

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

#### **Decision Notice**

27 January 2009

Public Authority: Transport for London

Address: Information Access & Compliance Team

Windsor House 42-50 Victoria Street

London SW1H 0TL

#### Summary

The complainant made a request to Transport for London ("TfL") for copies of the legal advice and correspondence it had received in relation to the introduction of the London Low Emission Zone. TfL refused to disclose this information as it believed that regulation 12(5)(b) of the EIR applied, and the public interest in maintaining the exception outweighed the public interest in disclosure. After investigating the case the Commissioner decided that regulation 12(5)(b) was engaged, and that the public interest in maintaining the exception outweighed the public interest in disclosing the information. Therefore he has decided that TfL was correct to withhold the information in question.

#### 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. In a letter dated 4 July 2007 the complainant made the following request to TfL:

"I am writing to request the legal advice and correspondence the Mayor of London and Transport for London has received with regards to the planned introduction of a Low Emission Zone. I also request all information relating



to the reasons behind Transport for London's decision to base its proposed standard for a Low Emission Zone on Euro standard particulate matter equivalents only."

This request was made under the EIR. For ease of reference the London Low Emission Zone will be referred to as the LEZ throughout the rest of this Notice.

- 3. TfL responded in a letter dated 30 July 2007. In relation to the request for 'legal advice and correspondence' it refused to disclose this information, informing the complainant that it believed that regulation 12(5)(b) provided an exception from disclosure. It explained to the complainant that it believed that disclosure of this information would adversely affect the course of justice. In particular, it stated that it believed that disclosure would adversely affect its ability to obtain advice on its legal rights and obligation, particularly as the period for Judicial Review in relation to the LEZ had not yet lapsed. It also stated that disclosure would adversely affect its position on future cases.
- 4. TfL went on to consider whether the public interest in maintaining the exception outweighed the public interest in disclosure. It provided a list of public interest factors both for and against disclosure, and informed the complainant that after considering these factors it believed that the public interest in maintaining the exception outweighed the public interest in disclosure.
- 5. TfL went on to provide information in response to the second part of the complainant's request for information relating to the reasons behind the decision to base its proposed standard for the LEZ on Euro standard particulate matter equivalents only. Finally, TfL informed the complainant of his right to request an internal review.
- 6. The complainant contacted TfL on 6 August 2007 in order to complain about the way his request had been handled. He stated that it was not clear how disclosure of information about the LEZ would affect someone's right to a fair trial. He also stated that he did not believe that disclosure would undermine TfL's position on future cases, or prejudice its existing relationship with Counsel. Finally, he argued that the public interest in maintaining the exception did not outweigh the public interest in disclosure.
- 7. TfL carried out an internal review, and responded to the complainant in a letter dated 14 September 2007. TfL upheld its previous decision to withhold the information under regulation 12(5)(b) and explained that,

"While it was considered that the point about TfL's 'long and productive relationship' with Counsel was irrelevant to the public interest factor, the key overriding factor in the Panel's opinion was the intrinsic public interest that TfL maintains the ability to seek full and frank legal advice without the inhibition that would arise from potential disclosure."

Finally, TfL informed the complainant of his right to complain to the Commissioner.



## The Investigation

#### Scope of the case

8. The complainant contacted the Commissioner on 26 September 2007 in order to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether TfL's decision to withhold the 'legal advice and correspondence' was correct.

- 9. The Commissioner notes that there are more than one objective readings to this request, i.e. for legal advice and legal correspondence, or for legal advice and other correspondence. In considering which of these meanings to focus on he has noted that TfL appeared to have applied the former. In its refusal notice TfL referred to, "your request for the legal advice received by the Mayor of London and TfL." and only sought to rely upon an exception for information to which it believed that legal professional privilege applied. The Commissioner also notes that when seeking an internal review the complainant did not complain that TfL had interpreted his complaint too narrowly, nor did he make this argument when complaining to the Commissioner. Furthermore in his complaint to the Commissioner the complainant has argued that, "it is very much in the public interest that the legal advice provided to TfL about introducing an LEZ scheme to London is made public." Because of these factors the Commissioner has progressed on the basis of the first of the objective readings - i.e. for legal advice and legal correspondence.
- 10. Furthermore, the complainant did not raise any concerns about TfL's response to the second part of his request – for information relating to the reasons behind the decision to base its proposed standard for the LEZ on Euro standard particulate matter equivalents only. Therefore the Commissioner has not considered TfL's response to this part of the request any further.

