

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)  
Decision Notice**

**Date:** 16 January 2012

**Public Authority:** Department for Communities and Local Government

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

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of a review ordered by Ministers in the Department for Communities and Local Government (DCLG) into the management of the revocation of the Regional Spatial Strategies (RSS), and any correspondence, documents and/or meeting notes related to the preparation and consideration of the review.
2. The DCLG applied exceptions to withhold the information on the basis that the information was internal communications, and that it contained information which is subject to legal professional privilege which would adversely affect the course of justice if it was disclosed.
3. The Commissioner's decision is that the DCLG has complied with its obligations under the Environmental Information Regulations 2004.
4. The Commissioner does not require the DCLG to take any steps.

**Request and response**

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5. On 10 December 2010 the complainant wrote to the DCLG and requested information in the following terms:

*"We attach an article from Inside Housing Magazine (online edition) dated 26 November 2010. That article refers to a review ("the review") ordered by ministers into "the management of the revocation of the RSS [sic]" and quotes from the Review itself.*

*We hereby request a copy of:*

- i. The review; and*
- ii. Any correspondence, documents and/or meeting notes related to the preparation and consideration of the Review."*

6. The DCLG responded on 9 February 2011. It stated that the information was exempt under the exceptions for internal communications and as a disclosure would prejudice the course of justice.
7. Following an internal review the DCLG wrote to the complainant on 22 March 2011. It stated that the information was exempt for the same reasons.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He agreed that the information was subject to both the exceptions claimed by the DCLG, however he argued that the public interest in disclosing the information clearly outweighed the public interest in the exceptions being maintained and so the information should have been disclosed.
9. The Commissioner considers that the complaint relates to the fact that the complainant has not received a copy of the information which he requested.

### **Reasons for decision**

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10. The information is environmental information, so the complaint is to be determined under the provisions of the Environmental Information Regulations 2004. Regulation 12(4)(e) provides an exception for information which is an internal communication. The Commissioner notes that all of the information is held in correspondence between members of DCLG and/or members of DCLG and other government departments. For the purposes of the exception correspondence between government departments is considered to be an internal communication.
11. The Commissioner identified many of the staff involved in email chains and copied into the relevant information as working for either the DCLG or other government departments. Where he could not establish that link himself he asked the DCLG to confirm who those individuals were. The DCLG provided this information to the Commissioner. The

Commissioner is therefore satisfied that all of the individuals who are involved with the correspondence were either officers within the DCLG or other government departments.

12. The Commissioner is therefore satisfied that all of the information in question is internal communications. He therefore recognises that the exception is engaged.
13. Regulation 12(4)(e) is subject to a public interest test. The test is whether the public interest in maintaining the exception outweighs the public interest in the information being disclosed. The Regulations require that the test is considered with a specific presumption towards disclosure.

#### The public interest in maintaining the exception

14. The central public interest in maintaining the exception revolves around preservation of internal confidentiality and the protection of internal decision making processes. These are required for the effective performance of some of the public authority's responsibilities.
15. The DCLG argues that there is a strong public interest in ensuring that officials and Ministers have the necessary degree of privacy:
  - to provide and consider advice on policy matters; and
  - so that Departments are able to undertake internal reviews about how policy is developed, so as to improve their internal administrative processes.
16. In this case the public interest issues which are raised concern the need for the authority to have thinking space to debate policy issues freely and frankly without fear that that information may be disclosed prematurely. This 'safe space' argument is based on the premise that it is in the public interest for Ministers and senior civil servants to be able to have a full and open debate away from external scrutiny to enable them to reach an agreed position.
17. The information in this case includes discussions of high level policy by senior members of the coalition government as it considered how to meet a manifesto commitment to revoke the RSS. The withheld information records discussion at the highest levels in government and includes in depth discussion and analysis. Much of the information includes legal advice, opinion and discussion about that legal advice.
18. The Commissioner recognises the public interest in the protection of safe space which is needed to seek, weigh and consider advice (including legal advice) when deciding on a policy direction. This is needed in order to support properly considered internal decision making.

19. The Commissioner also notes that the information records internal discussion between departments within government at a senior level. His view is that disclosure could potentially weaken collective Cabinet responsibility. Individual policy decisions are presented by government as united decisions, however much the internal discussions within government may have involved and addressed different views of individual ministers. A disclosure of those views, including any doubts or concerns expressed by ministers, potentially weakens this doctrine and weakens government policy making as a whole. This is particularly the case where the government is a coalition of parties and so many different viewpoints may be expressed and considered before a final policy decision is reached. It is only within a 'safe space' that such matters can be considered with impunity.
20. Regional Strategies are now expected to be fully revoked under the Localism Act, which received Royal Assent on 15 November 2011. For the purposes of this decision however the Commissioner must consider the circumstances of the case at the time that the request was received by the DCLG. At that time the Localism Bill was before Parliament and its provisions remained the subject of debate. A prior disclosure of the policy discussion could potentially weaken collective responsibility. The policy debate was and is still very much a live issue and a disclosure of this information would have been detrimental to the safe space needed for discussions, particularly at a time when those discussions were still relevant and sensitive.
21. There is clearly a public interest in public authorities ensuring the quality of their decision making and being able to demonstrate that their decisions are legally sound. Frank legal advice may discuss both strong and weak points of an argument. A disclosure of weak areas may be detrimental to the final position of the authority if they are disclosed. Therefore a fear of disclosure may lead to advice being less full and frank in the future. This would lead to a detrimental effect on decision making within government.
22. In this particular instance the disclosure of information which is subject to legal professional privilege could be particularly detrimental as the Localism Bill has yet to be passed into law at that time and the policy had yet to be effected.
23. The Commissioner has further considered the fact that the information was collated as part of a review of the circumstances which led to the revocation being overturned by the courts. A disclosure of this information would weaken the confidence of government departments that they can openly discuss, and review their procedures for making policy and administrative decisions without fear that that information will subsequently be disclosed. This again could potentially lead to individuals being less frank in these important discussions and when

seeking or providing advice in the future. This would be contrary to the public interest.

