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

Decision Notice

Dated 13 June 2006

Public Authority: Department for Communities and Local Government (formerly the Office of the Deputy Prime Minister)

Address: Eland House
Bressenden Place
London
SW1E 5DU

NOTE: at the time of the complaint to the Commissioner, the relevant public authority was the Office of the Deputy Prime Minister. This was replaced in May 2006 by Department for Communities and Local Government to which this Notice is therefore served. For historical reasons, the ODPM is referred to in the Notice as the public authority.

Summary Decision and Action Required

The Commissioner's decision in this matter is that the Public Authority has not dealt with the Complainant's request in accordance with Regulation 5 of the Environmental Information regulations 2004 (EIR) in that it has failed to properly apply the provisions of Regulation 12(4)(e) which allows for a request for information to be refused to the extent that it involves the disclosure of internal communications. The exception is subject to the public interest test and, although the Commissioner agrees that not all the requested information need be disclosed, he considers that some of it should.

The Commissioner requires the disclosure of advice given to the First Secretary of State with regard to a planning application for the Vauxhall Tower in London subject to redactions.

- 1. The Environmental Information Regulations 2000 ("the EIR") and the Freedom of Information Act 2000 (the "Act") – Application for a Decision and the Duty of the Commissioner**



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- 1.1 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 Act are imported into the EIR.
- 1.2 The Commissioner has received an application for a decision 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)
- 1.2 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.
- 1.3 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.

2. The Complaint

- 2.1 The Complainant has advised that on 19 May 2005 the following information was requested from the Cabinet Office:

"information relating to the representations made to the Deputy Prime Minister following the report of the Planning Inspector into the application to build Vauxhall Tower in London."
- 2.2 The Cabinet Office did not hold this information but transferred the request to the Office of the Deputy Prime Minister (ODPM). The request was submitted under the Act but the public authority indicated that the request was being treated as if made under the EIR since the information requested clearly fell within the definition of environmental information set out in Regulation 2(1)(c).
- 2.3 In response to the request, the complainant was given a copy of the revised planning obligation being considered by the First Secretary of State. However, other information falling within the terms of the request was refused in reliance on Regulation 12(4)(e).



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- 2.4 The complainant made representations to the public authority as to why it should reconsider its refusal of the request. These were considered in accordance with Regulation 11. Some additional information, consisting of representations that had been made to the First Secretary of State following the issue of a “minded to” letter on 31 March 2005 was released to the complainant. These were received from interested third parties. The advice given to the First Secretary of State by officials was, however, refused in reliance on regulation 12(4)(e). It is the refusal of the submissions made by officials which formed the basis of the complaint to the Commissioner and his investigation.
- 2.5 The complainant asked the Commissioner to review the decision to refuse his request for information. He expressed a particular interest in establishing some ground rules in similar cases for the future.

3. Relevant Statutory Obligations under the EIR

3.1 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.

3.2 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.”

3.3 Paragraph (4) referred to in the above paragraph 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.



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4. Review of the case

4.1 Background

- 4.1.1 The request for information arose out of an application for planning permission, submitted by St George South London Ltd, in respect of high rise building to be situated on the Thames, near Vauxhall Bridge in central London. The proposed building is known as the "Vauxhall Tower". The application was submitted to the local authority on 5 July 2003. On 17 October 2003, it was announced that the planning application had been "recovered" by the First Secretary of State, the Deputy Prime Minister. The procedure for the recovery of planning applications is set out in statute. It is a procedure which, according to information provided by the ODPM, leads to some 150 planning applications annually being considered by the First Secretary of State.
- 4.1.2 A public inquiry was held by the Planning Inspector, between 15 June and 9 July 2004. The inquiry received evidence from a number of interested parties. On 31 March 2005, a so-called "minded to" letter was issued on behalf of the First Secretary of State. This stated that, contrary to the recommendations made by the Inspector, the First Secretary of State was minded to grant planning permission subject to the submission of a revised planning obligation. The letter rehearsed the issues considered by the Inspector and gave an indication of the points of agreement and disagreement on the part of the First Secretary of State. The letter, together with a copy of the Inspector's report was sent to the parties who gave evidence at the planning inquiry.
- 4.1.3 A number of representations were received in response to the "minded to" letter and these were circulated to the parties on 11 June 2005. The decision by First Secretary of State to grant planning permission was announced by letter on 14 July 2005. There then followed a period of time during which the First Secretary of State's decision could be appealed by way of an application to the High Court. This period came to an end on 25 August 2005.

