

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

### **Decision Notice**

**Date: 27 May 2008**

**Public Authority:** Department for Transport  
**Address:** Great Minster House  
76 Marsham Street  
London  
SW1P 4DR

### **Summary**

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The complainant requested information held by the public authority in relation to the proposal for the development of a second runway at Stansted Airport. The public authority provided some information but initially withheld other information under section 35 of the Freedom of Information Act 2000. It subsequently sought to rely on regulations 12(4)(e) (internal communications) and 12(5)(b)(course of justice) of the Environmental Information Regulations 2004. The Commissioner decided that the public authority correctly applied regulation 12(5)(b) to the information it argued was covered by this exception. However, he decided that it incorrectly applied regulation 12(4)(e) to the remaining information and ordered that it be disclosed to the complainant. He also found that the public authority had not complied with regulation 14(3) as it failed to state in its refusal notice that regulations 12(4)(e) and 12(5)(b) were applicable to the withheld information.

### **The Commissioner's Role**

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1. The Environmental Information Regulations (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 Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## The Request

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2. On 28 March 2005 the complainant wrote to the Department for Transport (the “public authority”) and requested the following information under the Act:

“...the information which the Department reviewed, considered or prepared when considering whether or not a second runway at Stansted would pass the commercial viability hurdle.”
3. On 3 May 2005 the public authority wrote to the complainant and stated that it was considering the applications of the exemptions under sections 35 and 36 of the Act but needed additional time to consider the balance of the public interest.
4. On 23 May 2005 the public authority wrote to the complainant to inform him that it believed that all of the information which fell within the scope of his request was exempt from disclosure under section 35(1)(a) of the Act, with the exception of some witness statements which had been disclosed in open court in a High Court hearing and two documents which were available on the internet.
5. On 27 June 2005 the complainant requested an internal review of the decision to refuse to disclose the requested information
6. On 4 August 2005 the Department wrote to the complainant to inform him that the result of the internal review was to uphold the original decision that had been taken. It also indicated that some of the withheld information was arguably environmental information which was exempt from disclosure under regulation 12(4)(d) and (e) of the EIR.

## The Investigation

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### Scope of the case

7. On 14 September 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the refusal to disclose the information in question was correct.

### Chronology

8. On 24 November 2006 the Commissioner wrote to the public authority and asked for an explanation of the basis on which it had refused to disclose the requested information. The Commissioner also asked the public authority to provide him with a copy of the withheld information.

9. On 14 December 2006 the public authority asked the Commissioner for an extension of time to allow it to locate all the information and to prepare a response. It explained that locating the information had proved difficult due to a recent office move. The Commissioner agreed to an extension until 12 January 2007.
10. On 12 January 2007 the public authority wrote to the Commissioner and provided him with copies of the withheld information. In addition, it informed him that it had located additional documents relevant to the complainant's request and asked for further time to consider whether these should be disclosed. The Commissioner asked to receive a response by the end of January 2007.
11. On 2 February 2007 the Commissioner emailed the public authority seeking a response.
12. On 9 February 2007 the public authority emailed the Commissioner to ask for a little further time to provide a response.
13. On 16 February 2007 the public authority emailed the Commissioner to inform him that it believed the additional information that it had found was exempt from disclosure under section 35(1)(a) and that it would forward these additional documents to him immediately.
14. On 12 April 2007 the Commissioner, having reviewed the information sent to him, emailed the public authority to inform it that he had not received some of the documents that were supposed to have been sent to him. He asked to be provided with the ones that were missing. In addition, he explained that he had been provided with three documents that were not listed in the schedules of documents provided by the public authority and asked for further information about these.
15. On 14 May 2007 the public authority telephoned the Commissioner to inform him that it was having difficulty locating the missing documents but would contact him again shortly once it had completed further searches.
16. On 17 May 2007 the Commissioner emailed the public authority to ask it to indicate which information it believed was exempt from disclosure under the Environmental Information Regulations, as opposed to the Act. He also requested more detailed arguments regarding the application of the public interest test.
17. On 25 May 2007 the Department informed the Commissioner that it had located some of the missing documents but was carrying out further searches in an attempt to find the others.
18. On 12 June 2007 the Commissioner requested an update with regard to the current position.

