

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

**Decision Notice**

**Date: 26 August 2010**

**Public Authority:** Department for Communities and Local Government  
**Address:** Eland House  
Bressenden Place  
London  
SW1E 5DU

**Summary**

---

The complainant requested submissions, memos and emails which led to the Secretary of State's decision to extend part of the complainant's Unitary Development Plan relating to its affordable housing policy. The public authority disclosed a substantial part of the information held and originally withheld the remainder on the basis of an exemption in section 36 of the Act. The Commissioner decided that the requests should have been addressed under the Environmental Information Regulations (EIR). The public authority subsequently relied on the exception at regulation 12(4)(e). The Commissioner found that the withheld information was correctly withheld on the basis of regulation 12(4)(e) but in all the circumstances of the case the public interest in maintaining the exception did not outweigh the public interest in disclosure. The Commissioner therefore requires all the withheld information to be disclosed to the complainant.

**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.
2. 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.

## **Background**

---

3. Pursuant to the Compulsory Purchase Act 2004 (2004 Act), the policies in the Unitary Development Plans (UDP) of local authorities automatically lost their development plan status three years after the commencement of the 2004 Act. This time frame could however be extended by the Secretary of State if he/she concluded that the circumstances justified such an extension.
4. Policy HO5 relates to the affordable housing policy in the complainant's UDP. On 27 September 2007, notwithstanding the complainant's objections, the Secretary of State issued a direction extending policy HO5 beyond the statutory three year period.
5. In December 2008, the Secretary of State's direction was quashed by a court order following a judicial review instigated by the complainant. Policy HO5 was therefore allowed to expire as was required under the 2004 Act.

## **The Request**

---

6. On 11 October 2007, the complainant requested the following information:
7. "Copies of all the background papers (including departmental memoranda; interdepartmental memoranda; emails; file notes of conversations, discussions and meetings) which led to the Secretary of State for Communities and Local Government to make the Direction dated 27<sup>th</sup> September 2007 pursuant to paragraph 1(3) of Schedule 8 to the Planning and Compulsory Purchase Act 2004 in respect of Policy HO5 of Hammersmith and Fulham's Unitary Development Plan ("the Direction")

Insofar as they are not contained within the above, copies of all communications (including correspondence, memoranda, emails, file notes of conversations, discussions and meetings relating to the said Direction between the Secretary of State for Communities and Local Government and:

1. Any and all civil servants;
2. Mr. Andrew Slaughter M.P. for Ealing, Acton and Shepherds Bush;
3. Mr. Ken Livingstone, Mayor of London
4. Any and all Officers of the Greater London Authority;
5. Councillor Stephen Cowan, Leader of the Labour Group, Hammersmith and Fulham Council
6. Councillor Michael Cartwright, Deputy Leader of the Labour Group, Hammersmith and Fulham Council; and
7. The servants or agents of any above;

and any communication between any of the servants or agents of the Secretary of State for Communities and Local Government, and any of those persons mentioned in (1) – (7) above.”

8. The public authority did not respond until 07 March 2008. It disclosed a substantial part of the information held but withheld the remainder on the basis of the exemption at section 36 of the Act.
9. On 19 March 2008, the complainant requested a review of the original decision to withhold the remainder of the information held on the basis of section 36 of the Act.
10. The public authority wrote to the complainant with details of the outcome of the internal review in a letter which was received by the complainant on 09 December 2008. It made additional disclosures to the complainant but upheld the decision to withhold the remaining information on the basis of the section 36 exemption.

## **The Investigation**

---

### **Scope of the case**

11. On 19 December 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. The complainant specifically asked the Commissioner to review the decision to withhold the remainder of the information held.

13. The complainant also asked the Commissioner investigate the public authority's failure to respond to the requests for information and the internal review in a timely manner.

### **Chronology**

14. Unfortunately, due to a backlog of complaints under the Act at the Commissioner's office it was not until 20 October 2009 that the Commissioner wrote to the public authority in order to commence his investigation. The Commissioner asked the public authority to explain why it had considered the requests under the Act rather than the EIR.
15. The public authority responded on 11 November 2009. It explained that because the request *'was for information on policies about affordable housing as opposed to information on a particular planning application which specifically relates to land...'* it did not consider that they fell within the definition of environmental information in regulation 2(1) of the EIR. The public authority subsequently provided the Commissioner with copies of all the information held (including the withheld information) on 07 December 2009.
16. On 08 December 2009, the Commissioner wrote to the public authority. He advised the public authority that he had concluded the EIR was the appropriate access regime for the withheld information and invited the public authority to either disclose the information or rely on an appropriate exception(s) under the EIR to withhold it.
17. On 04 February 2010, the public authority responded. It accepted the Commissioner's finding in respect of the applicable access regime but sought to withhold the relevant information on the basis of regulation 12(4)(e) of the EIR.

