

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

Decision Notice

Date: 4 September 2006

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

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

Summary Decision

1. The complainant made a request for a copy of the Planning Inspector's report of a public inquiry held into proposed motorway service areas on the A1M in North Yorkshire. The Planning Inspectorate, which is part of the Department for Communities and Local Government (DCLG), withheld the report until the planning decision had been made, on the basis that it was an internal communication under regulation 12(4)(e) of the Environmental Information Regulations. The Commissioner decided that DCLG had applied regulation 12(4)(e) correctly and that the public interest was best served by maintaining the exception from the requirement to release information in regulation 5(1) of those regulations.

The Commissioner's Role

2. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 2 and 3 of the Environmental Information Regulations 2004. This Notice sets out his decision.
3. 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 Act are imported into the EIR. The Commissioner has received an application for a decision as to whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of regulation 5(1) of the EIR.
4. Section 50 of the Act provides that, where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

5. The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

The Request

6. On 3 January 2005 the complainant e-mailed the Planning Inspectorate (TPI), which is now an executive agency of DCLG (formerly of the Office of the Deputy Prime Minister(ODPM)), asking for the report of a public inquiry held by the Planning Inspector into proposed motorway service areas on the A1M in North Yorkshire. The complainant said that the public inquiry was held from 8 October 2002 to 10 June 2003, and that he understood that the Inspector's report was complete and held by TPI. He asked TPI to confirm whether or not it held the requested information and was prepared to grant access to it under the provisions of the Act.
7. On 28 January 2005 TPI e-mailed a letter to the complainant, refusing to provide him with a copy of the report. It said that the report would form the basis of the decision by the First Secretary of State as to whether or not to grant planning permission for the applications, and that his decision would be set out in a letter which would be made publicly available; parties to the inquiry would be sent copies of the report at the time that the decision was taken. TPI said that copies of the report would also be available on request after the decision letter was published but that, until that time, the report formed part of internal advice to Ministers. It said that the report was (at the time of its response) with the First Secretary of State for his consideration and formed an internal communication. It further said that it had considered whether the report should be released at that time in the public interest. It said that the public interest was served by the ability publicly to debate and question planning decisions; that this mechanism existed during the process of considering a planning application, and included the public inquiry. It commented that the debate might continue after the decision had been taken; as such, the report was an internal communication forming part of the decision-making process, following the public debate. TPI considered that it was not required to comply with the complainant's request, citing regulation 12(4)(e) of the EIR, which provided an exception from the regulations in respect of internal communications. It advised the complainant of its internal procedure for reviewing a decision refusing an information request.
8. By return on 28 January 2005, the complainant asked TPI to review its decision. He referred them to regulation 12(2) of the EIR, which requires a public authority to apply a presumption in favour of disclosure of information. As to the public interest, he referred TPI to the requirement in regulation 12(1)(b) to show that, in all the

circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. He contended that TPI had not explained why it believed that it was not in the public interest to disclose the information, or why the need for secrecy outweighed the public interest in disclosure, and that the regulations required TPI to do that. He said that the public interest was served when the public had the ability to hold Ministers to account for their decisions. He argued that it was clearly in the public interest that the public should have access to information, so that they could influence the decisions of their elected representatives. He contended that, in the case of planning decisions taken by the First Secretary of State, the public interest was not served by withholding information until after a decision had been taken. He said that he did not agree that a report prepared in the public interest and intended for publication could be classified as an internal communication; there was a huge difference between a Planning Inspector's final report and, say, an internal memo or e-mail.

9. Following a number of reminders from the complainant, on 8 April 2005 TPI replied to his review request, maintaining its refusal to provide him with a copy of the Inspector's report. TPI explained that it had been required to take into consideration refusals to release such reports in two similar requests made to its parent Department (ODPM) and that its decision had been reached in consultation with the Department for Constitutional Affairs. As to the complainant's contention that the Inspector's report was not an internal communication, TPI said that it considered that it was, and that the exception in regulation 12(4)(e) applied. TPI said that the First Secretary of State had a statutory duty to determine cases called in by him. In order to do so an Inspector, who was an employee of the First Secretary of State, held an inquiry on his behalf and provided a report, on the basis of which the First Secretary of State or one of his Ministers reached a decision. TPI contended that, until that decision was reached, the report represented an internal communication between persons employed by the First Secretary of State or under his control.
10. As to the question of whether or not it was in the public interest to release the report prior to the First Secretary of State's decision TPI argued that, were additional representations to be made following the early release of the report, other parties would also need to be given the opportunity to make further comments on the basis of the Inspector's conclusions and recommendations; this would, in effect, re-open the inquiry. TPI considered that further rounds of representations, and the (then) continuing uncertainty as to whether the development should go ahead, would not be in the public interest; the public interest was best served by a fast and efficient planning system which was fair but also certain. TPI said that, when the First Secretary of State's decision was made public, it would be accompanied by the publication of the report, which would provide further opportunity for informed debate. If, as a result of that debate, any party wished to seek a review of the decision, it was open to them to do so to the High Court. TPI said that, for all of those reasons, at that stage the public interest in withholding the information contained in the Inspector's report outweighed the presumption in favour of disclosure (although it accepted the complainant's comments that it should have given full reasons for its conclusions earlier). It advised the complainant to contact the Commissioner should he remain dissatisfied.

