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

Decision Notice

Date: 25 June 2007

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

Summary

The complainant asked DCLG for all of the background papers relating to the decision to call in a planning application for determination by the Secretary of State. DCLG provided some information but withheld internal emails and a minute, draft call-in letters, a draft Ministerial submission, the final submission and an internal case referral proforma, citing the exception in regulation 12(4)(e) of the Environmental Information Regulations 2004. DCLG subsequently agreed to release the draft call-in letters, and the factual elements of both the draft submission and the final submission. The Commissioner upheld DCLG's decision in relation to the internal emails and minute, but found that, in this case, the public interest in maintaining the exception did not outweigh the public interest in disclosing all of the information contained in the draft submission, final submission and proforma, although he agreed that the names of junior officials could be redacted.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 14 December 2004 the Government Office for the South East ("GOSE"), whose parent department is now the Department for Communities and Local Government (DCLG), wrote to the complainant about his client's planning application for the development of a four storey dwelling, saying that the then

Secretary of State had directed that the application be referred to him ("called in") for determination. On 22 April 2005 the complainant's client wrote to GOSE asking, under the Act, for copies of all of the background papers (including departmental memoranda; interdepartmental memoranda; emails; file notes of conversations, discussions and meetings) which had led the Secretary of State to call in the decision. In a letter dated 28 April 2005 to GOSE the complainant's client said that he was requesting the information under both the Act and the EIR.

3. On 23 May 2005 GOSE responded, saying that it considered that the information requested fell within the definition of environmental information set out in regulation 2(1)(c) of the EIR and that it was dealing with his request under those regulations. GOSE provided the complainant's client with the reasons for calling in the decision and some of the background information that he sought. However, GOSE considered that the departmental emails, minutes, proforma and submissions that had been requested fell within the scope of the exception in regulation 12 (4)(e) of the EIR (disclosure of internal communications). GOSE also said that it considered that the draft call-in letters fell within the scope of the exception in regulation 12 (4)(d) (material which is in the course of completion). GOSE said that the exceptions cited were subject to the public interest test; it had weighed the public interest in having an efficient and transparent decision-making process against the public interest in ensuring that decision-making was based on the best advice available and on a full consideration of the options. GOSE concluded that the balance of the public interest lay in withholding the outstanding information. It informed the complainant's client of his right to a review, and explained the process.

4. On 7 June 2005 the complainant sought a review of GOSE's decision. On 4 August 2005 the review was completed by the Government Office for the East of England (GOEE) at the request of DCLG's predecessor department (the Office of the Deputy Prime Minister). GOEE upheld GOSE's decision. (GOEE in addition concluded that regulation 12(5)(f), which provides a qualified exception where disclosure would adversely affect the interest of the person who provided the information, was also relevant, but DCLG is no longer relying on that exception). GOEE said that the decisive public interest argument against release of the withheld information was that there would be a risk of procedural unfairness if it were to be disclosed to one party to a case but not to others.

The Investigation

Scope of the case and Chronology

5. On 5 August 2005 the complainant contacted the Commissioner to complain about the way in which his client's request for information had been handled. The complainant said that he found the justification in the review decision for withholding the information to be totally unreasonable, given that it was open to GOSE to release the information to all parties, and because the purpose of the legislation was to enable individuals to understand the advice given to Ministers.

The complainant accepted that such advice might contain information about the opinions of officials and third parties, but contended that that was no different to the advice given to Local Planning Authorities by officers, and he could see no valid reason why such advice should not be made public.

6. Following correspondence and telephone conversations between the complainant and his client and the Commissioner's staff, and correspondence between the client's Member of Parliament and the Commissioner, on 6 December 2006 the Commissioner asked GOSE for copies of the withheld information. On 11 January 2007 GOSE said that the matter was being handled by DCLG's Freedom of Information Advice Team. DCLG provided the Commissioner with the bulk of the information by 20 February 2007, with further information being supplied on 19 March 2007 at the request of the Commissioner.

