

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

Decision Notice

Date: 11 November 2010

Public Authority: Welsh Assembly Government
Address: Cathays Park
Cardiff
CF10 3NQ

Summary

The complainant requested information relating to legal advice obtained by the Assembly Government in relation to two planning appeals. The Assembly Government refused to disclose the information by virtue of section 42 of the Act and regulations 12(4)(e) and 12(5)(b) of the EIR. The Commissioner has investigated and determined that the request should have been handled solely under the provisions of EIR. The Commissioner has found that regulation 12(5)(b) was engaged and the public interest favoured maintaining the exception. Therefore he has decided that the Assembly Government was correct to withhold the information in question and he requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

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 are imported into the EIR.

Background

2. The request and complaint to the Commissioner were submitted by solicitors acting on behalf of a named company. The requests relate to two planning appeals submitted by the named company against the decision of two local authorities not to grant planning permission for a development to extend open cast mining activities at a particular site.
3. The planning appeals in question were submitted on 3 April 2008. On 21 August 2008, a direction was issued by the Planning Inspectorate, under the authority of the Minister for Environment Sustainability and Housing, that the appeals should be determined by the Welsh Ministers rather than a planning inspector. Planning appeals can be dealt with in one of three ways; through written representations, a public hearing, or a public inquiry. In this case, the appeal was dealt with by a public inquiry conducted by a Planning Inspector appointed by the Planning Inspectorate, with the final decision on the appeal being made by Welsh Ministers.
4. A Public Inquiry took place in February 2009 and the Inspector's report was produced on 7 May 2009. The information requested in this case refers to legal advice which the Welsh Assembly Government sought in relation to the Inspector's report when determining the planning appeal. The Decision letter on the planning appeal was issued on 19 November 2009 and the appeals were dismissed. The decision was subsequently appealed to the High Court who issued their judgement on 29 July 2010 dismissing the appeal. The Commissioner understands that a further appeal regarding the planning applications has been made to the Court of Appeal.

The Request

5. On 11 December 2009, the complainant wrote to the Welsh Assembly Government ('the Assembly Government') in relation to a particular planning appeal and requested:

"...copies of any letters, emails, memoranda or notes generated by the Welsh Assembly Government officers or members in relation to [the planning appeal]"
6. The Assembly Government responded on 8 January 2010 to clarify the information being sought. On 11 January 2010, the complainant confirmed that they were interested in "everything after the Inspector

sent in his draft report, which will include the written submission to ministers". The complainant also asked for information relating to any amendments to the Inspector's report.

7. On 14 January 2010 the Assembly Government responded in relation to the request for amendments to the Inspector's report, confirming that the only amendments were typing or spelling errors. On 18 January 2010 the Assembly Government provided a copy of the submission that was put to the Minister dated 17 November 2009.
8. On 28 January 2010, the complainant wrote to the Assembly Government and made a new request for "...copies of any comments or advice provided by Legal Services on the Inspector's decision". The complainant also asked whether the Assembly Government's Legal Services Department had been consulted about a named individual's submission to the Minister and a copy of any comments which Legal Services had made on the submission.
9. The Assembly Government responded to the second request on 1 March 2010. It confirmed that its Legal Services Department had not been consulted regarding the submission to the Minister. It also confirmed that its Legal Services Department had been asked for legal advice on matters relating to the content of the Inspector's Report and it held information falling within this part of the request. The Assembly Government stated that this information was exempt under section 42(1) of the Act and regulations 12(4)(e) and 12(5)(b) of the EIR, and the public interest favoured non-disclosure of the information requested.
10. On 26 March 2010 the complainant contacted the Assembly Government and requested an internal review of its decision.
11. The Assembly Government communicated the outcome of its internal review to the complainant on 18 May 2010. The Assembly Government confirmed that, in its opinion, the correct access regime for the request was the EIR as opposed to the Act. As it considered the withheld information to be subject to legal professional privilege, the Assembly Government upheld its decision not to release the information requested by virtue of regulation 12(4)(e). In its letter to the complainant, the Assembly Government stated that, if any future inquiry determined that the correct access regime was the Act rather than the EIR, then it would seek to rely on section 42 of the Act.