### **Findings of fact**

18. The Commissioner understands that Government Offices represent 12 Whitehall departments including the Department for Communities and Local Government (DCLG). The public authority explained that the Government Office for London (GOL) acts on behalf of the DCLG on a range of land use and planning matters in London.
19. Therefore although the request as well as the complaint was dealt with by GOL, the Commissioner has issued the Notice to the DCLG which is in effect the public authority in this case.

## Analysis

---

### Applicable access Regime

20. 'Environmental Information' is defined at regulation 2(1) of the EIR as 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);
21. In the Commissioner's view, the phrase 'any information..on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. The Commissioner considers a broad interpretation of this phrase will usually include information concerning, about, or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in

environmental decision making is likely to be environmental information.

22. The Commissioner decided that the withheld information is environmental information within the meaning of the EIR because the predominant purpose (i.e. planning in relation to affordable housing) of the request affects some of the elements referred to in regulation 2(a) above. He is therefore satisfied that the withheld information is environmental by virtue of the provision in regulation 2(c) above.

#### Withheld Information

23. The public authority confirmed that it had specifically redacted information from the following documents:
- GOL assessment of LBHF submission to extend saved policies attached to Ministerial submission of 08 January 2007 (undated and marked document 7),
  - GOL submission to Minister – 13 September 2007 (incorrectly dated 13 January 2007 and marked document 8),
  - Internal GOL memo – 18 September 2007 (marked document 9),
  - GOL submission to Minister – 24 September 2007 (marked document 11), and
  - GOL Internal email – 26 September 2007 (marked document 12).

#### **Exceptions**

##### Regulation 12(4)(e)

24. Under regulation 12(4)(e), a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
25. In the Commissioner's opinion, internal communications will include but is not limited to communications within a government department, within any public authority, and between central government departments.
26. The public authority is part of the Government Office Network and acts on behalf of 12 Whitehall departments at a regional level. Government Office Networks help deliver a wide range of national policies at regional level and are in essence, central government in the regions. Therefore, communications between a Government office and any of

the government departments they represent are therefore necessarily internal.

27. The Commissioner therefore finds that the redacted information in the documents marked 7, 8, 9, 11 and 12 constitute internal communications within the meaning of regulation 12(4)(e). The Ministerial submissions were to then Secretary of State for the DCLG, Yvette Cooper MP. Both the email and memo were addressed to a number of GOL's staff. The Commissioner therefore finds that the withheld information was correctly withheld on the basis of the exception at regulation 12(4)(e).
28. The Commissioner next considered whether in all the circumstances of the case the public interest in maintaining the exception in respect of the information in the documents marked 7,8, 9, 11 and 12 outweighed the public interest in disclosure.

### **Public interest arguments in favour of disclosing the requested information**

29. In *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC* (EA/2006/0011 and EA/2006/0013), the Tribunal commented on the general public interest in openness. According to the Tribunal;

'While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.' (Paragraph 87).

30. The public authority specifically recognised the public interest in a transparent and accountable planning decision-making process.

### **Public interest arguments in favour of maintaining the exemption**

31. The public authority however argued that the public interest in ensuring that decision making is based on the best advice available could have been undermined by disclosure in this case. It argued that disclosure could have had a considerable deterrent effect on the frankness of such advice in the future. This would in turn affect the

robustness of any recommendation to the detriment of the quality of decision making.

### **Balance of the public interest arguments**

32. As always, the starting point is the withheld information. There is in addition a clear presumption in favour of disclosure in relation to environmental information.
33. The Commissioner accepts that officials would probably not have expected the withheld information to be disclosed so soon after the Secretary of State had made the decision to extend policy HO5. Additional details can be found in the confidential annex which is available to the public authority but not the complainant.
34. Nevertheless, in light of the controversy surrounding the decision to extend the affordable housing policy, the Commissioner considers that there was a significant public interest in disclosure.
35. The Commissioner however also recognises the significance of the public authority's concerns in relation to the possible loss of frankness and candour by officials when providing similar advice in the future, particularly given the timing of the decision and the request. He is however not persuaded that in this case, disclosure would be likely to be detrimental to the frankness and candour of officials when providing advice in the future. In the words of the Information Tribunal in *Department for Education and Skills v The Evening Standard (EA/2006/0006)*, to suggest that disclosure at the time of the request could possibly compromise the rigour of their considerations in future cases goes against the 'courage and independence that has been the hallmark of our civil services....' (Paragraph 75). The Commissioner therefore disagrees that officials could, as a result of disclosure in this case, be less frank in their future recommendations to the Secretary of State. Additional details can also be found in the confidential annex.
36. In addition, the Commissioner would argue that there was a strong public interest in understanding the full rationale for the Secretary of State's decision. Although the public authority made substantial disclosures to the complainant pursuant to the request, the Commissioner considers that in view of the Secretary of State's decision, there was a significant public interest in disclosing the specific information redacted from documents 7, 8, 9, 11 and 12. Additional details can be found in the confidential annex.
37. The Commissioner therefore finds that in all the circumstances of the case, the public interest in disclosure outweighed the public interest in maintaining the exemption at regulation 12(4)(e).