#### Chronology

- 11. The Commissioner wrote to TfL on 29 July 2008 and asked it to provide him with a copy of the withheld information. He also asked it to provide further submissions regarding its use of regulation 12(5)(b), and why it believed that the public interest in maintaining the exception outweighed the public interest in disclosure. He asked TfL to respond within twenty working days.
- 12. In a letter dated 18 August 2008 TfL informed the Commissioner that it would not be able to meet this deadline to respond, and asked for an extension of ten working days. In a letter dated 21 August 2008 the Commissioner agreed to a new deadline, and asked TfL to respond by 12 September 2008.
- 13. On 12 September 2008 TfL contacted the Commissioner by email. It informed him that it would not be able to meet the revised deadline, and that it expected to be in a position to respond by 19 September 2008.



- 14. The Commissioner wrote to TfL on 1 October 2008 and noted that he had not yet received a substantive response. In this letter he stated that unless he received a response by no later than 16 October 2008, he would consider issuing an Information Notice under section 51 of the Act.
- 15. TfL wrote to the Commissioner on 6 October 2008 and provided him with a copy of the withheld information. It confirmed that it was relying upon regulation 12(5)(b) to withhold this information, and that it believed that disclosure would adversely affect the course of justice. It stated that it believed that the withheld information fell within the scope of the exception as it was subject to legal professional privilege. It went on to provide further arguments as to why it believed that the disclosure of this information would adversely affect the course of justice, and why it believed that the public interest in maintaining the exception outweighed the public interest in disclosing the information.
- 16. The Commissioner wrote to TfL again on 28 October 2008 and asked it to provide further information regarding its use of regulation 12(5)(b). Firstly he noted TfL's comment in the refusal notice that the period for judicial review in relation to the LEZ had not yet lapsed, and asked it to provide further submissions to expand upon this point. He also asked whether this was a reference to the Greater London Low Emission Zone Charging Order 2006 (which was confirmed on 3 May 2007). He also noted TfL's reference to the possibility of legal challenges up to and beyond the date of implementation of the LEZ, and asked it to provide further information to support this statement.
- 17. TfL wrote to the Commissioner on 3 November 2008 and provided further submissions. In relation to the reference about a potential judicial review it stated that,
  - "...as TfL was exercising a public function when devising and introducing the [LEZ], any of its decisions, actions or omissions in respect of the LEZ could have been (and continue to be) subject to judicial review. However, you are correct to identify that the confirmation of the Greater London Low Emission Zone Charging Order 2006 on 3 May 2007 posed the biggest threat of judicial review to TfL at the time [the complainant] made his request.

Although the decision to confirm the Order was strictly that of the Mayor of London, if this decision was judicially reviewed, TfL would have been joined either as a defendant or joint interested party. As the time limit for commencing a judicial review action is within 3 months of when the ground upon which the claim could be made first arose, a judicial review action relating to the confirmation of the Order could have been brought up until 5 August 2007. [The complainant] made his request on 5 July 2007 and TfL responded on 25 July 2007.

On this basis I can confirm that as part of the application of regulation 12(5)(b), TfL wishes to use the argument that at the time [the complainant] made his request the judicial review period for the Greater London Low Emission Zone Charging Order 2006, had not expired."



18. In respect of its previous references to the continuing possibility of legal challenges, TfL stated that its implementation of the Greater London Low Emission Zone Charging Order 2006, and any variations to it, could be the subject of a judicial review claim.

- 19. The Commissioner has noted that by the time TfL carried out its internal review the three month time limit for a judicial review of the confirmation of the LEZ Order had elapsed. However, his view on the timing of issues to be considered when carrying out the public interest test, as well as the factors to take into consideration when establishing whether an exception is engaged, is that the public authority should only take into account the circumstances as they existed at the time of the request or at least by the time it dealt with the request. This follows the views of the Tribunal in several cases, such as BERR v ICO & Friends of the Earth [EA/2007/0072], which stated,
  - "...we have found that ... the timing of the application of the [public interest] test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA...We make the same finding in relation to the timing of the application of the public interest test under EIR."