The Investigation

Scope of the case

12. On 8 June 2010, the complainant contacted the Commissioner to complain about the way the request for information of 28 January 2010 had been handled. The complainant specifically asked the Commissioner to consider whether the withheld information should be disclosed.
13. On 21 September 2010, the Commissioner wrote to the Assembly Government and the complainant confirming that the scope of his investigation would focus on the information requested on 28 January 2010, namely "copies of any comments or advice provided by Legal Services on the Inspector's decision".

Chronology

14. The Commissioner wrote to the Assembly Government on 28 July 2010 to confirm that the complaint had been deemed eligible for formal consideration and requested copies of the withheld information.
15. The Assembly Government provided copies of the withheld information to the Commissioner on 25 August 2010.
16. The Commissioner wrote to the Assembly Government on 21 September 2010. In that letter the Commissioner confirmed that, having viewed the withheld information, his view was that the information constituted environmental information and the correct access regime was therefore the EIR. The Commissioner asked for confirmation as to the exceptions on which the Assembly Government was relying and representations to support the application of any relevant exceptions, including details of its public interest test considerations.
17. On 22 October 2010, the Assembly Government responded to the Commissioner and agreed that the correct access regime was the EIR. The Assembly Government stated that it considered the information requested to be exempt under regulation 12(5)(b) and/or regulation 12(4)(e) in the alternative. The Assembly Government provided representations in support of its application of the exceptions and details of its public interest test considerations.

Analysis

Substantive Procedural Matters

Correct Access Regime

18. The Assembly Government originally processed the complainant's request for information under both the Act and the EIR and considered the information to be exempt under section 42 of the Act and regulations 12(4)(e) and 12(5)(b) of the EIR. However, the Commissioner considers that the information requested constitutes environmental information and that the correct access regime is, therefore, the EIR.
19. The Commissioner has determined that the requested data would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This provides 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 on—

(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.”

The full text of regulation 2(1) is included in the legal annex to this notice.
20. The Commissioner considers that the phrase “any informationon” should be interpreted widely and that this in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which is implemented into UK Law through the EIR. It will usually include information concerning, about, or relating to measures, activities and factors likely to affect the state of the elements of the environment.
21. The information requested in this case refers to legal advice in relation to a planning appeal. The planning applications to which the appeal relates were for extension of open cast mining activities at an existing opencast site. The planning appeal considered both the effects the development would have on the character and appearance of the site, and the effect on the living conditions of local residents in relation to dust and noise resulting from the development.

22. The Commissioner is satisfied that the withheld information falls within regulation 2(1)(c) because it is information on, or relating to, a measure which is likely to affect the elements and factors referred to in regulations 2(1)(a) and 2(1)(b); in particular land, landscape, air and atmosphere.

Exceptions

Regulation 12(5)(b)

Is the exception engaged?

23. Under regulation 12(5)(b), 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".

24. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers 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".

25. Legal professional privilege ('LPP') 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”¹.

26. 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.
27. 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.
28. The Assembly Government believes that the requested information in this case is subject to legal advice privilege. The Assembly Government has confirmed that the legal advice was specifically sought in relation to a Planning Inspector’s report published following a Public Inquiry into a particular planning appeal. The report sets out the Inspector’s appraisal of the representations made to the Inquiry, and his conclusions and recommendations to the Welsh Ministers.
29. The Commissioner has reviewed the withheld information, and is satisfied that it constitutes communications between a client and its legal advisers for the sole or dominant purpose of obtaining legal advice. Therefore he is satisfied that the withheld information is subject to legal advice privilege.
30. Having satisfied himself that the relevant information was covered by legal advice privilege, the Commissioner went on to consider whether there were any circumstances in which privilege may be considered to have been waived in this case. Even if information is privileged, this can be lost (waived) if the client has shared it with third parties and it has lost its confidentiality. When the Assembly Government was asked about this, it stated that the legal advice has only been disclosed outside of the Assembly Government to external lawyers who have been instructed to act on behalf of the Welsh Ministers in the ongoing litigation involved with this particular planning appeal. In the absence of any evidence to the contrary, the Commissioner accepts that the

¹ EA/2005/0023, para 9

Assembly Government is the party entitled to legal professional privilege and that this privilege has not been waived in this case.