7. In commenting on the complaint DCLG said that, on 10 May 2006, which was subsequent to the complaint to the Commissioner, the Secretary of State had reached a decision on the planning application. DCLG said that this would make a difference to the information that it was now prepared to release and that it would now be willing to provide the complainant with the following information:

- the factual elements of the submission to the Secretary of State prepared by GOSE on 3 December 2004, and the factual elements of the draft of that submission dated 1 December 2004; and

- the drafts of the call-in letters.

8. DCLG said that it had withheld the identities of junior staff mentioned in the submission and had withheld the advice and recommendations contained in the submission under regulation 12(4)(e). In support of its conclusions in relation to the submission, DCLG cited the decision of the Commissioner in a similar case (ref: FER0086623). DCLG quoted paragraph 5.3.21 in which the Commissioner said:

"Although there is certainly a public interest in knowing whether the advice given by officials is impartial, in the final analysis it is the decision taken by Ministers which matters and which is the subject of legitimate debate and may be challenged in the Courts. The Commissioner accepts that there would be significant prejudice to the giving of impartial advice if the advice given by officials were to become a matter of public comment".

DCLG also maintained that the remaining information, comprising a GOSE case referral proforma, an internal minute, and internal emails between 26 November 2004 and 13 December 2004 should still be withheld under regulation 12(4)(e). DCLG contended that, in all of these instances, the balance of the public interest lay in withholding the relevant information.

Calling in planning applications

9. In a Parliamentary Written Answer (Hansard 16 June 1999, col.138) the then Minister for the Regions, Regeneration and Rural Affairs said:

"[The First Secretary of State's] policy is to be very selective about calling in planning applications. He will, in general, only take this step if planning issues of more than local importance are involved. Such cases may include, for example, those which, in his opinion:

- may conflict with national policies on important matters;
- could have significant effects beyond their immediate locality;
- give rise to substantial regional or national controversy;
- raise significant architectural and urban design issues; or
- may involve the interests of national security or of foreign Governments".

10. In addition, GOSE's website explains in some detail the circumstances in which planning applications may be called in, and states "Each application referred to us is measured against national planning policies, rather than judging the planning permission on the particular circumstances of the case". Papers provided to the Commissioner by DCLG show that the planning application in the present case was the first instance of paragraph 11 of Planning Policy Statement 7 (PPS7), which required the proposed development to meet the criteria for promoting innovative design of exceptional quality, being claimed as justification for granting planning permission since PPS7 was published, and it was thus of particular interest.

Analysis

Application of the EIR

11. Environmental information is defined in regulation 2(1) of the EIR as including 'measures (including administrative measures), such as policies,….plans…and activities affecting or likely to affect' the state of the elements of the environment. (Other statutory provisions relevant to this complaint are set out in full in the Legal Annex to this Decision Notice). Clearly the granting, or denial, of planning permission for the building of a house in a countryside location will affect the landscape and natural sites. The Commissioner agrees that the information requested falls within the broad definition in regulation 2(1) and that DCLG was correct therefore in considering the request as a request for information under the EIR. This is consistent with the treatment of other similar cases relating to requests for information about planning applications that have been the subject of decisions by the Information Commissioner (for example, case references FER0086623 and FER0087051). In considering this case the Commissioner has also borne in mind the general presumption in favour of disclosure as set out in regulation 12(2).

Internal Communication Exception – regulation 12(4)(e)

12. The information in question consists of the advice elements of both a draft and a final submission made by officials to the Minister, an internal proforma and internal emails, and an internal minute. Under regulation 12(4)(e) a public

authority is able to refuse to disclose information where the request involves the disclosure of internal communications. The Commissioner agrees that the outstanding information falls within the terms of the regulation and that the exception is engaged.

Public interest test

13. However, that is not the end of the matter. Regulation 12(4)(e) is subject to the public interest test in regulation 12(1)(b), and DCLG may only rely on it as a basis for withholding the relevant information if 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'.