The Commissioner believes that this reasoning is also applicable to the application of exceptions – that in applying exceptions public authorities can only take into account factors as they existed at the time at which the request was received by the authority or at least at the time it dealt with the request. Likewise in considering the complaint before him the Commissioner is not able to consider the fact that the time limit for a judicial review of the confirmation of the LEZ Order had elapsed following the public authority issuing its refusal notice. Therefore he has taken TfL's argument about the potential for judicial review into account. Of course, the above does not preclude a public authority taking into account the passage of time or new facts in deciding to disclose requested information after an initial refusal, or as the result of a new request.

## **Background**

- 20. The LEZ is a charging scheme with the stated aim of reducing the pollution emissions of diesel-powered commercial vehicles in London. Vehicles are defined by their emissions and those that exceed pre-determined levels are charged to enter Greater London. The website of the Greater London Authority states that its objectives are, "to move London closer to achieving national and EU air quality objectives, and to improve the health and quality of life of people who live and work in and visit London, through improving air quality."<sup>2</sup>
- 21. On 3 May 2007 the Greater London Low Emission Zone Charging Order 2006 (the "Order) was confirmed. Following confirmation of the Order the LEZ started operating on 4 February 2008. There is a planned phased introduction of an

<sup>1</sup> EA/2007/0072, para 110.

http://www.london.gov.uk/mayor/environment/air\_quality/lez.jsp



increasingly strict regime up to 2012, when it will be fully operational. The scheme is administered by the TfL executive agency within the Greater London Authority.

#### **Analysis**

#### Is it environmental information?

22. The definition of "environmental information" is set out in EIR regulation 2(1). This states that:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)..."
- 23. The Commissioner considers that the phrase "any information…on" should be interpreted widely and that this is in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIRs enact.<sup>3</sup>

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<sup>&</sup>lt;sup>3</sup> Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.



24. In this case the relevant part of the above definition is regulation 2(1)(c). This defines environmental information as information on 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. In this instance, the information in question is legal advice surrounding the introduction of a low emission zone, intended to lower harmful emissions into the environment. Therefore the Commissioner believes that that the information in question is information on a measure, likely to affect the elements and factors referred to in (a) and (b). Therefore he is satisfied that the withheld information falls under the definition of environmental information for the purposes of EIR.

## **Exception**

## Regulation 12(5)(b)

25. Under this regulation a public authority can refuse to disclose information to the extent that 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. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that,

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation."

This exception is subject to a public interest test.

- 26. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Vederers of the New Forest* [EA/2008/0020], which stated that,
  - "...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone, has long been recognized as an integral part of our adversarial system."<sup>5</sup>

<sup>&</sup>lt;sup>4</sup> EA/2006/0001, para 21.

<sup>&</sup>lt;sup>5</sup> EA/2008/0020, para 29.



27. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice, and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase 'course of justice'.

## Is the exception engaged?

- 28. In order to reach a view on whether the exception is engaged the Commissioner has first considered whether the requested information is subject to legal professional privilege.
- 29. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] 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, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation." 6
- 30. There are two types of privilege legal advice privilege and litigation privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
- 31. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.
- 32. In its letter to the Commissioner dated 6 October 2008 TFL stated that the withheld information attracted legal professional privilege as it was, "...created for the sole or dominant purpose of seeking or providing legal advice on the rights and obligations of TfL in relation to the LEZ's implementation."
- 33. The Commissioner has reviewed the withheld information, and is satisfied that it constitutes communications between TfL and its legal advisors for the sole or dominant purpose of obtaining legal advice. Therefore he is satisfied that the withheld information is subject to legal professional privilege.
- 34. The Commissioner has gone on to consider whether the disclosure of the withheld information would have an adverse affect on the course of justice.
- 35. In *Archer v ICO & Salisbury District Council* [EA/2006/0037] the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the matters set out in

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<sup>&</sup>lt;sup>6</sup> EA/2005/0023, para 9.



paragraphs 25 and 26 above; the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse affect and that any statement that it could or might have such an effect was insufficient. The information is then subject to the public interest test and the Tribunal confirmed that the information must still be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosing the information.