Adverse effect

31. The Commissioner has gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice, with particular reference to legal professional privilege.
32. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for regulation 12(5)(b) to be engaged. It explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception.
33. In reaching a decision on whether disclosure would have an adverse effect 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 effect. 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.
34. The Assembly Government argued that disclosure would have an adverse effect on the course of justice because the principle of LPP would be weakened if information subject to LPP were to be disclosed on a regular basis. It also considered that disclosure of information subject to LPP would inhibit the Assembly Government from seeking legal advice in the future, and its legal advisors from providing open and frank legal advice.
35. The Commissioner is of the view that disclosure of information subject to LPP will have an adverse effect on the course of justice. The Commissioner accepts that disclosure of the legal advice would undermine the important common law principle of LPP. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legal advice would adversely affect the Assembly Government's ability to defend itself in any current or future legal challenge. The Assembly Government should be able to defend its position and any claim made against it without having to reveal its

position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.

36. After considering the arguments presented to him by the Assembly Government, the Commissioner is satisfied that the information is covered by LPP and that disclosure of the withheld information would adversely affect the course of justice. Therefore, he is of the view that regulation 12(5)(b) is engaged.
37. 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

38. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner was mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

39. The complainant provided the Commissioner with a number of reasons regarding the public interest in disclosure. The complainant advised the Commissioner that there has been considerable public debate about the site in question and, as such, the public interest in decisions affecting the site is significant.
40. The complainant accepts that it is the intention of the EIR to protect information that is relevant to legal proceedings that are currently in progress or in prospect. However, the complainant is of the view that this does not reflect the circumstances of this particular case because the legal advice requested does not discuss the merits of any legal proceedings but, rather, concerns the Assembly Government's role as a draftsman of guidance documents and as a decision maker. As planning authorities have to consider the Assembly Government's guidance and advice, the complainant believes that transparency is needed to understand how the Assembly Government intends its guidance to be applied.

41. In the complainant's view, this is not a case where there could be any prejudice to any individual interests as the information being sought is directly related to minerals policy and advice in Wales and, more importantly, how the Assembly Government interprets such guidance. The complainant feels that disclosure of information which reflects how the Assembly Government applied such guidance in this planning appeal is relevant both to this particular case, as well as to the coal mining industry generally in Wales.
42. The Assembly Government acknowledged that there is a public interest in individuals having access to information that would enhance their understanding of the reasons for decisions taken by a public authority. The Assembly Government also accepted that there is an inherent public interest in ensuring public authorities are transparent in the decisions they make. However, the Assembly Government feels that there is a strong public interest in protecting the confidentiality of communications between lawyers and clients because this encourages clients to seek legal advice and allows full and frank exchanges between lawyers and clients.
43. The Information Tribunal has previously found that there is a clear public interest in planning decisions being taken by public authorities in an open and transparent way. The Commissioner therefore considers that a disclosure of the information in this case would be generally in the public interest in a similar way. A disclosure of the legal advice in this case would provide a degree of transparency and reassurance to interested parties that the Assembly Government's actions were in the best interests of the community and may assist the public in understanding the legal basis for this particular decision.
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 the transparency of the process through which such decisions are arrived at. He believes that this is especially the case where the public authority's actions have a direct effect on the environment.
45. The Commissioner considers that another factor in favour of disclosing the information is the number of people who may be affected by the subject matter. In *Pugh v Information Commissioner and Ministry of Defence (EA/2007/0055)*, the Information Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "a significant group of people". The Commissioner notes that there has been strong opposition to the development from local residents living in communities near to the site in question. The Commissioner understands that the local planning

authorities received over 3,000 letters of objection to the original planning application, with only 134 in support of the plans. It is therefore clear that the subject matter of this request does have the potential to affect a fairly significant group of people.

Public interest arguments in favour of maintaining the exception

46. The Commissioner's published guidance on LPP states the following:

"Legal Professional Privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. This in turn ensures the administration of justice".

47. In light of the above, there will always be a strong argument in favour of maintaining the exception because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy case [EA/2005/0023] when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...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..."

48. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

49. In this case, in relation to the public interest in favour of maintaining the exception, the Assembly Government put forward the following arguments:

- It is in the public interest that decisions taken by the Assembly Government are made in a fully informed legal context. As such, it requires high quality, comprehensive legal advice for the effective conduct of its business.
- Legal advice needs to be given in context, with a full appreciation of all the relevant facts.
- Disclosure of legal advice has a significant potential to prejudice the Assembly Government's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and

- indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour.
- Ensuring that public authorities make decisions on the basis of fully informed and thorough legal advice.
 - Disclosure could lead to reluctance in the future to fully record any such legal advice, or legal advice may not be sought. This could lead to decisions being made that could potentially be legally flawed, or at best, the process by which any decision is made not being recorded accurately and fully. In addition to undermining the quality of decision making, this could also lead to legal challenges, which could otherwise have been avoided.
 - Preserving the ability of the Assembly Government to defend its decision in the event of legal challenge. It is in the public interest that the Assembly Government is entitled to a level playing field for any future litigation.
 - The relative age of the legal opinion; the matter is live in that there are currently ongoing court proceedings relating to the planning appeals. Disclosure would expose any potential weaknesses in response of the Welsh Ministers' position and compromise their ability to defend their position at trial. This is not a case where time has reduced the inbuilt weight of the privilege.
 - There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts.
50. In conclusion, the Assembly Government felt there were no sufficiently strong countervailing arguments in favour of disclosure in this case that would outweigh the arguments in favour of maintaining the exception or the adverse effect disclosure would have, in the context of ongoing court proceedings. It stated that the public interest was best served in withholding the requested information.

Balance of the public interest arguments

51. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, he has taken account of the presumption in favour of disclosure as set down by regulation 12(2). Even in cases where an exception applies, the information must still be disclosed unless 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'. The threshold to justify non-disclosure is consequently high
52. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the

public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.

53. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to planning activities, particularly large scale developments affecting a significant amount of people. He accepts that disclosure of the legal advice would help the public to consider more fully the basis on which it dismissed the planning appeals in question.

54. The Commissioner has also taken into account the Information Tribunal's comments in the Bellamy case [EA/2005/0023]:

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."

55. The Commissioner considers that Parliament did not intend the principle of legal privilege to be used as an absolute exception. In the case of Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052) the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. Whilst the Commissioner accepts that the decision in this particular case has the potential to affect a fairly significant number of people, he does not feel that this factor alone is enough to outweigh the factors in favour of maintaining the exception.

56. Whilst the Commissioner considers that the arguments in favour of disclosure have significant weight, in his view, in this case there are stronger public interest arguments in favour of maintaining the exception. The Assembly Government argued that it needs to be able to obtain free and frank legal advice. The Commissioner accepts that if disclosure were ordered, this would undermine the Assembly Government's ability to obtain such advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of disclosure. The Commissioner believes that there must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future the principle of confidentiality might be

undermined and the legal advice less full and frank than it should be. In the case of *Kitchener v Information Commissioner and Derby City Council* (EA/2006/0044) the Information Tribunal stated:

“if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered.”

57. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered the timing of the request and the status of the advice. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition, he considers that the timing of the request means that significant weight should be attributed to the argument that disclosure of the requested information would harm the candour between the Assembly Government and its legal advisors. The advice was obtained relatively recently, in October 2009, and at the time of the request it remained live, in that the planning appeals for which the legal advice was sought is subject to appeal, and the appeal is subject to ongoing legal proceedings.
58. On balance, the Commissioner is satisfied that, in this case, the public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at Regulation 12(5)(b) outweighs the public interest in disclosure of the information.
59. Having established that the requested information is exempt from disclosure by virtue of regulation 12(5)(b), the Commissioner has not gone on to consider the Assembly Government's application of regulation 12(4)(e).

The Decision

60. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, in that it correctly applied regulation 12(5)(b) to withhold the requested information and

the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Steps Required

61. The Commissioner requires no steps to be taken.

Right of Appeal

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

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 11th day of November 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

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);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

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

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 12 - Exceptions to the duty to disclose environmental information

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 these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.