19. On 21 June 2007 the public authority wrote to the Commissioner enclosing some of the missing documents but informed him that it had been unable to locate the others.
20. On 2 July 2007, the Commissioner sought an explanation as to what might have happened to the missing documents and details of the searches that had been carried out by the public authority in an attempt to locate them. He also pointed out that he had not yet received a response to his email of 17 May 2007.
21. On 26 July 2007 the public authority emailed the Commissioner and informed him that, in an attempt to find the missing documents, enquiries had been made of its officers and searches had been made of electronic and paper files. It stated that it had been forced to conclude that the missing documents had been destroyed and were not held elsewhere in the public authority.
22. On 14 August 2007 the Commissioner telephoned the Head of Information Rights at the public authority to express his concerns that it appeared that it had destroyed information which was the subject of a complaint to his office. It was suggested that the Commissioner write to the Divisional Manager of the public authority dealing with the matter so that he could be provided with a full response to his concerns.
23. On 14 August 2007 the Commissioner wrote to the relevant Divisional Manager at the public authority seeking copies of its records management policies, any evidence that the missing documents had been destroyed and full details of investigations carried out to locate them.
24. On 15 August 2007 the Commissioner emailed the public authority to confirm that he had written to the Divisional Manager and sought a response to the issues raised in his email of 17 May 2007.
25. On 21 August 2007 the public authority telephoned the Commissioner to inform him that it had now located two of the documents which had been missing and asked him to confirm which documents he still believed were missing.
26. On 22 August 2007 the Commissioner wrote to the public authority and provided a list of the documents he believed were still missing of the ones that it had previously indicated that it held.
27. On 10 September 2007 the Commissioner wrote to the Divisional Manager seeking a response to his letter of 14 August 2007.
28. On 12 September 2007 the public authority telephoned the Commissioner to inform him that it had received his letter of 10 September but did not appear to have received his letter of 14 August 2007. It confirmed that it would provide a response to the queries he had raised.

29. On 19 September 2007 the Commissioner agreed to extend the deadline for a response from the public authority until 28 September 2007.
30. On 1 October 2007 the public authority wrote to the Commissioner indicating that it found another four of the missing documents and forwarded these to him. As regards the remaining missing documents, it indicated that it believed that some of them may never have existed and that it may have been due to clerical error that it had confirmed that it held them. Where this did not apply, the documents may have been destroyed in error.
31. The public authority provided some further information on searches which had been undertaken, together with copies of relevant policies. In addition, it gave further arguments regarding the application of exceptions under the EIR to the withheld information.
32. On 15 November 2007 the Commissioner emailed the public authority to express his concern over its lack of certainty as to what had happened to documents which it appeared to have held when the request was originally made. He explained that his concerns had been exacerbated when further searches had located some of the missing documents.
33. In order to be satisfied that appropriate searches had been carried out for the missing documents, the Commissioner asked a series of questions about the operation of the public authority's records management procedures. In addition, he asked for information about the searches that had been undertaken in relation to the missing documents. He requested that the information be provided to him within 10 working days.
34. On 29 November 2007 the public authority emailed the Commissioner to ask for an extension of the time period for its response.
35. On 3 December 2007 the Commissioner emailed the public authority to grant an extension until 14 December 2007 but emphasized that, if a response was not received by that date, he would have to consider serving an Information Notice.
36. On 17 December 2007 the Commissioner emailed the public authority to enquire as to why he had not received a response.
37. On 18 December 2007 the public authority emailed the Commissioner and informed him that it had not been able to finalise a response but indicated that it would make every effort to provide a reply as soon as possible.
38. On 22 December 2007 the public authority emailed the Commissioner to again apologise for the delay in responding to him. It explained that it had been occupied on other matters but would endeavour to reply to his questions as soon as possible.
39. On 3 January 2008 the Commissioner wrote to the public authority enclosing an Information Notice. This notice required the public authority to provide him

with responses to the questions he raised in his email of 15 November 2007 within 30 days.