- 36. In reaching a decision on whether disclosure would have an adverse affect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council* [EA/2005/0026 & EA/2005/0030] in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse affect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
- 37. TfL has argued that disclosure would adversely affect the course of justice by:
  - Affecting its ability to obtain legal advice on its legal rights and obligations. TfL
    argued that disclosure would inhibit it from seeking and obtaining frank legal
    advice on the LEZ and other issues. This would mean that legal risks would
    not receive the analysis and mitigation they required.
  - Any disclosure of instructions to Counsel would inhibit TfL from fully explaining issues of concern in relation to future legal advice. This would undermine its relationship with Counsel.
  - At the time of the request, the period for judicial review in relation to the introduction of the LEZ and confirmation of the Order had not lapsed (see paragraph 17 above). Disclosure of the withheld information would put TfL at a disadvantage in any proceeding.
  - Disclosure would also affect its position on future cases. TfL has stated that
    irrespective of time limits for judicial review, there is a possibility of legal
    challenges up to and beyond the date of implementation of the LEZ. TfL
    confirmed that any variations to the Order could be the subject of a judicial
    review claim, and that the withheld information is of continuing relevance to
    the current scheme and any future proposals. In support of this statement TfL
    informed the Commissioner that under the Order it can make decisions as to
    whether to grant exemptions to the LEZ, and at the time of writing to him it
    was currently being judicially reviewed in respect of such a decision.
  - TfL argued that disclosure of the withheld information would put it at a disadvantage in any such proceedings, "as it would be open knowledge to any prospective party to a proceeding what TfL viewed as the strengths and/or weaknesses of its particular position on the matters covered in the advices. For the avoidance of doubt, it should not be assumed that the advice contains anything that indicates TfL was not entitled to take any particular action that it did or did not take."



38. In reaching a view on TfL's arguments the Commissioner has again noted the views of the Tribunal in *Rudd v ICO & The Vederers of the New Forest* [EA/2008/0020], in which the Tribunal considered whether the disclosure of legal advice obtained by the public authority would have an adverse affect on the course of justice. In that case the public authority argued that:

- It was currently engaged in litigation where the subject of the legal advice had been raised. Disclosure would adversely affect its ability to defend its legal rights by disclosing advice that was the subject of current and potential future litigation.
- It would adversely affect its ability to obtain legal advice in respect of other decisions or issues affecting the authority and its responsibilities.
- It would undermine the relationship between the authority and its lawyers, inhibiting the free and frank exchange of views on its rights and obligations.
- Disclosure would lead to the authority not speaking frankly in the future whilst seeking advice.
- Disclosure could lead to reluctance in the future to record fully such advice, or legal advice may not be sought – leading to decisions being made that would potentially be legally flawed.

After considering these arguments the Tribunal was satisfied that these matters related to the course of justice, and that disclosure would have an adverse affect upon them.<sup>7</sup>

- 39. The Commissioner has noted the views of the Tribunal as recorded above, and the similarities in the arguments presented by the public authorities in that case and this one.
- 40. After considering the arguments presented to him by TfL the Commissioner is satisfied that the disclosure of the withheld information would more likely than not adversely affect the course of justice. Therefore he is of the view that regulation 12(5)(b) is engaged.
- 41. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

## The public interest test

- 42. Regulation 12(1)(b) states that a public authority may refuse to disclose environmental information if
  - an exception to disclosure applies under paragraphs 12(4) or 12(5); and
  - in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

<sup>&</sup>lt;sup>7</sup> EA/2008/0020, para's 33 – 34.



