

## Environmental Information Regulations (2004)

### Decision Notice

Date 4<sup>th</sup> December 2006

**Public Authority:** Department for Environment Food and Rural Affairs (DEFRA)  
**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

#### Summary

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The complainant requested the advice given to a Minister who subsequently confirmed a Byelaw in relation to salmon fishing on the River Teign. The request was correctly handled under the Environmental Information Regulations 2004. Access to the information in question was refused on the grounds that the advice constituted internal communications and that the balance of the public interest favoured maintaining the exception. The Commissioner has reviewed the information in question and considered the arguments proposed, but does not agree that the balance lies in favour of withholding the information. Defra are required to release the information within 35 working days.

#### The Commissioner's Role

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1. The Environmental Information Regulations 2004 (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. On 23 May 2005 the complainant requested, from the public authority, the advice given to the Minister at the public authority which led to the decision to confirm the Byelaw regarding salmon fishing on the River Teign.
3. The public authority responded on 9 June 2005, refusing access to the information on the grounds that it constituted internal communications under

regulation 12(4)(e), and that the public interest in this case favoured maintaining the exception.

4. On 19 September 2005 the complainant requested a review of this decision.
5. The public authority responded on 15 November. This review upheld the original decision not to provide the information in question.

## The Investigation

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### Scope of the case

6. On 8 September 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. However the complainant had not pursued an internal review and was directed back to the public authority.
7. On 19 November 2005 the complainant contacted the Commissioner regarding the outcome of the internal review and asked that he consider the following points:
  - That the refusal to provide the information was contrary to a commitment to open government.
  - That more sensitive information had been released in relation to other requests.
  - That disclosure would improve relations between stakeholders and the Environment Agency.
8. These views can be summarised as a general objection to the decision to refuse access to the information in question.
9. Therefore this investigation focuses on the application of the exception under 12(4)(e) and the public interest test which must be applied under the Regulations.

### Chronology

10. **28 April 2006** The complaint was allocated, for investigation, to a member of the Commissioner's staff who wrote to the complainant to obtain a copy of his original request and explain how he intended to proceed.
11. **3 May 2006** The complainant responded providing various pieces of correspondence but not the original request. The original request was later obtained directly from the public authority.

12. **15 May 2006** The public authority was contacted and asked to provide justification for the classification of the information in question as internal communications, a copy of the withheld information, a copy of any information provided to the complainant, and any further information which it would consider helpful in arriving at a decision.
13. **19 June 2006** The public authority responded to the points raised under paragraph 12. The public authority states that two documents were withheld: a submission dated 3 February 2006 to Ben Bradshaw and a follow up minute to Mr Bradshaw dated 8 February 2006. It explained that both these documents were sent from the relevant policy division, Fisheries Division II, to the Minister and that it therefore formed the view that they constituted internal communications. It also stated that a submission from the Environment Agency to the public authority had already been provided to the complainant, along with the Salmon Action Plan and a letter to objectors from the public authority.
14. The public authority then provided further details of its consideration of the public interest test. In doing so, it highlighted that some of the information included in the submissions to the Minister constituted legal advice and would therefore have been subject to regulation 12(5)(d). However they had focused on the exception under 12(4)(e) as all of the information constituted internal communications.
15. **12 July 2006** A series of further questions were put to the public authority in relation to the application of the public interest test, specifically questioning how the public interest test had focused on this particular information, as opposed to disclosures of information of this type in general.
16. **16 August 2006** The public authority responded fully to the points raised in relation to the application of the public interest test, by providing arguments for and against disclosure.

## Analysis

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## Exceptions

### 12(4)(e) – Internal Communications

17. The exception under 12(4)(e) provides that a public authority may refuse to provide access to information to the extent that it constitutes internal communications. The full text of this exception is available in the Legal Annex.
18. The Commissioner is satisfied that the withheld information constitutes internal communications. In referring to published guidance on the subject, information contained in any internal communication of a public authority, including correspondence between officials, may be protected under this exception.

