

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

**Date:** 4 January 2012

**Public Authority:** Department for Culture Media and Sport  
**Address:** 2-4 Cockspur Street  
London  
SW1Y 5DH

**Decision (including any steps ordered)**

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1. The complainant requested information in connection with the decision by the Secretary of State not to list Slough Town Hall as a building of special architectural or historic interest in accordance with the Planning (Listed Buildings and Conservation Areas) Act 1990.<sup>1</sup>
2. The Commissioner's decision is that:
  - The exception at regulation 12(4)(e) was engaged in respect of the disputed information. However, in all the circumstances of the case, the public interest in maintaining the exception did not outweigh the public interest in disclosure in respect of most of the disputed information. The information he decided was correctly exempt from disclosure can be found at paragraphs 147, 148, 149 (of the disputed information) and in the confidential annex to this notice to be disclosed to the public authority only.
  - The public authority correctly withheld the names and contact details of junior officials and members of the public on the basis of the exception at regulation 13.
  - The public authority breached regulation 11 for failing to conduct an internal review.

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<sup>1</sup> Planning Act 1990

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose all of the information he has found was not exempt because the public interest in disclosure outweighed the public interest in maintaining the exception at regulation 12(4)(e).
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply 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.

### Request and response

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5. On 6 July 2011 the complainant wrote to the public authority and requested information in the following terms:

*'Please provide:*

*1. The attached documents without redaction<sup>2</sup>...*

*2. The advice given by the civil service to John Penrose MP and Jeremy Hunt MP concerning Slough Town Hall together with any appendices.*

*3. All correspondence between DCMS [Department for Culture Media and Sport] and Slough Borough Council and Fiona Mactaggart MP since 1<sup>st</sup> May 2010.'*

6. The public authority responded on 2 August 2011. It disclosed some of the information requested and explained that it did not hold any information within the scope of item 3 of the request above.
7. The public authority also explained that it was withholding the remainder of the information within the scope of items 1 and 2 above on the basis of the exceptions at regulations 12(4)(e) and 13 of the Environmental Information Regulations 2004 (the EIR).
8. The public authority also advised the complainant that it did not consider an internal review necessary given the length of time since the first

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<sup>2</sup> The redacted documents had previously been disclosed by the public authority following an earlier request on the same subject matter by the complainant in February 2010.

request in February 2010 and the likelihood that a review would not lead to a different conclusion.

## Scope of the case

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9. On 10 August 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. He specifically asked the Commissioner to rule on the public authority's decision not to provide the following information:
  - Annex A Cover Note (1 December 2009): Paragraphs 2, 15, 16 and 17
  - Annex A Submission (1 December 2009): Paragraphs 3, 93, 98, 103, 106, 108, 118, 129, 132, 142, 143, 144, 146, 145, 147, 148 and 149
  - Information redacted from the advice to John Penrose MP, Minister for Tourism and Heritage.
11. However, the public authority made additional disclosures during the course of the Commissioner's investigation. Specifically, the information of the Annex A submission at paragraphs 93, 97, 98, 103, 104, 106, 107, 108, 118 and 129 was provided to the complainant by the public authority on 27 October 2011.
12. The Commissioner's investigation was therefore restricted to determining whether the information described below was exempt from disclosure on the basis of the exception at regulation 12(4)(e) and, where relevant, regulation 13:
  - i. Annex A Cover Note (1 December 2009): Paragraphs 2, 15, 16 and 17
  - ii. Annex A Submission (1 December 2009): Paragraphs 3, 142, 143, 144, 145, 146, 147, 148 and 149
  - iii. Information redacted from the advice to John Penrose MP, Minister for Tourism and Heritage.<sup>3</sup>

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<sup>3</sup> The relevant information is described in detail in the confidential annex to be disclosed to the public authority only.

