



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

**Decision Notice**

**Dated 27 July 2006**

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

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

**Summary Decision and Action Required**

**The Commissioner's decision in this matter is that the Public Authority has dealt with the Complainant's request in accordance with Regulation 5 of the Environmental Information Regulations 2004 (EIR).**

**The Commissioner does not require any action to be taken by the Public Authority.**

- 1. The Environmental Information Regulations 2000 ("the EIR") and the Freedom of Information Act 2000 (the "Act") – Applications for a Decision and the Duty of the Commissioner**
  - 1.1 The EIR were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC[4]). 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 Act are imported into the EIR.
  - 1.2 The Commissioner has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public Authority has been dealt with in accordance with the requirements of Regulation 5(1).
  - 1.3 Section 50 of the Act provides that where a complainant has made an application for a decision, unless:
    - a complainant has failed to exhaust a local complaints procedure, or
    - the application is frivolous or vexatious, or
    - the application has been subject to undue delay, or



- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

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

## **2. The Complaint**

2.1 The Complainant has advised that on 12 January 2005 the following information was requested from the Office of the Deputy Prime Minister ("ODPM"):

*"A copy of the report submitted to the First Secretary of State by the Inspector for the Planning Inquiry about land west of the A1(M) at Stevenage, Herts: Application by the West of Stevenage Consortium."*

2.2 The information was requested under the Freedom of Information Act 2000. However, the Information Commissioner is satisfied that the information requested by the complainant is 'environmental information' as defined in Regulation 2 of the Environmental Information Regulations 2004 ("the EIR").

On 24 January 2005 ODPM wrote to the complainant, refusing to supply the requested information to him. At this time, the First Secretary of State was still considering the application for planning permission that the requested information relates to. ODPM cited Regulation 12(4)(e) of the EIR as its basis for withholding the information. This Regulation allows a Public Authority to refuse to disclose information to the extent that the request involves the disclosure of internal communications. ODPM also cited s.22 of the Act (information intended for future publication). ODPM argued that once the planning decision has been taken the Planning Inspector's Report would be made available to the public. ODPM advised the complainant that he would be provided with a copy of the planning decision letter and the Planning Inspector's Report as soon as it is published.

ODPM also advised the Complainant of its internal procedure for reviewing a decision to refuse a request.

On 1 February 2005 the Complainant wrote to ODPM to ask it to carry out a review of its initial decision to refuse his request. The Complainant argued that public debate of planning decisions is in the public interest, and that public debate cannot take place while the Minister is considering the Report if the public cannot read it. He went on to question how anyone can make informed responses to a ministerial decision, when eventually he makes it, if no-one can read the Report until after his announcement. The Complainant went on to argue that all interested parties should have equal access to relevant material, and that unless everyone has had the opportunity to read and consider the principal document on which the planning



decision will be based they cannot make informed comments at a time when media interest in the decision will be at its height. The Complainant also argued that by delaying publication of the Report until the decision is announced, the Minister is seeking to ensure that only he will be able to relate his decision to the detailed contents of the Report, all other responses will be ill-informed or too late to be reported. Finally, the Complainant explained his belief that the Report relates to one of the most important planning decisions for decades, one which could lead to the largest encroachment ever into the Green Belt, a decision that will have planning consequences for the Green Belt nationwide.

On 17 March 2005 ODPM wrote to the complainant to inform him of the outcome of its internal review. ODPM again refused to provide the information, arguing that early release of the Report would lead to further rounds of representations, and that this would delay the planning process and cause public uncertainty. ODPM concluded, therefore, that release of the information would not be in the public interest. It advised the complainant to contact the Commissioner should he remain dissatisfied with its handling of his request.

On 22 March 2005 the Complainant wrote to the Commissioner to ask him to investigate ODPM's handling of his request for information.

### **3. Relevant Statutory Obligations under the EIR**

#### **3.1 Regulation 5(1) provides—**

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

#### **3.2 Regulation 12(1) provides -**

“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 the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

#### **3.3 Paragraph (4) referred to in the above paragraph contains the following at sub-paragraph (e):**

“...for the purposes of paragraph (1)(a), a Public Authority may refuse to disclose information to the extent that ... the request involves the disclosure of internal communications.



## **4. Review of the case**

### **Background**

- 4.1 The request for information arose from an application submitted by the West of Stevenage Consortium for planning permission to build houses on Green Belt land west of the A1(M) at Stevenage, Hertfordshire. A Public Inquiry concerning the proposed development was held in 2004. The planning decision was 'called in' by ODPM under the provisions of the Town and Country Planning Act 1990. According to information provided by the ODPM, some 150 planning applications are 'called in' each year for consideration by the First Secretary of State.