40. On 31 January 2008 the public authority provided the Commissioner with detailed responses to the questions asked in the Information Notice. The responses included details about the efforts the public authority had made to locate any information it might hold that was relevant to the complainant's request.
41. On 31 March 2008 the Commissioner emailed the public authority to point out that it had suggested that some of the withheld documents were exempt from disclosure as they were protected by legal professional privilege. He asked it to confirm which documents it believed this applied to and provide him with detailed arguments as to why it believed these documents were exempt.
42. On 16 April 2008 the public authority provided the Commissioner with details as to why it believed that some documents were exempt from disclosure on the basis that legal professional privilege was applicable to them.

## Analysis

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43. The full text of the provisions of the EIR which are referred to can be found in the Legal Annex at the end of this notice, however the relevant provisions are summarised below. The procedural matters are considered first and then matters relating to the application of the exceptions.

## Background

44. In December 2003, following a lengthy consultation exercise, the Government published its White Paper setting out a strategic framework for the development of air capacity in the United Kingdom for the next 30 years. The White Paper did not itself authorise or preclude any particular developments. However, it was intended to set out the Government's policy framework which was to inform future planning applications and to allow public bodies, airport operators and airlines to plan ahead with a degree of certainty.
45. The White Paper looked at factors driving demand for air transport, likely future demand, environmental concerns and safety and security issues and went on to put forward the Government's proposals for the airports in the different regions of the United Kingdom. In relation to Stansted Airport, it expressed support for the development of a second runway subject to strict environmental controls. The White Paper discussed the impact that a second runway would have on road and public transport, noise, emissions and the development of the surrounding area.

## Is the information environmental information?

46. The Commissioner initially considered whether the information that had been withheld by the public authority constituted environmental information as defined by regulation 2(1) of the EIR.

47. Regulation 2(1) provides that

*“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –*

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);*

48. The information that was withheld by the public authority comprised a considerable number of documents related to the development of the White Paper. These documents encompassed information on the following areas:

- i. existing capacity and future demand for air transport;
- ii. likely economic effects of the proposed development;
- iii. the commercial and financial viability of different options being considered;
- iv. how the proposals might be funded;

- v. environmental implications of the proposals such as the impact on climate change, air pollution and noise and discussions of possible action to protect the environment;
- vi. road and rail infrastructure changes necessary for access to the airport;
- vii. impact on local land use;
- viii. likely levels of opposition to the proposals;
- ix. health and safety issues;
- x. possible timescales for development.

49. In the Commissioner's view all of the withheld information is environmental information as it falls within regulation 2(1)(c) of the EIR. It constitutes information about policies, plans and activities, in this case the expansion of Stansted Airport, which are likely to affect some of the elements and factors referred to in regulation 2(1)(a) and (b) as well as measures or activities designed to protect some of those elements. The expansion of the airport would be likely to affect elements of the environment referred to in regulation 2(1)(a) such as air, atmosphere, land and the landscape. The information also contains discussions concerning measures and activities which might protect the air, land and landscape. In addition, these policies, plans and activities would be likely to affect factors referred to in regulation 2(1)(b), particularly noise and emissions, which would be likely to affect the elements of the environment referred to in 2(1)(a), such as air and land.

50. As well as constituting environmental information under regulation 2(1)(c), some of the information falls within regulation 2(1)(e), as it constitutes cost-benefit and other economic analysis and assumptions used within the framework of the activities referred to in 2(1)(c). Some of it also comes within regulation 2(1)(f), as it is information on the state of human health and safety as affected by matters referred to in 2(1)(c).

## **Procedural matters**

### **Information held by the public authority**

51. At the start of his investigation, the public authority provided the Commissioner with details of the documents it believed that it held in relation to the request. However, when the Commissioner asked to see these documents the public authority was initially unable to provide him with copies of some of them.