## Reasons for decision

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### Regulation 12(4)(e)

13. As mentioned, the public authority withheld the requested information within the scope of the investigation (the disputed information) on the basis of the exception at regulation 12(4)(e).
14. By virtue of regulation 12(4)(e), a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
15. The disputed information consists of advice from officials to Ministers regarding the application made to the public authority for Slough Town Hall to be listed in accordance with the Planning Act 1990. The disputed information described above as 'Annex Cover Notes' and 'Annex Submissions' consists of the advice provided to Margaret Hodge MP, former Minister of State for Culture and Tourism.
16. The same advice was subsequently provided to John Penrose MP in his capacity as Minister for Tourism and Heritage. There were a number of internal email exchanges between officials regarding the advice and the application and it is the information redacted from these exchanges which constitute item iii above of the disputed information.
17. In view of the above, the Commissioner finds that the disputed information constitutes internal communications and is therefore exempt from disclosure on the basis of regulation 12(4)(e).

### Public Interest Test

18. Regulation 12(4)(e) is subject to a public interest test. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the disputed information.
19. In favour of disclosing the disputed information, the public authority acknowledged the public interest in being able to assess the quality of advice given to Ministers.
20. It also recognised the general public interest for reasons of transparency and accountability to the public.
21. It further recognised the public interest in understanding the listing process and how listing decisions are made.

22. The public authority specifically recognised the public interest in understanding the arguments for and against the case the listing of Slough Town Hall.
23. It accepted there was a public interest in demonstrating that there was no inappropriate agreement between Margaret Hodge MP and officials of Slough Borough Council (the Council).
24. Against disclosure, the public authority argued that there would be a chilling effect on the frankness of the advice provided by officials in relation to listing decisions if they knew that the advice provided would be routinely disclosed. It argued that even though the detail of the advice will differ from case to the case, the frankness in each case should stay constant.
25. The public authority argued that although a review of the original decision was complete, the matter was still sensitive and officials would be less likely to be as open in the future if the disputed information was made public. A decrease in the quality of briefing to Ministers would not be in the public interest.
26. The public authority pointed out that paragraphs 147-149 (inclusive) of the disputed information above constitutes internal legal advice and submitted that there is generally a significant public interest in withholding details of legal advice. It submitted that the public interest in disclosure was not sufficient to merit the disclosure of the internal legal advice in this case.

#### Balance of the Public Interest

27. The Commissioner agrees with all of the public interest arguments advanced by the public authority in favour of disclosure.
28. The Commissioner disagrees with the public authority that disclosing the disputed information would have a chilling effect on the frankness and candour of officials when providing advice to Ministers regarding future listing applications. He also disagrees that the quality of future briefings to Ministers would decrease as a result. The Commissioner understands that the substance of the advice provided to Margaret Hodge MP was previously disclosed to the complainant in February 2010 and as mentioned, additional information was provided in response to his request of July 2011. The disputed information specifically relates to the recommendation by officials to Margaret Hodge MP on whether or not to list Slough Town Hall.
29. The Commissioner considers the fact that the substance of the advice has already been disclosed significant in terms of the likelihood of a chilling effect from the disclosure of the disputed information. Given the previous disclosures, the Commissioner is not persuaded that

officials would be less likely to make informed and considered recommendations in future to Ministers in relation to listing applications. On the other hand, he considers the knowledge that the substance of their advice could be subject to public scrutiny would specifically contribute to ensuring that officials make recommendations that can be defended. This is more likely to also enhance the degree of rigour in the overall process of providing advice or briefings to Ministers regarding listing applications.