11. On 11 April 2005 the complainant wrote again to TPI, agreeing that the public interest was best served by a fast, efficient planning system which was fair but also certain. He said, however, that; in this instance, the process had taken more than eight years; there had been two public inquiries, one High Court Case and one at the Court of Appeal; there had been no opportunity for the public to use democratic means to influence the decision-maker during his deliberations; and that he did not know when a decision would be taken or whether the First Secretary of State would ignore the Planning Inspector's recommendations. Also on 11 April, the complainant asked the Commissioner to investigate TPI's handling of his request for information.

Relevant Statutory Obligations under the EIR

12. **Regulation 5(1)** provides :-

“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.”

13. **Regulation 12(1)** provides -

“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.”

Paragraph (2) provides :

“A public authority shall apply a presumption in favour of disclosure”

Paragraph (4) contains the following at sub-paragraph (e):

“...for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that ... the request involves the disclosure of internal communications.”

The Investigation

Scope of the case

14. The request for information arose from applications for planning permission to build motorway service areas on the A1(M) in North Yorkshire. A Public Inquiry concerning the proposed development was held between 2002 and 2003 and a Planning Inspector prepared a report of the inquiry for the First Secretary of State.

At the time of the complaint to the Commissioner the First Secretary of State had not reached a decision on the applications. He has since done so, and TPI has now provided the complainant with a full copy of the report.

15. The complainant has specifically asked the Commissioner to review TPI's position, which is that Planning Inspectors' reports of Public Inquiries are internal communications and that the need for secrecy outweighs the public interest in disclosing the information. These are the questions at issue in this complaint.

Chronology/Case history

16. After an initial acknowledgement, the Commissioner asked the complainant to provide a copy of the correspondence relevant to his request. As part of his response, the complainant said that he had now received (a summary of) the Inspector's report and the decision letter. That being so, and in the light of the Inspector's recommendation that the planning application in relation to the complainant's local area should be dismissed, the Commissioner asked the complainant whether he still wished to proceed with his complaint. The complainant confirmed that he wished the Commissioner to continue with the investigation. He said that, although information had been released to him, the fundamental problem of secrecy in the planning process remained. He contended that it was wrong that the public had no right to see Inspectors' reports of public inquiries once they were complete, but must wait for a year or more while the Secretary of State completed his/her deliberations in secret and issued a decision letter. He argued that it was a matter of considerable public interest that reports of public inquiries should be released immediately they were completed, so that the public had the opportunity to hold their elected representatives to account as decisions were taken based on the contents of an Inspector's report.
17. In the light of the complainant's comments the Commissioner wrote to TPI, seeking a copy of the report and asking whether it was now prepared to release the full report to the complainant, or to give its reasons for considering that the public interest in maintaining the exception continued to outweigh the public interest in disclosure. In response TPI provided a copy of the report and agreed that, since the First Secretary of State had reached a decision and the report was in the public domain, it would send a copy to the complainant (which it has since done). However, TPI continued to maintain that it was correct, at the time the complainant made his information request, to withhold the report under the exception in regulation 12(4)(e), for the reasons it had already given in its original decision and on review. TPI also cited a recent decision of the Commissioner (Ref: FER0070181) in a comparable case in which the Commissioner had upheld the withholding of an Inspector's report prior to the planning decision being made by the First Secretary of State. TPI said that at some point the planning process had to close down so that the First Secretary of State could proceed to a final decision.

Findings of the case

18. Having considered the arguments made by the complainant and TPI, and the conclusions reached in case reference FER0070181, which involved the same

considerations, the Commissioner finds that the Planning Inspector's report had the status of an internal communication until such time as the First Secretary of State reached his decision on the planning application.

Analysis

19. The Commissioner has considered the complainant's representations and the public authority's response to the complainant's request for information. The complainant is clearly of the view that, as a report prepared in the public interest for future publication, the Planning Inspector's report was not an internal communication. In this case the report was prepared by the Inspector following the planning inquiry. As stated above, TPI is an executive agency of DCLG (and was, at the relevant time, of ODPM) and Planning Inspectors are appointed by their First Secretary of State. The Inspector makes a Report and recommendation to the First Secretary of State, based on the evidence and submissions considered in the course of a planning inquiry. In doing so the Inspector's role constitutes an integral part of the same legal and administrative function as that performed by the First Secretary of State himself. The First Secretary of State bases his decision on the contents of the Report and the recommendations of the Inspector together with any other matters brought to his attention by officials in DCLG's HQ.
20. The fact that the resulting reports are published after the planning decision is taken is immaterial to the fact that the Report is, in the opinion of the Commissioner, an 'internal communication' and therefore falls within the scope of the exception in Regulation 12(4)(e).