4.2 The complaint

- 4.2.1 The complainant first contacted the Commissioner on 21 June 2005, providing an outline of his complaint. He had submitted his request for information on 19 May 2005. The complainant was anxious to have the Commissioner consider his concerns by 28 June. It was explained by letter on 12 July 2005 that it had not been possible to consider the complaint within the suggested timescale.
- 4.2.2 The full complaint, including copies of the correspondence between the complainant and the ODPM, were received on 12 August. The complainant indicated that he sought a determination of the complaint by 25 August 2005. This



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was the last date upon which an application for a review of the First Secretary of State's decision, announced on 31 March 2005, to grant a planning permission could be made to the High Court.

- 4.2.3 It was explained to the complainant that it would not be possible to make a determination of the case by the date indicated, not least because of the period of time for appeal against a Decision Notice allowed by the Act. The complainant accepted this but indicated that he was interested in establishing some ground rules for the future.
- 4.2.4 On 14 September 2005, the complainant made a further submission to the Commissioner, indicating the questions which he considered should be addressed. These were whether Regulation 12(4)(e) of the EIR is applicable and had been correctly interpreted, and whether the public interest in disclosure or maintenance of the exception has been properly considered. The complaint distinguished in principle between the public interest considerations which arose at the time of the original refusal of his request, at the time of his appeal against that refusal to the ODPM and at the date of the Commissioner's determination of his complaint.

4.3 **Investigation of the complaint**

- 4.3.1 By the time the complaint was investigated by the Commissioner, the period for appeal against the First Secretary of State's decision had come to an end. The complaint had therefore become "academic" in the sense that no use could be made of any information which the Commissioner might judge should be disclosed. However, given that the period of time between the announcement of the granting of planning permission and the final date for appeals against such a decision to the High Court is relatively short, six weeks, the Commissioner agreed that it was important to establish some general principles for the future so that any similar requests for information would not fail simply because of time pressures.
- 4.3.2 The Commissioner obtained from the ODPM, the following information:
- Copies of the submissions by officials to the First Secretary of State (the withheld information);
 - The Hansard account of the debate in the House of Lords of 28 June 2005 on the First Secretary of State's decision;
 - Copies of the "minded to" letter of 31 March 2005 and of the decision letter of 14 July 2005
 - An account of the process whereby planning applications are "called in" and "recovered" for consideration by the First Secretary of State.
 - A full account of the steps taken by the ODPM having received the request for information and subsequent appeal against refusal.



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4.3.3 The ODPM also offered to send copies of the submissions made by external parties in response to the “minded to” letter. It did not seem to the Commissioner that these would be material to his decision.

5. The Commissioner’s Decision

5.1 Procedural matters

5.1.1 The Commissioner has considered the question of the compliance by the ODPM with the procedural requirements of the Act and the EIR. Although not raised by the complainant, the Commissioner notes that the Cabinet Office to which the original information request was directed, properly and helpfully transferred the request to the ODPM. The ODPM appears to have dealt with both the request and appeal by the complainant promptly and in accordance with statutory requirements.

5.2 Application of the exception

5.2.1 Environmental information is defined in Regulation 2(1) of the EIR information to include information “on ... measures (including administrative measures), such as policies, ... plans ... and activities affecting or likely to affect” the state of the elements of the environment. The Commissioner agrees that the information requested falls within this broad definition and that the ODPM was correct, therefore to consider the request as a request for information under the EIR.

5.2.2 The withheld information consists of submissions made by officials to the First Secretary of State. The Commissioner agrees that request falls within category of information encompassed by Regulation 12(4)(e), that is the request “involves the disclosure of internal communications.”