Internal emails and minute

14. In commenting on the complaint to the Commissioner, DCLG said that many of the views and exchanges expressed in the internal emails and the minute were frank. There was a strong likelihood that, if officials were aware that their advice and comments, which were given in confidence and in the belief that they would remain private, were to be disclosed under the Act, they would be very much more cautious in what they said. DCLG said that the planning process hinged on high quality, free and frank advice being provided between officials and to Ministers, setting out the pros and cons of all the options and making a clear recommendation. DCLG said that it was in the public interest for decision-making to be based on the best advice available, drawing on the relevant evidence, and for it to be based on a full consideration of all the options. In DCLG's view, were this information to be disclosed, there would be a considerable deterrent effect on the frankness of the advice, with disclosure closing off discussion and the development of options: this would critically affect the robustness of any recommendation, to the detriment of quality decision-making and, therefore, the public interest. DCLG considered the public interest in disclosing the private views of those who had been consulted internally by means of emails and the minute to be limited.

15. The Commissioner recognises that factors favouring disclosure of information include the promotion of accountability and transparency by public authorities for decisions taken by them and the fostering of a better understanding of those decisions among those affected by them. The Commissioner has also noted the complainant's comments that the advice given to Local Planning Authorities by officers was in due course made available to a wider audience. However, he further recognises that email exchanges and minutes form an essential element of communication between officials. Having read the exchanges and the relevant minute in this case, it is clear that: they were not drafted for wider circulation; they contain views which DCLG regard as confidential, and that their authors might have expressed themselves in a different manner had they been aware that their exchanges would reach the public domain, having had no expectation that this would be the case at the time they were drafted. It is also pertinent that these exchanges occurred at a comparatively early stage in the planning process. For this process to operate successfully which, the Commissioner accepts, is entirely in the public interest, it is necessary for those whose views are sought on a

planning application, including the question of whether or not such an application should be called-in for a decision, to be able to express themselves freely. The Commissioner considers that, on balance, the public interest in maintaining the exception outweighs the public interest in the release of the internal emails and minute, and that DCLG are entitled to withhold them.

Ministerial submission, draft submission and GOSE case referral proforma

16. As regards the draft and final versions of the Ministerial submission and the case referral proforma, at the time of the original information request the planning process was still underway and the Secretary of State had not reached a decision as to whether or not the planning application should be approved. The Commissioner recognises that release of the content of those submissions would at that time almost certainly have re-opened the debate, thereby delaying the planning process. In the Commissioner's view, that would not have been in the public interest and DCLG would have been entitled, at that stage, to withhold them. This should not be taken to imply that any such information requested before completion of the planning process should, in all cases, be withheld until that process is complete: each case should be judged on its own merits.

17. However, since the referral of this complaint to the Commissioner, the Secretary of State has reached a decision on the planning application (which is in the public domain), and DCLG has agreed to release to the complainant the factual elements of the submissions. DCLG contends, however, for the reasons already given in paragraph 14 above, that the public interest in withholding the advice contained in the submissions outweighs the public interest in releasing it. DCLG also said that the public interest was 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 the grounds that it might receive public exposure, then that would discourage the robust challenge to the decision-making process that they were expected to offer in planning cases. DCLG said that the decision-making process depended on civil servants and Ministers being able to deliberate and consider the issues freely and frankly without the constraint that the possibility of disclosure in the near future might place upon such advice.