52. Following a number of searches of its records, the public authority was able to provide the Commissioner with copies of all of the missing documents with the exception of three, which it was unable to locate.
53. The public authority has provided the Commissioner with details of the efforts it has made to locate the missing documents. It has explained the extensive searches have been carried out of its electronic and paper records. In addition, it has provided details of the officers within the public authority, and those outside it, who have been contacted in an effort to find copies of the documents. This has included those involved in the preparation of the documents and those who have previously been provided with copies of them. In light of the evidence provided by the public authority, the Commissioner is satisfied that, on the balance of probabilities, it no longer holds the three remaining missing documents.

### **Regulation 14(3) – refusal to disclose information**

54. Regulation 14 requires that when a public authority refuses a request for environmental information it should do so in writing within 20 working days of the request and specify any exception under regulations 12(4), 12(5) or 13 that it is relying on. By failing to deal with the request under the correct legislation and therefore failing to issue a refusal notice which met these requirements, the public authority breached the requirements of regulation 14(3)(a).

### **Exceptions**

#### **Regulation 12(4)(e)**

55. Regulation 12 allows a public authority to refuse to disclose information if one of a number of exceptions to disclosure applies and, under regulation 12(1)(b), *“in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”*.
56. In this case the public authority relied on regulation 12(4)(e) which applies where the request is for the disclosure of internal communications.
57. The Commissioner initially considered whether the withheld information was contained within internal communications and then proceeded to assess the public interest arguments.

#### **Are all of the documents internal communications?**

58. The Commissioner is satisfied that the communications between officials in the Department for Transport, and the communications between officials in the Department for Transport and other government departments, constitute internal communications for the purposes of regulation 12(4)(e). He therefore went on to consider the public interest test in relation to this information.

59. However, some of the documents which were withheld were communications between the Department for Transport and the Civil Aviation Authority and submissions by the Civil Aviation Authority. The Commissioner does not accept that these fell within regulation 12(4)(e). The Civil Aviation Authority is separate public authority, independent of government, which acts as an aviation regulator and provider of air traffic services. Its communications with the Department can not therefore be regarded as internal communications. The Commissioner is therefore of the view that the exception was not engaged in relation to these communications and that they should have been released.

### **Public interest test**

60. Once the Commissioner determined that the exception in regulation 12(4)(e) was applicable to some of the information that had been withheld by the public authority, regulation 12(1) requires him to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosure.

61. The Commissioner notes that regulation 12(2) provides that, in dealing with a request for information, a public authority should apply a presumption in favour of disclosure.

### **Public interest in withholding the information**

62. The public authority argued that regulation 12(4)(e) recognises the importance of allowing government policy and decision making to proceed in the self contained space needed to ensure that it is done well. There needed to be a free space in which officials, Ministers and airport operators could consider policy options outside of the public arena and use imagination without fear that potential policy options would be held up to public criticism before they were sufficiently developed to justify informed debate. It stated that the documents being considered were all produced during the process of formulating Government policy which resulted in the White Paper on air transport produced in 2003.

63. The public authority was also of the view that, in producing the White Paper, the Government gave detailed consideration to a large number of potential policies in relation to different airports and different issues. It believed that it would be unhelpful at this stage, and prejudicial to policy making, for the detail of these considerations to be placed in the public domain as some of the issues that had to be considered during this process were of a highly sensitive and controversial nature.

64. The Commissioner notes that the information which was withheld consisted of a number of different elements including factual elements, discussions of issues under consideration and the provision of advice and expression of views on particular issues. He believes that the arguments for withholding information falling into the first two categories are generally weaker than for

information falling in the latter category. The impact of the disclosure of factual information and descriptions of the issues under consideration are not likely to have the same potential inhibiting effect as the disclosures of advice and opinions. The Commissioner considers that generally there is a strong public interest in the disclosure of factual information which has been used to provide an informed background to decision making.