24. The Commissioner recognises, however, that in this case the withheld information does not reproduce individual submissions which were taken as part of the review. Rather, the review mostly collated and took account of correspondence and records of the discussions which had taken place.
25. The Commissioner recognises that the discussions took place very soon after the coalition government took office and so the policy issues under discussion were then at an early stage of development as coalition government policy.
26. Whilst the Commissioner does not accept this as a conclusive public interest factor for maintaining the internal communications exception, he recognises the value of reviews such as the one in this case being carried out with an expectation of some degree of privacy. This is necessary in order to maximise the effectiveness of the review. At the time, it would have been of utmost importance to recognise any misunderstandings which were created as a result of any change in approach by the new ministerial team. At the time there would have been a strong impetus for reviews to be carried out quickly and effectively in order that issues could be identified and addressed as soon as possible.

#### The public interest in disclosing the information

27. The central public interest in the disclosure of the information rests in creating transparency about a government decision which affects the entire country. It would shed a greater light on how the decision to revoke Regional Strategies, subsequently overturned by the courts, was reached.
28. In response to the initial refusal the complainant wrote to the DCLG and argued that:

*“the revocation and the subsequent finding that it was unlawful have been the subject of extensive coverage in the national and trade press as well as being the subject of a Parliamentary Select Committee inquiry... This alone is highly illustrative of the keen public interest in the release of the relevant information, notwithstanding the numerous other factors justifying full and frank disclosure.”*
29. The complainant also argued that there was no longer a policy decision relating to the revocation left to make in this case. He considered that, irrespective of the future fate of Regional Strategies, the policy decisions

leading to the revocation had already occurred and that the revocation had since been quashed by the High Court.

30. The complainant also argued that there is a public interest in greater transparency given the use of taxpayers' money to defend the decision to revoke in the High Court.
31. The complainant directed the Commissioner to the findings of the Select Committee which looked into the revocation. It found that the attempted revocation of the RSS left planning authorities and house building companies in an uncertain situation as to what their responsibilities were in the interim period before the Localism Act was passed into law. It found that this led to many planning authorities putting on hold planning decisions until the implementation of the Localism Act, and that *"There is in fact a hiatus in planning, which can only have a detrimental effect on the economic recovery"*.
32. Backing this argument, the complainant has provided evidence from the High Court case in the form of witness statements which indicates that the attempted revocation created confusion amongst authorities. He argues that given the damage and the confusion which the decision created there is a strong public interest in the public being able to access the review and the surrounding information in order to allow scrutiny of any faults in the process of introducing the new policy, including how and when they may have occurred.
33. The Commissioner recognises that there is a public interest in disclosure from the point of view of creating greater transparency on the workings of government in the implementation of a major policy decision. In addition to the important issue of housing supply, house building provides an important boost to the economy. There is a strong public interest in allowing the public to access any information which might explain how a situation which may have consequences in terms of economic recovery came about.
34. The Commissioner notes that the government's policy intention is to provide greater decision making powers at a local level rather than having decisions led by a central body. The Commissioner notes that such a change will affect ongoing debates on housing provision, and also those on other issues such as mineral rights and traveller sites. Its impact would be felt across the country. There is therefore a strong public interest in decisions of this sort being taken openly and transparently, and any concerns or weaknesses in the intended policy aired in order that the public can understand what the full implications of the policy might be.

The balance of the public interests

35. The Commissioner has considered the balance of all the public interest factors in this case. He considers that, while, the Localism Bill has yet to be implemented, the policies under discussion within the withheld information are still relevant and 'live'. The matters discussed are relevant to the enactment and implementation of the Localism Bill as this Bill effectively addresses many of the same issues.
36. A disclosure of the early thinking by ministers and civil servants on the process would therefore be likely to affect the ongoing progress of the Bill whilst the discussion of the issues is still relevant for the reasons given above.
37. As stated, the Commissioner also notes that there is legal advice intertwined throughout the withheld information, and much of it would therefore be subject to legal professional privilege, both advice and litigation privilege.<sup>1</sup>
38. The Commissioner is satisfied that while the policy considerations are still live the need to protect the safe space for ministers and civil servants to debate and discuss issues away from public and media interference is a strong argument in favour of maintaining the exception. Although the legality of the original revocation decision was resolved through the decisions of the High Court, the policy issues remained live at the time of the request. In all the circumstances the Commissioner considers that the nature of the withheld information is such that the greater public interest lies in maintaining the internal communications exception. He has therefore decided that in this instance the public interest in maintaining the exception outweighs that in disclosure.

Regulation 12(5)(b)

39. In light of the Commissioner's decision as regards the application of Regulation 12(4)(e) he has not considered the application of this exception further.

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<sup>1</sup> CALA Homes (South) Ltd brought a number of legal challenges before the courts, including a judicial review of the DCLG's actions when seeking to revoke the RSS and legal advice is held within the withheld information which is relevant to these cases.

## Right of appeal

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40. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

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