5.3 The public interest test

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

Arguments presented by the ODPM

5.3.2 In its refusal notice of 17 June 2005, before the First Secretary of State made his final decision in respect of the planning application, the public authority advanced the following argument in favour of maintaining the exception from disclosure:

“In assessing the public interest in the release of internal correspondence, we have balanced the public interest in transparent decision making against the need to ensure that we have an efficient and fair planning system. In this regard we



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consider that decision making is based on the best advice available and a full consideration of all the options. This approach also allows for the Ministers and officials to conduct rigorous and candid risk assessment of their policies including considerations of the pros and cons without there being premature disclosure which might close off discussion and the development of better options. We have therefore concluded that for these reasons there is no compelling public interest in the release of this information.”

- 5.3.3 In response to the appeal against the original refusal of the request, the ODPM provided certain information previously withheld, in particular the representations received from third parties. However, the refusal of the submissions made by officials was confirmed. In respect of the public interest test, the following was stated by the official conducted the review of the case:

“... I have taken into account the extent to which all the relevant arguments appear to have been put to Ministers, and the extent to which the reasons for their decision have been made transparent in the decision letters. I am satisfied that this was the case here.”

- 5.3.4 An additional argument was advanced, taking into account the timing of the request, which was before the announcement of the First Secretary of State's decision. This was that in addition to providing the requested information to the complainant, it would have been necessary to provide it to all the interested parties and that this would have “reopened the debate after the inspector had submitted his report,” leading to further delay. It was argued that this would not have been in the public interest.

- 5.3.5 Finally it was argued that the ODPM had been correct to take into account:

“the possible impact of the disclosure of this material in this case on the way in which officials are likely to handle similar cases where there might be strongly held differences of view between the parties concerned, as there are here. The public interest ... is best served by officials feeling free to offer Ministers full and frank advice as to the options open to them ... Were officials to qualify or modify that advice on ground such as their own likely public profile or exposure, then that would discourage the robust challenge to the decision making process that they are expected to offer in planning cases ...”

Arguments presented by the complainant

- 5.3.6 The complainant is under no obligation to articulate the public interest arguments in favour of disclosure. However, it is helpful that in this case he has done so, albeit briefly. In particular, he argues in his appeal against the original refusal of his request that:



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“I consider it in the public interest for the public to know what representations were received by the Deputy Prime Minister which led him to reject the Inspector’s report.”

5.3.7 In a more recent letter to the Commissioner, the complainant argued:

“It is important in a case such as this one, where a Minister has gone against the advice of a planning inspector in relation to a planning application for a ‘key’ site with clear ‘precedent’ implications, that the interested public should know precisely how and by whom that decision was taken. What was the discussion between civil servants? What advice was given to the person who took the final decision? Was the final decision taken personally by the First Secretary of State, or (quite probably lawfully) by an official acting in his name?”

The Commissioner’s published advice

5.3.8 The Commissioner has published guidance on both the public interest test and the EIR exceptions. Although this is not binding and must be applied carefully to the circumstances of individual cases, it does represent the Commissioner’s starting point.

5.3.9 The Commissioner’s basic approach to the public interest test to be applied under both the Act and the EIR is explained in Awareness Guidance No 3. Among the factors favouring disclosure are the following:

- furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority.
- promoting accountability and transparency by public authorities for decisions taken by them. By placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.
- allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.

In the Commissioner’s view each of these factors is relevant to this particular case.

5.3.10 The Commissioner has also published introductory advice on the application of the exceptions in the EIR. In this advice, the Commissioner recognises that one of the purposes of the exception is “to provide some protection for the “private thinking space” for senior officials or elected members...” The advice explains that although



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the exception appears to have a very wide scope, in practice this is likely to be narrowed by the application of the public interest test.

5.3.11 The advice goes on to explain, “When refusing a request for information on the ground that it relates to internal communications, public authorities must be satisfied that disclosure would firstly cause some harm, for instance by misleading the public or making the formulation of policy difficult or impossible and, secondly, that there is not a stronger public interest in increasing public input into the formulation of policy.”

