were released. This is integral to their role as police officers. However, he recognises and accepts the strength of the argument made by the public authority about the difficulty of finding individuals willing to participate in an investigation as a witness and that this willingness would be further reduced were potential witnesses concerned that their contributions, which would otherwise have remained confidential, could be disclosed. The

Commissioner agrees that an erosion of the willingness of potential witnesses to participate would have an adverse effect on the ability of the public authority to conduct an inquiry of a criminal nature.

47. The information consists of details of the work carried out by the public authority and the appendices to the investigation file that have yet to be disclosed to the complainant. This includes internal communications within the public authority in which individual police officers comment on the investigation. The Commissioner recognises the importance of the public authority having space to carry out investigations confidentially.
48. The Commissioner is satisfied that if the material were released it would reveal information about the way in which the police approach this type of investigation and in particular the approach to gathering evidence and questioning witnesses. In reaching this decision the Commissioner has also taken into account the fact that the investigation was conducted relatively recently and that therefore the techniques are still likely to be relevant. A greater awareness of such techniques could allow those suspected of committing crimes to evade detection or may assist those being investigated to interfere with evidence by revealing what the police are and are not aware of.
49. In assessing whether the exception is engaged in this case the Commissioner has also considered the stage that the investigation had reached and the age of the requested information.
50. The relevant equivalent provision to regulation 12(5)(b) under the Act is section 30. Section 30 is a class based exemption and therefore it is not necessary to demonstrate that prejudice would, or would be likely to, occur in order to engage the exemption. In cases involving section 30 the Commissioner takes the view that it is relevant to consider the status of the investigation and the age of the information when considering the public interest test. His guidance on section 30 states that the public interest is more likely to favour maintaining the exemption where an investigation is ongoing. This is on the basis that the harm to the investigation is likely to be more significant where it remains active.
51. As mentioned above, regulation 12(5)(b) can only be relied upon as a basis for refusal to disclose information where this would result in an adverse effect. The Commissioner considers that when assessing whether or not the exception is engaged it is relevant to take into account the stage that the investigation has reached. This is because there may, in some instances, be cases where, due to the status of the case or the age of the information no adverse effect would result from disclosure. In such cases the public authority would not be able to rely upon the exception.
52. In assessing the arguments about the adverse affect on the investigatory process put forward by the public authority, the Commissioner has considered the fact that the investigation is closed and that no charges were brought against the planning authority or its employees. He has also been mindful of the fact that the CPS considered the case and the decision was made not to take further action. In addition, he is aware that one of the employees at the centre of the allegations is

now deceased and therefore it would not be possible to pursue that individual.

53. He has also considered the likelihood of the investigation being re-opened. This is because he accepts that if the requested information was released and the case later re-opened this too could prejudice the investigation and eventually the ability of a person to receive a fair trial. This is because the public would have access to the evidence in advance of any proceedings in court.
54. During the investigation the Commissioner queried the possibility of the case being re-opened. The public authority indicated that in principle the investigation could be re-opened if new evidence were found. However, it did not indicate that there was any intention to do so or any realistic prospect that this would be necessary.
55. Notwithstanding the points mentioned above, the Commissioner is satisfied that disclosing the requested information would adversely affect the ability of the police to obtain information from witnesses. Whilst he does not consider that there is a significant likelihood of this case being re-opened he nevertheless recognises that the information contains material about approaches that are still used by the police and therefore he accepts that its release could adversely affect future investigations.
56. The second strand relates to a limited amount of information that records advice received by the public authority from the CPS which is subject to legal professional privilege. The Information Tribunal has been clear in previous rulings that this exception covers information subject to legal professional privilege. For example in the case of *Kirkaldie vs Thanet District Council (EA/2006/0001)*.
57. In this case, the Commissioner is satisfied that information recording advice from the CPS is subject to legal professional privilege. It is advice provided by a legally qualified person to a client, in this case the police. He accepts that if the information were released it would adversely affect the ability of the public authority to obtain free and frank legal advice. This is because public authorities must be able to highlight problems and give full information to their legal advisers without fear that any weaknesses that may be identified will be revealed. This is to ensure that the legal adviser has as full facts as possible on which to base his or her advice. Further, it is important that the legal adviser is able to provide clear and full advice and options for their clients without the concern that this will be disclosed to the wider public.