18. The Commissioner accepts that Ministers and officials are entitled to private thinking space in reaching decisions, to enable them to explore options both radical and safe. The Commissioner also accepts that there would be significant prejudice to the giving of impartial advice if the advice given by officials were to be made available to a wider audience as a matter of course. However, each case must be considered on its merits, and the areas of concern which caused DCLG to recommend that the planning application be called in for determination by the Secretary of State were set out in the call-in letter. The officials involved were exercising their professional expertise to assess factual information against established policy guidelines. The Commissioner does not believe that publication now of the full reservations and recommendations in this particular case would result in officials being reluctant to comment, nor would it lead to them not making recommendations in the future on whether a planning application should be called in: if anything, it should ensure that when they do recommend call-in they do so properly and with good reason. The Commissioner also believes that release of

the reservations and recommendations in this instance would further public understanding of a complex and difficult process. This is particularly so where, as in this case, a particular element of the planning process such as the application of paragraph 11 of PPS7 is being tested for the first time. This conclusion is consistent with the view of the Information Tribunal who, in a recent decision on a similar matter (Lord Baker v the Information Commissioner and DCLG (Tribunal reference: EA/2006/0043)), said, in paragraph 28, that:

" the strength of the argument in favour of disclosure and against maintaining the exemption is that disclosure will enable the public to form a view on what exactly happened and not on what it can otherwise only guess at".

The Tribunal concluded (paragraph 29) that, on the facts of the case that it was then considering:

" the disclosure, after the date when the Minister's decision had been promulgated, of the advice and opinions of civil servants in question would not undermine to any significant extent the proper and effective performance by civil servants of their duties in the future".

The Commissioner, therefore, finds that, in all the circumstances of this case, the public interest in maintaining the exception does not outweigh the public interest in disclosing the full text of the submission, draft submission and proforma, and that that information should be released to the complainant.

19. However, in a further decision of the Information Tribunal (The Department for Education and Skills v the Information Commissioner (Tribunal reference: EA/2006/06)) the Tribunal, albeit in relation to section 35 of the Act which provides a similar exemption to the exception in regulation 12(4)(e), discussed the circumstances in which the names of officials should be released. In paragraph 75 (viii) the Tribunal said

"..there may be a good reason in some cases for withholding the names of more junior civil servants who would never expect their roles to be exposed to public gaze. These are questions to be decided on the particular facts, not by blanket policy."

In paragraph 75 (xi) the Tribunal said:

"A blanket policy of refusing to disclose the names of civil servants wherever they appear in departmental records, cannot be justified because, in many cases disclosure will do no harm to anyone, even if it does little good. …..there will plainly be instances where an individual has advanced particularly sensitive or controversial advice which for whatever reason should not be attributed. It might be appropriate to disclose the advice with the name redacted. …..each decision will depend on the facts of the case. There must, however, be a specific reason for omitting the name of the official where the document is otherwise disclosable. That reason may not need to be utterly compelling where, as will often be the case, there is little or no public interest in learning the name."

In the present case, the recommendation by officials to call in the planning application was controversial. The junior officials involved in the preparation of the draft and final version of the submission and the proforma would have had no expectation that their identities would be revealed, and the Commissioner considers that there is little public interest in learning their names. He therefore concludes that the names of junior officials should be deleted from those documents.

The Decision

20. The Commissioner agrees that the public interest in maintaining the exception outweighed the public interest in disclosing the draft submission, final submission and proforma until the Secretary of State had reached a decision on the planning application.

21. However, the Commissioner considers that, once the Secretary of State's decision had been taken, the public interest in maintaining the exception no longer outweighed the public interest in releasing the information contained in the draft and final submissions and proforma and that this information should now be released to the complainant.

22. The Commissioner agrees that DCLG acted in accordance with the Act in withholding the internal emails and minute.

Steps Required

23. The Commissioner requires DCLG to provide the complainant with a copy of the draft call-in letters as previously agreed, and of the full versions of the draft submission, final submission and GOSE's case referral proforma, redacted to remove the names of junior officials.

24. DCLG must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

25. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

26. 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.

Dated the 25th day of June 2007

Signed ……..

Richard Thomas
Information Commissioner

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

Legal Annex

Regulation 12 - Exceptions to the duty to disclose environmental information

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

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

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

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

(a) it does not hold that information when an applicant's request is received;

(b) –(c) …….

(d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.