5.3.12 Although this request for information was made and refused under the EIR, it also relevant to consider the exemption in the Act relating to the formulation of government policy since this gives a much clearer “steer” as to the sensitivity of different types of information held in connection to the formulation of policy and the different public interest considerations that may arise from time to time. In particular, section 35(4) of the Act provides:

“In making any determination required by section 2(1)(b) or 2(b) [that is, the application of the public interest test] in relation to information which is exempt information by virtue of subsection 1(a) [that is, information relating to the formulation of government policy] regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

5.3.13 It is not suggested that section 35 of the Act is directly relevant to this case, rather that it may be reasonable to apply the same general approach to information held in relation to the formulation of government policy to information held in relation to a decision made by a Minister.

5.3.14 In Awareness Guidance 24, which gives high level advice on the FOI exemption relating to the formulation of government policy, the Commissioner observes:

“Subsection 35(4) provides an explicit indication that there is a strong public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking. The Information Commissioner therefore advises it is only where factual information is inextricably interlinked with advice etc, that it might not be disclosable in the public interest.

“However, in distinguishing factual material from opinion, advice and recommendation, it must be stressed that just because something is not factual, it is not automatically exempt but, on the contrary, any decision not to release the information is subject to the public interest test.”



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The Commissioner's assessment of the application of the public interest test

- 5.3.15 The Commissioner has considered the application of the public interest test at the time the request for information was first submitted, that is between the date of the First Secretary of State's "minded to" letter and the announcement of his final decision.
- 5.3.16 It seems clear to the Commissioner that at this time there was a public interest in disclosing the advice to the First Secretary of State since this would have furthered public debate about his forthcoming decision and may have prompted fresh representations by interested parties, leading perhaps to a more informed decision.
- 5.3.17 However, the Commissioner is persuaded that the consequences of release of the information at that time would, as the ODPM suggests, have been likely to protract the proceedings by reopening public debate. In accepting the force of the argument put by the ODPM, the Commissioner is mindful of the fact that the First Secretary of State's inclination to grant planning permission had been made explicit, as had the arguments against that proposed decision in the form of the Planning Inspector's report. In addition, the ODPM was shortly to publish the external representations which it received. In other words, while the Commissioner accepts that there would have been some public interest in the disclosure of the information when first requested, he considers that, given the amount of information which had already been made public, the public interest in achieving closure of the planning application process was the stronger.
- 5.3.18 The Commissioner has further considered the public interest considerations that existed between the date of the announcement of the First Secretary of State's decision and the final date, six weeks later, for the application for a review of that decision by the High Court.
- 5.3.19 The particular question arises as to whether disclosure of the submissions made to the First Secretary of State would have assisted the complainant in challenging the decision to grant planning permission. Section 288 of the Town and Country Planning Act 1990 makes provision for an appeal to the High Court. The arguments against the granting of planning permission were already well known. The Planning Inspector's report had been put into the public domain as had the representations made by interested parties. The First Secretary of State had given his reasons for rejecting the recommendations and the representations made in response to his "minded to" letter. The Commissioner does not agree that the refusal to release the submissions made by officials has materially affected the exercise of the complainant's right to make an appeal to the High Court.
- 5.3.20 Thirdly, the Commissioner has considered whether the public interest in maintaining the confidentiality of internal communications, whether this is



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expressed in terms of protecting the “private thinking space” of Ministers and officials, or allowing the free and frank exchange of views between officials and Ministers in the future, is outweighed by the public interest in making public the reasons for decisions and thereby promoting accountability and transparency by public authorities for decisions taken by them. The Commissioner finds these arguments more finely balanced.