## Conclusion

58. The Commissioner accepts that the exception is engaged in relation to the legal advice received by the public authority. Regulation 12(5)(b) covers information subject to legal professional privilege.
59. Secondly, the Commissioner concludes that disclosure of the requested information would have an adverse effect on the ability of the public authority to conduct inquiries of a criminal nature. This on the basis that witnesses would be dissuaded from coming forward and giving evidence if the material were released

and because the public would be aware of the police's approach to such cases. The Commissioner therefore accepts that the exception also applies by virtue of an adverse effect on the investigation process. He has therefore gone on to consider the public interest in respect of information subject to regulation 12(5)(b) for these two different reasons.

### **Does the public interest favour the maintenance of the exception?**

#### **Adverse affect on the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature**

60. It is important to note that all of the exceptions in Regulations 12(4) and (5) are subject to the public interest test. Therefore it must be accepted that there might be circumstances where the public interest would favour disclosure despite some adverse effect recognised in the exceptions.
61. When considering whether an exception under the EIR should be maintained, Regulation 12(2) obliges a public authority to apply a presumption in favour of disclosure. In a case such as this, where the adverse effect resulting from disclosure is manifest, Regulation 12(2) still applies. It is incumbent on the Commissioner, as well as the public authority, to take this into account this when applying the public interest test.
62. The public authority has itself cited the enhancement of its accountability as a public interest argument in favour of disclosure. The complainant has also argued that because the investigation was into alleged irregularities in the behaviour of public bodies and their employees, disclosure would ensure that they are held to account for their actions.
63. The Commissioner agrees that there is a public interest in ensuring that the public authority is accountable for its decisions and transparent about the reasons for reaching those decisions. Greater accountability and transparency is also likely to increase public confidence in the decisions of the public authority.
64. The investigation carried out by the public authority in this case related to allegations about planning permission being granted for a controversial development. In the Commissioner's view there is a public interest in releasing the withheld information to demonstrate that a thorough and impartial investigation was carried out into allegations that were made about the way in which the planning permission was processed and eventually granted. It would also assist the public in understanding how and why the decision was taken by the police not to take any action in this case. This decision has also led residents to question the way in which the public authority carried out its investigation.
65. The complainant believes that disclosure in this case is in the public interest given the subject of the investigation that the information relates to. The complainant believes that the development for which planning permission was granted places the homes of people in this area at risk. The complainant further believes that disclosure of the withheld information would assist in demonstrating that planning permission was inappropriately granted. The Commissioner acknowledges that

- the local community is clearly concerned about the planning permission and in particular the status of and risk to their homes which has a considerable effect on them.
66. The Commissioner recognises the value in the arguments about improving the accountability of the public authority. This is a valid argument in relation to any public authority that purports to provide a public service and that is funded from the public purse. In this case particularly, the Commissioner recognises that a number of individuals have raised concerns about the outcome of the public authority's investigation and that disclosure of the information requested would assist in understanding the outcome of the investigation.
  67. In addition to increasing accountability of the police, the Commissioner also considers that there is a public interest in disclosing the requested information so that the public can better understand the actions of the planning authority and the way in which the planning application was processed. He also believes that the material would help those affected to better understand why the decision was made that planning permission should be granted and why this would not contravene restrictions on building in the area that the residents believed to be in place. This information may also assist the public in challenging the decision made by the police not to take further action and the wider position in relation to the status of the housing development.
  68. The Commissioner also acknowledges the arguments about the number of people affected by the outcome of the investigation and the nature of the allegations that were the subject of the investigation. The Commissioner considers that these add weight to the valid public interest arguments in favour of disclosure of the requested information.
  69. When giving its arguments as to why disclosure would not be in the public interest, the public authority has stated that it is important to be aware of distinguishing what is of interest to the public and what is of public interest. The Commissioner agrees that this is an important distinction to be drawn when considering where the public interest lies.
  70. The public authority has argued that as this case is closed and as the outcome of the investigation was that no wrong doing was found, this means that the disclosure of information relating to the investigation would be of interest to the public, rather than in the public interest. The Commissioner is unconvinced by this argument.
  71. As noted previously, the Commissioner is aware that the investigation is closed and that the outcome to this investigation was that no wrong doing was established. However, it is this outcome that has resulted in this information request having been made. The Commissioner considers that the public interest arguments regarding transparency and accountability have significant weight given the controversy surrounding the outcome of the investigation.
  72. The public authority has argued that the factual context in which this information request was made is of significance. It has cited a previous decision made by the