30. The Commissioner understands the outcome of the review by the Minister of Tourism and Heritage of the previous decision (by Margaret Hodge MP) was published on 29 June 2011. Although this was only a few days before the request (July 2011), the Commissioner considers the previous disclosures significant enough to further weaken the argument that disclosing the disputed information so soon after the outcome of the review would result in a chilling effect.
31. The Commissioner has given little weight to the argument that disclosure would lead to a decrease in the quality of future briefings to Ministers. He does not consider that argument is inherent in the exception at regulation 12(4)(e). In his opinion, the chilling effect argument in relation to regulation 12(4)(e) should be relevant to related issues (in this case, listing applications) and not future unrelated issues. In any event, the Commissioner finds that in view of the circumstances described above, disclosing the disputed information would be unlikely to decrease the quality of future briefings to Ministers in future. Therefore, in the absence of any specific evidence relevant to this case, he is not persuaded by the argument that there would be a chilling effect on the quality of future Ministerial briefings.
32. The Commissioner considers there is a significant public interest in disclosing the disputed information in order for interested parties to be able to participate in a fully informed debate about the decision not to list Slough Town Hall. Information relating to the recommendation by officials would enhance the quality of the debates. It would also significantly enhance the transparency and accountability of the Minister and officials in the decision making process.
33. The Commissioner however agrees with the public authority that there is significant public interest in not disclosing internal legal advice relating to the decision. In addition to the information specified by the public authority at paragraphs 147, 148 and 149, the Commissioner has identified information in the confidential annex which he also finds constitutes internal legal advice.
34. The Commissioner finds disclosure could result in the loss of trust in the principle of legal professional privilege on internal discussions within the public authority. It is conceivable that officials may be

deterred from seeking legal advice in relation to listing applications for fear that it could be disclosed and consequently place the public authority in a disadvantageous position at a judicial review of its decision or any resulting legal action. This could have a detrimental impact on the quality of advice provided to Ministers and the overall decision making process.

35. The Commissioner considers there to be a strong public interest in the protection of a safe place needed to seek, weigh and consider legal advice without external interference. He accepts that disclosing the legal advice could result in the loss of trust in the principle of legal professional privilege on internal discussions within the public authority. There is a significant public interest in ensuring that officials are not deterred from seeking legal advice when providing advice to Ministers and also that there is no loss of trust in the principle of legal professional privilege on internal discussions.
36. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exception at regulation 12(4)(e) did not outweigh the public interest in the disclosure of the disputed information, apart from the information at paragraphs 147, 148, 149 of the Annex A submission and the information described in the confidential annex.

### **Regulation 13**

37. As mentioned, the public authority also withheld part of the disputed information on the basis of the exception at regulation 13. It specifically withheld the names and contact details of junior officials and members of the public from disclosure.
38. Information is exempt from disclosure on the basis of regulation 13(1) if it is personal data of which the applicant is not the data subject (i.e. third party personal data) and either the first or second condition at regulation 13(2) is satisfied.

#### Do the names and contact details withheld constitute personal data?

39. Personal data is defined in section 1(1) of the DPA as:

*'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'*



40. The names and contact details of the junior officials and members of the public clearly constitute personal data within the meaning of the DPA.

Would the disclosure of the names and contact details contravene any of the Data Protection Principles?

41. As mentioned, for regulation 13(1) to apply, either the first or second condition in regulation 13(2) must be satisfied. The first condition in regulation 13(2) states that the disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
42. The first data protection principle states:
- 'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-*
- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*
43. The Commissioner first considered whether the disclosure of the names and contact details of the junior officials and members of the public would have been fair to the individuals concerned.
44. The public authority submitted that there was no particular need to know the names and contact details of the junior officials and members of the public. The individuals concerned will reasonably expect that their names would not be disclosed in response to a request under the Act.
45. The Commissioner agrees with the public authority and finds that the junior officials' expectation regarding the disclosure of their names and contact details in the context of the disputed information is reasonable. They are not responsible or accountable for the submissions to the Minister and it would be unfair to disclose their names in a way that would suggest otherwise.
46. The Commissioner also agrees with the public authority that members of the public who contacted the public regarding the listing application have a reasonable expectation that their names and contact details will not be made publicly available in that context.
47. The Commissioner finds that the disclosing the names and contact details of the junior officials and members of the public would have been unfair and therefore in contravention of the first data protection principle. He consequently also finds that the public authority was



correct to withhold the relevant names and contact details on the basis of the exception at regulation 13.

### **Regulation 11**

48. Unlike the Freedom of Information Act 2000, the EIR contain a legal obligation on a public authority to provide an internal review in relation to a request for environmental information.
49. The Commissioner therefore finds the public authority in breach of regulation 11 for advising the complainant that it was not going to conduct an internal review in relation to his request.

## Right of appeal

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50. 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)

51. 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.
52. 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** .....

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
**SK9 5AF**