- 43. The Commissioner notes that regulation 12(2) states that in dealing with a request for environmental information a public authority should apply a presumption in favour of disclosure.
- 44. The Commissioner believes that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. This, he believes, helps create a degree of accountability and enhances transparency of the way in which those decisions were arrived at. He believes that this is especially the case where the public authority's decisions have a direct effect on the environment.
- 45. In this particular case the Commissioner recognises that the introduction of the LEZ would have a major impact on the environment of Greater London, and on a high number of individuals who live and work within the zone. He also recognises that the measures which the LEZ would introduce would have an affect upon the owners of vehicles who would become subject to charging as the scheme took effect.
- 46. The Commissioner believes that the disclosure of the withheld information would allow for a more informed public debate of the introduction of the LEZ, which, at the time of the request, was very much a current topic. It would also increase public understanding of the decisions made in the build up to the introduction of the LEZ.
- 47. However, the Commissioner also accepts that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers after having full and frank disclosures. This is a fundamental principle in the legal system and there is a strong public interest in maintaining it.
- 48. The Information Tribunal has endorsed this principle. In its decision in *Bellamy v ICO & DTI* [EA/2005/0023] the Tribunal stated that, "...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It 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...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."
- 49. In this case the Commissioner has noted that at the time of the request, the information related to a live issue. The request was received shortly after the confirmation of the Order, at a time when it was still open to a judicial review. Further to this, he also notes TfL's statement that,
  - "...the legal advice canvasses issues which have relevance beyond the introduction of the LEZ. Accordingly, there remains the prospect of

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<sup>&</sup>lt;sup>8</sup> EA/2005/0023, para 35.



litigation in relation to aspects of the current scheme and any changes that may be made to it."

In addition he has noted that TfL has informed him that at the time of writing to him it was currently subject to a judicial review regarding a decision it had made whether or not to grant an exemption to the LEZ scheme.

- 50. The Commissioner believes that it is in the public interest to allow a public authority to defend itself in any potential judicial review, without the legal advice upon which the original decision was made being put into the public domain at an earlier point which would be likely to unfairly prejudice its position. He believes that to disclose legal advice where litigation is in contemplation or prospect would upset the delicate balance of fairness between legal adversaries. This, he believes, would not be in the public interest.
- 51. TfL has made several submissions regarding the public interest in maintaining the exception:
  - Disclosure would undermine TfL's position in future litigation. In relation to any potential litigation regarding the introduction of the LEZ, or any changes made to it, disclosure of the withheld information would put TfL at a disadvantage. It is in the public interest that TfL is entitled to a level playing field for any future litigation.
  - Any disclosure of instructions to Counsel would inhibit TfL from fully explaining issues of concern in relation to future legal advice. It is very much in the public interest that TfL maintains the ability to seek full and frank legal advice, without the inhibition disclosure would cause.
  - There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts.
- 52. The Commissioner has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO* [EA/2007/0092], which was considering the public interest in relation to the section 42 exemption of the Freedom of Information Act 2000 (this provides an exemption for information to which a claim to legal professional privilege could be maintained in legal proceedings). During its deliberations the Tribunal said:

"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."

The Tribunal went on to state that such arguments of misrepresentation should be supported by, "cogent evidence". 9

<sup>&</sup>lt;sup>9</sup> EA2007/0092, para's 29 and 33.



- 53. Having considered the circumstances of the case and the withheld information the Commissioner has not found any evidence of the above factors. The Commissioner also notes that the complainant has not presented any such arguments.
- 54. After considering the above factors the Commissioner is satisfied that in this particular case there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of legal professional privilege is not countered in this case by at least equally strong arguments in favour of disclosure. Therefore he believes that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- 55. The full text of regulation 12 can be found in the Legal Annex at the end of this Notice.

#### The Decision

56. The Commissioner's decision is that TfL dealt with the request for information in accordance with the EIR.

### **Steps Required**

57. The Commissioner requires no steps to be taken.



### **Right of Appeal**

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

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

Tel: 0845 600 0877 Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 27<sup>th</sup> day of January 2009

Signed	 	 	

Nicole Duncan Head of FOI Complaints

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



### **Legal Annex**

## 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 discloser 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.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (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.
- (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.
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect
  - (a) international relations, defence, national security or public safety;
  - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature:
  - (c) intellectual property rights;
  - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
  - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
  - (f) the interests of the person who provided the information where that person—
    - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
    - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
    - (iii) has not consented to its disclosure; or
  - (g) the protection of the environment to which the information relates.



- (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).
- (7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.
- (8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.
- (9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).
- (10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.
- (11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.