Information can be withheld on the basis that it is an “internal communication” only where it is in the public interest to do so.

19. For Government Departments within the meaning of the Regulations, the scope of the exception expressly extends to communications between one Government Department and another by virtue of Regulation 12(8). Regulation 12(8) is express recognition of the importance of the convention of collective responsibility, which requires that Ministers be able to argue freely in private in the expectation that when decisions have been reached they will present a united front.
20. The meaning of Government Department has been taken to include all ministerial and non-ministerial departments of state. Executive agencies are part of their parent department, so can use this exception for communications both internal to the Executive Agency and between the Executive Agency and the parent department. For this purpose, the scope of the exception for internal communications is understood to be communications internal to the body as defined by “public authority” in Section 2(2) of the Regulations.
21. However, the availability of the exception for internal communications does not in itself provide a right for authorities to withhold information. It is merely the starting point from which the public interest test should be considered.
22. The information has been examined and it was clearly created by members of the Fisheries Division II and sent to the Minister. Therefore, the Commissioner is satisfied the exception is engaged.
23. The EIR, through Regulation 12(2), builds in a presumption in favour of disclosure. This means that if the arguments are evenly balanced for withholding and disclosing information, the information must be disclosed. The presumption in favour of disclosure reflects the view that openness is often for the public good. Public authorities should consider the need to promote openness, transparency and accountability and to encourage public participation in environmental decision making.
24. The public interest in releasing information particularly to further accountability and to enable public participation and involvement in decision-making must be weighed against the public interest in not disclosing the information.
25. In this case the public authority advanced the following factors in favour of providing access to the information in question.
  - that genuine local interest in the disclosure of these documents exists;
  - there is a public interest in knowing the quality of advice provided to ministers and subsequent decision making; and
  - knowledge of the Government’s internal workings demystifies the policy making process.
26. The public authority advanced the following arguments in favour of maintaining the exemption and refusing access to the withheld information:

- that the issues mentioned in the submission are 'live' and could be reconsidered at any stage;
  - a commercial buy out of the netsmen on the Teign remains a possibility and disclosure could damage the public authority's ability to get value for public money;
  - disclosure of policy deliberations would be likely to re-open debate at a time when the department is focussed on monitoring the success of the current voluntary system in place; and
  - disclosure of some comments constituting legal advice could prejudice the Government's future legal position.
27. In the Commissioner's consideration of the public interest, the following background information was useful. The number of salmon in the River Teign is at a low level therefore requiring conservation measures to be put in place to protect stock levels of the river. The main groups using the river are netsman, who earn a living from the river, and the general public who use it for rod fishing. To address these environmental issues the Environment Agency developed a Salmon Action Plan which, in brief, led to a consultation exercise, a Net Limitation Order, and proposed various byelaws with the intention of preventing anglers taking fish home. The Environment Agency presented a submission to the public authority which, following the confirmation of the byelaws, subsequently held meetings with anglers and netsman and their representative bodies to discuss their preferred method of conserving salmon stocks. Ultimately this resulted in voluntary rules being set up and the repeal of the byelaws.
28. The Commissioner finds that the public interest arguments in favour of releasing this information are strong. To disclose the documents in question would achieve three things:
- It would demystify the process by which a minister is informed of, and arrives at, a decision on an environmental issue such as this. This would help the public at large to understand and have confidence in the actions taken on their behalf by officials within the public authority. It may also encourage members of the public to engage in consultation exercises knowing that their views and opinions would inform the outcome.
  - Disclosure would help to ensure that officials are accountable for their actions through the transparency of the decision making and policy formulation process. There is a general public interest in providing people with as much information about the way Government and other official bodies operate.
  - This particular issue is of real relevance to people who use the River Teign for both recreational and commercial purposes. In addition to supporting the livelihood of netsman it provides an area of natural beauty for the use of those both locally and from further afield. A change in the way in which the river is used could affect the local economy, for example tourism, meaning that any information on this topic would be helpful to local residents.