### **4.2 The complaint**

The complainant first contacted the Commissioner on 22 March 2005, asking him to investigate ODPM's handling of his request for information of 12 January 2005. He provided a brief outline of his complaint. The Commissioner wrote to the Complainant on 4 April 2005, advising him that his correspondence had been referred to a member of the Commissioner's Complaints Resolution Team. The complainant was contacted again on 28 April 2005 and was asked to provide a copy of correspondence relating to his request, including ODPM's initial refusal letter and the second refusal it made. This was provided on 11 May 2005. On 16 May 2005 the Commissioner wrote to ODPM to ask about the handling of the complainant's request, to clarify that the requested information was 'environmental' and to request further information about the process for dealing with 'called in' planning applications. On 23 June 2005 ODPM provided a substantive response to the Commissioner's letter of 16 May. This included detailed information about the process for handling 'called in' planning decisions. ODPM also provided additional explanation of its decision not to provide the complainant with the information he requested, using the same arguments as it had put forward previously.

### **4.3 Investigation of the complaint**

This complaint was investigated by correspondence. ODPM cited Regulation 12(4)(e) of the EIR as its basis for withholding the information. This Regulation allows a Public Authority to refuse to disclose information to the extent that the request involves the disclosure of internal communications. The investigation of this complaint involved ascertaining, firstly, whether the Report in question is an 'internal communication' and, secondly, whether the public interest favours the release of the Report. The Commissioner has not seen a copy of the Report. He has, though, seen similar reports provided to him in connection with his investigation of complaints similar to this one. The Commissioner took the view that the Report's purpose, authorship and distribution, rather than its content, is key to determining whether it is an 'internal communication'. There is no doubt that ODPM does hold the requested information.



## **5. The Commissioner's Decision**

### **5.1 Application of the exception: Would disclosure of the requested information involve the disclosure of internal communications?**

5.2 The Commissioner took the view that the requested information is 'environmental' because a planning inspector's report contains information on administrative measures that are likely to affect the state of the elements of the environment. Clearly, the granting, or denial, of planning permission for the building of houses on green belt land will affect the local landscape and natural sites. The Commissioner and ODPM both agree that the information requested is environmental information, as defined in Regulation 2(1) of the EIR, and that the ODPM was correct, therefore, to consider the request as a request for information under the EIR. Originally ODPM cited exemptions in the Act and exceptions in the EIR as its basis for withholding the information. The Commissioner explained to ODPM that the information in question is 'environmental' and is therefore exempt from the Act. ODPM agreed that this was the case, and that the request ought to be considered solely under the EIR. Therefore this Decision Notice does not consider the applicability of the Act's s.22 exemption.

5.3 The withheld information consists of a report made by a Planning Inspector. Some may take the view that the planning inspector's report is not an internal communication since he is an independent person. In this case the Report was prepared by the Inspector for the Planning Inquiry. The Inspector is appointed by the Secretary of State. The Inspector makes a Report and recommendation to the Secretary of State, based on the evidence and submissions considered in the course of a planning inquiry. In doing so the Inspector's role constitutes an integral part of the same legal and administrative function as that performed by the Secretary of State himself. The Secretary of State bases his decision on the contents of the Report and the recommendations of the Inspector together with any other matters brought to his attention by officials in ODPM HQ.

The fact that the resulting reports are published after the planning decision is taken is immaterial to the fact that the Report is, in the opinion of the Commissioner, an internal communication.

The Commissioner is therefore satisfied that the Report is an 'internal communication' and therefore falls within the scope of the exception in Regulation 12 (4) (e).

### **5.4 The public interest test**

The exceptions from disclosure in the EIR are all subject to the public interest test. In its letter of 24 January 2005 ODPM provided a brief explanation of what it saw as the relevant public interest considerations. It argued that the public interest is served by the ability publicly to debate and question planning decisions, and that



this mechanism exists during the process of considering a planning application and once a decision has been taken. ODPM argued that an early release of the Inspector's Report would not seem likely to assist the process of debate and may undermine the procedures which have been put in place to handle planning appeals and call-in cases fairly and objectively.

#### 5.5 The Commissioner's published advice

The Commissioner has published guidance on both the public interest test and the EIR exceptions. Although this is not binding and must be applied carefully to the circumstances of individual cases, it does represent the Commissioner's starting point.

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

- furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority.
- promoting accountability and transparency by public authorities for decisions taken by them. By placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.
- allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.

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

The Commissioner has also published introductory advice on the application of the exceptions in the EIR. In this advice, the Commissioner recognises that one of the purposes of the exception is "to provide some protection for the "private thinking space" for senior officials or elected members..." The advice explains that although the exception appears to have a very wide scope, in practice this is likely to be narrowed by the application of the public interest test.