Information Tribunal (EA/2006/0046) in support of its arguments on this point. The public authority has stated that this request was made in the context of the complainant wishing to take private proceedings and the request was designed as a search for information that would assist these private proceedings.

73. The Commissioner notes that, in the decision referred to by the public authority, the Tribunal stated that the factual context in which a request is made is relevant. However, the Commissioner also notes that, in the same decision, the Tribunal recognised that the motives of an applicant in making an information request should not be material to the manner in which the public authority responds to the request. The point made by the Tribunal was that it may be appropriate to take into account the factual context of an information request when attempting to define what information the applicant is requesting.
74. In this case, the Commissioner does not believe that the motives of the applicant in making this request are relevant to interpreting what material was being sought. There is no obvious ambiguity in the wording of the request and so it would not appear to have been necessary for the public authority to have considered the factual context of the request when considering the nature of the request. Beyond this, the Commissioner does not consider it appropriate for the public authority to assume knowledge of the motivation behind the request.
75. Whilst the Commissioner acknowledges the weight of the arguments in favour of disclosure, in this case he considers that the arguments in favour of maintaining the exception are compelling. In reaching this conclusion he has, as mentioned earlier, been careful to include the presumption in favour of disclosure in regulation 12(2) when balancing the public interest.
76. The Commissioner recognises the importance of witnesses when carrying out an investigation. He is satisfied that releasing the requested information would adversely affect the ability of the public authority to obtain co-operation from witness which in turn is likely to reduce its ability to solve cases. The public interest in protecting the ability of the police to obtain full evidence from witnesses is considerable. This is crucial to resolving cases and ensuring that justice is done.
77. The Commissioner further notes that, in the decision referred to above at paragraph 22, the Information Tribunal notes the importance of protecting information acquired in confidence in the course of police investigations. The judgement of the tribunal was that this was an important factor that should be given weight.
78. The public authority referred to a previous decision (FS50118209) made by the Commissioner that considered the balance of the public interest in relation to the exemption provided by section 30 of the FOIA. In this decision, the Commissioner took into account the Freedom of Information White Paper that had specified that the freedom of information regime should not undermine criminal proceedings conducted by public authorities. Whilst this relates more directly to section 30 of the FOIA, it is also relevant to Regulation 12(5)(b). The Commissioner considers this point about the freedom of information white paper to be valid here.

79. In addition there is also clearly a significant public interest in ensuring that the police are able to apprehend, detain and question suspects. Disclosing information that would reveal the techniques used to carry out these activities would harm the ability of the police to function which would not be in the public interest.