## **Procedural Requirements**

38. Subject to a number of provisions, a public authority is required under regulation 5(1) to make available environmental information that it holds on request.
39. The Commissioner therefore finds the public authority in breach of regulation 5(1) for failing to make the withheld information available on request.
40. A public authority is also required under regulation 5(2) to make information available on request as soon as possible and no later than 20 working days.
41. The Commissioner finds the public authority in breach of regulation 5(2) for disclosing the information it provided to the complainant on 07 March 2008 and 09 December 2008 outside of the stipulated 20 working days.
42. The Commissioner additionally finds the public authority in breach of regulation 5(2) for failing to disclose the information he has found was incorrectly withheld on the basis of regulation 12(4)(e) within 20 working days.
43. Under regulation 14(2), a public authority is also required to issue a refusal notice within 20 working days following a request.
44. The Commissioner finds the public authority in breach of regulation 14(2) for failing to issue a refusal notice within 20 working days.
45. By virtue of the provisions of regulation 11, a public authority is required to conduct an internal review within 40 working days.
46. The Commissioner finds the public authority in breach of regulation 11(4) for taking over 180 days to inform the complainant of the outcome of the review requested on 19 March 2008.

## **The Decision**

---

47. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR.

48. The redacted information in documents 7, 8, 9, 11 and 12 did engage regulation 12(4)(e) but the public interest in disclosure outweighed the public interest in maintaining the exception.
49. The Commissioner finds the public authority in breach of regulation 5(1) for failing to make the withheld information available on request.
50. The Commissioner finds the public authority in breach of regulation 5(2) for failing to disclose the information provided to the complainant on 07 March 2008 and 09 December 2008 within 20 working days.
51. The Commissioner additionally finds the public authority in breach of regulation 5(2) for failing to make the redacted information in documents 7, 8, 9, 11 and 12 available to the complainant within 20 working days.
52. The Commissioner finds the public authority in breach of regulation 14(2) for failing to issue a refusal notice within 20 working days.
53. The Commissioner also finds the public authority in breach of regulation 11(4) for failing to inform the complainant of the outcome of its internal review within 40 working days.

### **Steps Required**

---

54. The Commissioner requires the public authority to take the step outlined below to ensure compliance with the EIR:  
  
Disclose all of the redacted information in documents 7, 8, 9, 11 and 12
55. The public authority must take the step required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

---

56. 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

---

57. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 26<sup>th</sup> day of August 2010**

**Signed .....**

**Gerrard Tracey  
Principal Policy Adviser**

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

## **Legal Annex**

### **Regulation 5 - Duty to make available environmental information on request**

**Regulation 5(1)** 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.

**Regulation 5(2)** Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 5(3)** To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

**Regulation 5(4)** For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

**Regulation 5(5)** Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

**Regulation 5(6)** Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

### **Regulation 11 - Representation and reconsideration**

**Regulation 11(1)** Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

**Regulation 11(2)** Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date

on which the applicant believes that the public authority has failed to comply with the requirement.

**Regulation 11(3)** The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

**Regulation 11(4)** A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

**Regulation 11(5)** Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

## **Regulation 12 - Exceptions to the duty to disclose environmental information**

**Regulation 12(1)** Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

**Regulation 12(2)** A public authority shall apply a presumption in favour of disclosure.

**Regulation 12(3)** To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

**Regulation 12(4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

**Regulation 12(5)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from 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.

**Regulation 12 (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).

**Regulation 12(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.

**Regulation 12(8)** For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

**Regulation 12(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).

**Regulation 12(10)** For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

**Regulation 12(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.

### **Regulation 14 - Refusal to disclose information**

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

**Regulation 14(2)** The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 14(3)** The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

**Regulation 14(4)** If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

**Regulation 14(5)** The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.