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



Although this request for information was made and refused under the EIR, it is also relevant to consider the exemption in the Act relating to the formulation of government policy since this gives a much clearer “steer” as to the sensitivity of different types of information held in connection to the formulation of policy and the different public interest considerations that may arise from time to time. In particular, section 35(4) of the Act provides:

“In making any determination required by section 2(1)(b) or 2(b) [that is, the application of the public interest test] in relation to information which is exempt information by virtue of subsection 1(a) [that is, information relating to the formulation of government policy] regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

It is not suggested that section 35 of the Act is directly relevant to this case, rather that it may be reasonable to apply the same general approach to information held in relation to the formulation of government policy to information held in relation to a decision made by a Minister.

In Awareness Guidance 24, which gives high level advice on the FOI exemption relating to the formulation of government policy, the Commissioner observes:

“Subsection 35(4) provides an explicit indication that there is a strong public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking. The Information Commissioner therefore advises it is only where factual information is inextricably interlinked with advice etc, that it might not be disclosable in the public interest.

“However, in distinguishing factual material from opinion, advice and recommendation, it must be stressed that just because something is not factual, it is not automatically exempt but, on the contrary, any decision not to release the information is subject to the public interest test.”

The Commissioner has given careful consideration to the application of the public interest test set out in Regulation 12(1)(b), mindful of the requirement of Regulation 12(2), namely, “A Public Authority shall apply a presumption in favour of disclosure.”

The Commissioner recognises the enormous significance that planning decisions have on local communities and on society more generally. This is particularly the case where the granting of planning permission results in encroachment onto Green Belt land. This case, in particular, reflects tension between satisfying future housing needs and preserving the countryside.

There is clearly a strong public interest in planning decisions being taken properly, and particularly in Ministers making decisions that are based on accurate and



complete information provided to them by Planning Inspectors and others involved in the process. Giving access to Planning Inspectors' Reports at an early stage in the planning process would no doubt allow the public to scrutinise the process, to bring any defects to light and to make representations. Early access would also facilitate public debate of planning decisions, and would allow those opposed to the granting of planning permission to use the media to put forward their point of view at a time when a planning issue is still 'live'.

However, the system for dealing with planning applications that have been 'called in' for consideration by the Secretary of State is well-established. The statutory arrangements for this are set out at s.18 of the Town and Country Planning Act 1990. During the process the various interested parties have an opportunity to make representations about a planning application. There are opportunities to make written submissions, and there are statutory requirements to ensure there is community involvement in the planning process.

Once a public consultation period has ended, the Inspector will produce a report which will be submitted to the Secretary of State for consideration. Once a planning decision has been made the resultant report will be provided to certain interested parties and will be made available to anyone who wants a copy.

In his correspondence with the Information Commissioner, the applicant has not suggested that there has been any departure from the proper procedure under planning legislation in this case. If there had been, then the means of legal challenge would be by way of Judicial Review.

In the view of the Commissioner, ODPM's argument that, at some point, the Secretary of State had to 'close the book' on public consultation and make his decision is a valid one and it is in the public interest that this should happen.

The Commissioner understands that ODPM was under a duty to consider any further submissions made in connection with a planning application, even ones made after its 'cut off date'. It is difficult to envisage how the public interest would be served in further public debate being promoted, and submissions considered, in the period between evidence being called in and the planning decision being taken. The Commissioner accepts the argument put forward by ODPM that this would lead to delay and uncertainty in the planning process, this having a detrimental effect in the area planning decisions would have an impact upon.

Had the Report had been released prior to the planning decision being taken, it would have been difficult to see what benefit this would have had for those affected by the ultimate decision or on society more generally. The public interest was served by there being a planning process that worked properly, that involved the public and that resulted in a planning decision being taken, as has now occurred in this case. The release of the Inspector's Report at the time it was requested would





have generated further uncertainty for no practical reason and would have further prolonged the planning process.

The Commissioner is, for the reasons set out above, satisfied that, in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the information.

In this case, therefore, the Information Commissioner has decided that the ODPM dealt with the complainant's request for information in accordance with Part 1 of the Freedom of Information Act 2000 as amended by the Environmental Information Regulations 2004.

## **5.6 Summary of the Commissioner's decision**

The Commissioner accepts that, whilst the First Secretary of State was still in the process of deciding whether to grant planning permission, the request would involve the disclosure of internal communications. Therefore the exception at Regulation 12(4)(e) of the EIR is engaged in respect of the requested information. The exception is subject to the public interest test. The Commissioner's also accepts that release of the requested information would have been likely to delay the making of the final decision, and that this would not be in the public interest. In reaching this view he is mindful of the fact that a process for appeal is laid down in statute, that the matters before the First Secretary of State had been the subject of a public inquiry and that there is a strong public interest in ensuring that planning decisions are made reasonably quickly.

## **6. Action Required**

- 6.1 The Commissioner does not require the Department for Communities and Local Government, formerly ODPM, to take any action.

## **7. Right of Appeal**

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)



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

**Dated the 27th day of July 2006**

**Signed .....**

**Graham Smith**  
**Deputy Commissioner**

**Information Commissioner**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**