The public interest test

21. The exceptions from disclosure in the EIR are all subject to the public interest test. In its letter of 24 January 2005 TPI provided a brief explanation of what it saw as the relevant public interest considerations. TPI expanded on this when replying to the complainant's request for a review. It argued that the public interest is served by the ability publicly to debate and question planning decisions, and that this mechanism exists during the process of considering a planning application and once a decision has been taken. TPI also argued that an early release of the Inspector's Report would be likely to result in additional representations upon which other parties would need to be given the opportunity to comment and that these further rounds of representations, and the continuing uncertainty as to whether or not the planning applications had been successful, would not be in the public interest.
22. The Commissioner has given careful consideration to the application of the public interest test set out in regulation 12(1)(b), mindful of the requirement of regulation 12(2), namely that, "A public authority shall apply a presumption in favour of disclosure."
23. The Commissioner recognises the enormous significance that planning decisions have on local communities and on society more generally. There is clearly a strong public interest in planning decisions being taken properly, and particularly in Ministers being accountable by making decisions that are based on accurate and

complete information provided to them by Planning Inspectors and others involved in the process. Giving access to Planning Inspectors' reports at an early stage in the planning process would no doubt allow the public to scrutinise the process, to bring any defects to light and to make representations. Early access would also facilitate public debate of planning decisions, and would allow those opposed to the granting of planning permission to use the media to put forward their point of view at a time when a planning issue is still 'live'.

24. However, the system for dealing with planning applications that have been 'called in' for consideration by the Secretary of State is well-established. The statutory arrangements for this are set out at section 18 of the Town and Country Planning Act 1990. During the process the various interested parties have an opportunity to make representations about a planning application. There are opportunities to make written submissions, and there are statutory requirements to ensure that there is community involvement in the planning process. Once a public consultation period has ended, the Inspector will produce a report which will be submitted to the Secretary of State for consideration. Once a planning decision has been made the resultant report will be provided to certain interested parties and will be made available to anyone who wants a copy.
25. In his correspondence with the Information Commissioner, the complainant has not suggested that there has been any departure from the proper procedure under planning legislation in this case. If there had been, then the means of legal challenge would be by way of judicial review.
26. In the view of the Commissioner, TPI's argument that, at some point, the First Secretary of State had to 'close the book' on public consultation and make his decision is a valid one and in the public interest.
27. The Commissioner understands that DCLG is under a duty to consider any further submissions made in connection with a planning application, even ones made after its 'cut off date'. It is difficult to envisage how the public interest would be served by further public debate being promoted, and submissions considered, in the period between evidence being called in and the planning decision being taken. The Commissioner accepts the argument put forward by TPI that this would lead to delay and uncertainty in the planning process, which would be likely to have a detrimental effect on the area affected by the planning decisions.
28. Had the report been released prior to the planning decision being taken, it would have been difficult to see what benefit this would have had for those affected by the ultimate decision, or for society more generally. The public interest is served by there being a planning process that works properly, that involves the public and that results in a planning decision being taken, as has now occurred in this case. In the present case, the release of the Inspector's Report at the time it was requested may have generated further uncertainty for no practical reason and may have further prolonged the planning process, which, as the complainant has pointed out, had already been protracted. The Commissioner recognises that the complainant believes that, in general, the early release of Inspectors' reports prior to the First Secretary of State's decision would result in earlier opportunities to correct errors without the need to take matters to the courts, but this is not a factor in the majority

of cases (we understand from the DCLG that only 10% of cases are challenged in the courts, and only 1% succeed).

29. For the reasons set out above, and in line with the conclusions reached in case FER0070181, the Commissioner is satisfied that, in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the information. In this case, therefore, the Information Commissioner has decided that DCLG dealt with the complainant's request for information in accordance with Part 1 of the Freedom of Information Act 2000 as amended by the Environmental Information Regulations 2004.

The Decision

30. The Commissioner agrees that it was reasonable for DCLG to refuse the complainant's request for information while the First Secretary of State was still in the process of deciding whether or not to grant planning permission. In reaching this view, the Commissioner accepts the argument that release of the information would have been likely to delay the making of the final decision. He is mindful of the fact that a process for appeal is laid down in statute, that the matters before the First Secretary of State had been the subject of a public inquiry and that there is a strong public interest in ensuring that planning decisions are made without avoidable delay.

Action Required

31. The Commissioner does not require DCLG to take any action.

Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Reference: FER0071457



Dated the 4th day of September 2006

Signed

**Information Commissioner's Office
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