29. Opposed to these are the arguments against the disclosure of this information. Firstly, the current status of salmon fishing on the Teign is that voluntary arrangements regarding the return of catch are present for anglers; these are enforced by the angling clubs in the area and monitored by the Environment Agency. If the voluntary measures were judged to be failing the public authority could decide to reintroduce byelaws, meaning that this is still a 'live' issue and disclosure could impinge on the ability of the public authority to introduce a different procedure.
30. Secondly, if the public authority chose to buy-out netsmen on the Teign their bargaining position could be hampered by the disclosure of the submissions to the Minister. There is a clear public interest in the public authority being able to negotiate a good price for the public purse if they proceed with a buy-out.
31. Finally, there exists a public interest in officials having private thinking space within which to consider the relative merits of any decision and advise a minister accordingly. The policy of the public authority in this area would appear to be particularly fluid therefore emphasising the need for well considered advice without being second guessed.
32. Much material has already been released by the authority as a result of the original request. The Commissioner acknowledges the lengths gone to by DEFRA to supply a lot of detailed information on the subject and the exemption has been applied to two specific documents. Having viewed the material, the Commissioner is of the opinion that that depth of information contained is not commensurate with the level of argument put forward by DEFRA. The details covered do not expose particularly sensitive opinion, indeed, they appear to confirm that due consideration has been given by the department to the various options that exist.
33. Also considered is the fact that the byelaws might be reinstated. To maintain the exemption on the basis of what might happen would appear to be unreasonable, as there has been no indication that this course of action is more likely than not. Release of the documents would add to the background of opinion that led to the decisions taken and inform interested parties as to the logic applied.

12(5)(b) – The course of justice.

34. During the course of correspondence with the ICO, DEFRA also raised the possibility that the withheld information could constitute legal advice and might therefore be subject to Regulation 12(5)(d) as it is subject to legal professional privilege. The issue of legal professional privilege is addressed by the Information Tribunal in *Kirkaldie v The Information Commissioner and Thanet District Council* (appeal number EA/2006/001). In this decision, the Tribunal draws a direct comparison between Section 42 of the Freedom of Information

Act 2000 (The Act) and Regulation 12(5)(b)<sup>1</sup> of the EIR and expressly states that legal professional privilege is covered by Regulation 12(5)(b) of the EIR.

35. When considering the issue of legal professional privilege, therefore, the Commissioner has not considered the applicability of Regulation 12(5)(d) but instead referred to the guidance applicable to section 42 of the Act and Regulation 12(5)(b) of the EIR.
36. There are two categories of legal professional privilege:
  - advice privilege – where no litigation is contemplated or pending; and
  - litigation privilege – where litigation is contemplated or pending.
37. Advice privilege attaches to communications between a client and its legal advisors and the information in question must be communicated in a professional capacity. Litigation privilege arises where litigation is contemplated or is in fact underway and confers a wider privilege. In both cases, communication needs to be made for the principal or dominant purpose of seeking or giving legal advice.
38. After reading the withheld documents, the Commissioner is satisfied that Regulation 12(5)(b) does not apply as the principal purpose of the communication is not to provide legal advice and none of the parties involved present themselves as a 'professional legal advisor'.
39. Having balanced the factors, and taking into account the presumption in the Regulations in favour of disclosure, the Commissioner is of the view that the information should be disclosed.

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<sup>1</sup> See Legal Annex for full text of EIR Regulations 12(5)(b) and 12(5)(d) as well as Section 42 of the Act

## The Decision

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40. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Regulations insofar as they failed to balance the public interest in relation to regulation 12(4)(e) correctly.

## Steps Required

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41. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
  - To disclose the information withheld.
42. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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



## Right of Appeal

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

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

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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

**Dated the fourth day of December 2006**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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

## Legal Annex

### Environmental Information Regulations 2004 - Regulation 12

- 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 the 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 the 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;

Freedom of Information Act 2000 (The Act)

*Section 42*

Legal professional privilege

**42.** - (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.