5.3.21 The Commissioner recognises, firstly, that there is a significant difference between the advice of officials and the representations made by third parties. Almost by definition the latter will be partial and there is a strong public interest, therefore, in being able to form a judgment as to whether the First Secretary of State was unduly influenced by or unreasonably disregarded any of the arguments advanced. The Commissioner accepts, however, that the advice of officials is of a different order. While representations made by third parties seek to persuade the recipient of rightness of the third parties' point of view, the advice given by officials is more technical, designed to assist Ministers in their decision taking, rather than to persuade. Although there is certainly a public interest in knowing whether the advice given by official is impartial, in the final analysis it is the decision taken by Ministers which matters and which is the subject of legitimate debate and, as in this case, may be challenged in the Courts. The Commissioner accepts that there would be a significant prejudice to the giving of impartial advice if the advice given by officials were to become the matter of public comment. In reaching this view, the Commissioner is mindful of the fact that in the context of this particular case, the recommendations of the Planning Inspector and the third party representations are in the public domain and that it is possible, therefore, for the public to obtain a reasonable picture of the breadth of views which the First Secretary of State had available to him.

5.3.22 Submissions to Ministers are likely to contain a number of different elements including a factual element, an exposition of the issues for consideration by the Minister and the advice of the officials making the submission. While the Commissioner accepts that, in this case, the advice of officials may be withheld, he does not accept that the same considerations apply to the factual element of the submission or to the exposition of the issues for consideration. In taking this view the Commissioner draws upon the distinction made in the Act between factual information held in relation to the formulation of policy and other information such as advice. Although it may be that, in this case, the factual information simply reflects the factual information contained in the Planning Inspector's report and, indeed, in the planning application, the Commissioner considers that there is a strong public interest in the public being able to know the facts that were put before the First Secretary of State. He does not consider that the publication of this information would be likely to inhibit officials in the future from laying relevant facts before Ministers. On the contrary, he considers it likely that publication may support



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a thorough approach and may enhance public confidence in the professionalism of officials.

5.3.23 Submissions are also likely to contain a description of the matters for consideration. The Commissioner accepts that this information is more sensitive than factual information. However, he considers that the public interest in understanding the basis of a decision outweighs the risk that the advice of officials may be inferred from the description of the matters for consideration.

5.3.24 Finally the Commissioner has considered the argument that the fact that the First Secretary of State's decision was unusual and controversial creates a particularly strong public interest in the disclosure of the background to that decision. In the Commissioner's view this is an argument which has a neutral conclusion. While there is certainly a stronger public interest in understanding unusual or controversial decisions, it is precisely the difficulty of those decisions which strengthens the argument for the need to preserve a "private thinking space" and to create the right conditions for free and frank internal debate. The Commissioner is not persuaded that, simply because the First Secretary of State's decision was controversial one, more background information should be released than might normally be the case.

5.4 Summary of the Commissioner's decision

5.4.1 The Commissioner agrees that the balance of the public interest supported the refusal of the complainant's request for information before the date of the First Secretary of State's decision to grant planning permission. In reaching this view, he accepts the argument that release of the information would have been likely to delay the making of the final decision. In reaching this view 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 reasonably quickly.

5.4.2 However, once the First Secretary of State's decision had been taken, the Commissioner considers that it would have been possible and in the greater public interest for the ODPM to release both the factual elements of the submission by officials to ministers and those parts of the submissions which set out the questions for consideration by the First Secretary of State. The Commissioner agrees, however, that the advice of officials and any expression of opinions by officials may be legitimately withheld.

5.4.3 Although the ODPM (now the Department for Communities and Local Government) could provide a summary of the information, the Commissioner considers that a clearer impression of the basis of the First Secretary of State's decision would be given by a copy of the documents, redacted as indicated above.



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6. Action Required

- 6.1 The Commissioner requires the Department for Communities and Local Government to provide the complainant with a copy of the submissions made to the First Secretary of State in respect of the recovered planning application for the building of the Vauxhall Tower. In doing so the Department may remove the advice given to the First Secretary of State and any expressions of the opinions of the officials making the submissions.
- 6.2 The above information should be provided to the complainant within 30 days of receipt of this notice.

7. Right of Appeal

- 7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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

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

Dated the 13 day of June 2006

Signed

**Graham Smith
Deputy Commissioner**

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