### Legal Professional Privilege

80. The Commissioner considers there is considerable weight to the argument that the confidentiality of contributions to criminal inquiries made by the CPS should be maintained. The exchanges between the public authority and the CPS are subject to legal professional privilege, which brings with it a built in public interest. There is a clear public interest in avoiding any adverse effect on the ability of the public authority and the CPS to seek and provide full and frank legal advice. It is important that the police are able to include all of the pertinent information when referring matters and that the CPS is able to provide full and frank advice. This is likely to include reasons that cases are not taken forward and in some instances the weaknesses in a case.
81. The public interest in legal professional privilege is rooted in the proper administration of justice. The detailed policy arguments supporting the doctrine were most recently considered and fully set out in the judgment of the House of Lords in the *Three Rivers DC v Bank of England (No.6)* [2004] UKHL 48. Further, in the case of *Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023)*, the Tribunal stated that
- “there is a strong 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 may well be that, in certain cases...for example where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight”.*
82. The Commissioner is satisfied that the arguments relating to accountability, transparency as well as challenging and understanding decisions addressed in relation to the bulk of the information above, also apply in respect of the material which is subject to legal professional privilege.
83. Specific consideration was given to whether the legally privileged material could be considered stale and if so, whether particular weight should be given to the public interest arguments favouring disclosure. The Commissioner acknowledges that the case to which the material relates is closed and that the decision has been taken not to pursue further action.
84. In addition, although he has not been presented with evidence that it is likely that the case will be re-opened, the Commissioner notes that the local residents remain concerned about the activities of the planning authority and the Council in relation to this issue and that they have indicated their intention to pursue the matter. He considers that this indicates the prospect of further challenges to the decision not to take any action against the planning authority and therefore in his

view the information cannot be seen as stale. As a result he has not given particular weight to the arguments in favour of disclosure, though he has applied the presumption in favour of disclosure in regulation 12(2) when balancing the public interest.

## Conclusion

85. In this case the Commissioner has concluded that the public interest arguments in favour of maintaining the exception outweigh those in favour of disclosure.
86. In reaching this decision he has taken into account the level of harm that is likely to arise to the public authority's ability to investigate and to seek legal advice. He is satisfied that if the public authority were unable to obtain full and frank information from witnesses or people were dissuaded from voluntarily providing information this would seriously impact on the ability of the police to carry out investigations. Though the Commissioner acknowledges the significance of the arguments favouring disclosure, in this case he does not believe that they are compelling. There is a clear public interest in ensuring that the police are able to fully investigate and to apprehend those alleged to have committed offences. The ability to secure full information from witnesses and to decide how pursue an investigation away from public scrutiny are central to that process.
87. In addition the Commissioner is satisfied that ensuring that the public authority is able to obtain full and frank legal advice is important to the overall administration of justice. It is also important that the public authority is able to obtain such advice to ensure that decisions that are made comply with the law.
88. In reaching this conclusion the Commissioner has been mindful of the fact that the investigation itself has been concluded, as mentioned in the section of this notice that addressed the applicability of the exception. Though he does not consider that there is a significant likelihood that it will be re-opened he does recognise the potential for further challenge. He has also placed considerable weight on the age of the information. In particular he acknowledges that the witness statements were provided relatively recently and that therefore disclosure may cause greater harm to the confidence in police investigations. In addition the techniques and approach of the police will remain current and will still be in use in active operations.

## The Decision

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89. The decision of the Commissioner is that the public authority did not deal with the request in accordance with the EIR in that its initial refusal of the request did not comply with the requirements of Regulation 14.
90. However, the Commissioner also finds that the public authority dealt with the request in accordance with the EIR in that the exception provided by Regulation 12(5)(b) is engaged in respect to all the information withheld. The Commissioner also finds that the public authority was correct to find that the public interest in the

maintenance of this exception outweighed that in the disclosure of the information requested.

## Steps Required

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91. Whilst the Commissioner has found that the public authority failed to comply with Regulation 14, this breach does not necessitate remedial action. The Commissioner requires no steps to be taken.

## Other matters

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92. Although in this case the Commissioner has concluded that the witness statements held on the investigation file subject to the request are exempt by virtue of section 12(5)(b) he also wishes to highlight that information of this nature is likely to constitute personal data. Regulation 13 provides an exception for information constituting personal data the disclosure of which would breach the data protection principles. Although no formal decision on this has been included in this notice, it is likely that the disclosure of the witness statements would be unfair and in breach of the first data protection principle.

## Right of Appeal

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93. 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](mailto:informationtribunal@tribunals.gsi.gov.uk)

94. 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 19<sup>th</sup> day of March 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Regulation 2 - Interpretation

### Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) 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 elements of the environment referred to in (b) and (c);

## 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(3)** To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

**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; orthe protection of the environment to which the information relates.

## Regulation 14 - Refusal to disclose information

**Regulation 14(1)** If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

**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).