65. The Commissioner notes the Information Tribunal's comments in *Friends of the Earth v The Information Commissioner and Export Credit Guarantee Department (EA/2006/0073)* that the degree of justification in protecting a safe space for policy deliberations would be stronger in circumstances which related to the early stages of policy formulation. (para 57)
66. The Tribunal went on to say, endorsing the view of the Tribunal in the *Department for Education and Skills v The Information Commissioner and The Evening Standard (EA/2006/0006)* case, that
- “...the timing of a request is of paramount importance in the sense that the earlier the request in relation to the process of policy making or formulation, the greater the consideration that should be afforded to whether the particular exception or exemption should be maintained.” (para 60)
67. The Commissioner acknowledges that the timing of a request is a very important consideration in this type of situation where different policy options are being examined and debated. He believes that once a decision has been made on the policy to which the information relates, the risk of disclosure prejudicing the policy process is likely to be reduced. This in turn reduces the public interest in withholding the information.
68. In this case the public authority's final decision in relation to the request was made nearly two years after the White Paper, to which the information related, was published and which set out the Government's policy choices. In the Commissioner's view there was therefore little risk of disclosure causing harm to the policy making process.
69. The Commissioner further notes the Tribunal's comments in the *Export Credit Guarantee Department* case in considering the application of regulation 12(4)(e), that there is an onus on the public authority
- “...to specify clearly and precisely the harm or harms that would be caused were disclosure to be ordered. If no such harm can be clearly made out given the terms and effect of Regulation 12(2), the balance must fall in favour of disclosure under the test in Regulation 12(1)(b).”. (para 53)
70. The public authority has not provided the Commissioner with detailed evidence as to why the disclosure of any of the information which was withheld would have been likely to cause harm to the free space needed to allow Ministers, officials and air operators to consider policy options once the

Government announced the policies it favoured in relation to Stansted Airport by the publication of its White Paper.

71. In the absence of such evidence, and given that nearly two years had elapsed since the publication of the White Paper when a final decision was made in relation to the request, the Commissioner can not see any significant public interest in withholding the information in order to protect a free space for policy deliberations.
72. The public authority also argued that there had been considerable public consultation and debate around the publication of the White Paper and at this stage only was such consultation and debate useful and appropriate.
73. The Commissioner does not accept that the public's interest in government policies, and its attempts to influence such policies, would or should be limited to periods prior to those policies being announced. Once a policy has been announced there will still often be significant debate over the issues concerned, particularly in relation to a sensitive issue such as airport expansion. The disclosure of information related to policy formation can be valuable in helping to inform that continued debate.
74. In addition, the public authority contended that some of the assumptions that may have been relied on during the policy making process might, with the benefit of hindsight, appear to have been mistaken. During the process these assumptions had to be accepted in good faith and it was only recently that they had been able to reflect on their veracity. To reopen these assumptions to scrutiny at this stage would be a potentially retrograde step in policy terms, as policy has built on and also progressed on from decisions that were founded on them. To release information of this sort would give scope to challenge several years of Government policy and undermine the basis on which it has been necessary for Government to proceed in this area.
75. The Commissioner does not accept that there is a public interest in withholding information because it may reveal that assumptions on which government policy were based were incorrect and therefore bring into question that policy. He believes that, where this is the case, there is a stronger argument for the disclosure of information as this would help to ensure transparency in relation to the decision making process and could lead to policies being corrected where they are based on false assumptions.
76. The public authority suggested that the data and issues discussed in the documents in question reflected the position at the time and were no longer either so relevant or accurate. Disclosure could have misled or otherwise misrepresented the latest thinking of Government and policy officials.
77. The Commissioner does not believe that the fact that information may be inaccurate or misleading is a legitimate basis for withholding the information in question. In such circumstances it is advisable for a public authority to release the information accompanied by a statement which puts the information into

context and corrects any errors which the public authority believes are contained within it.

78. It was argued by the public authority that the information that had been withheld related to the economic case for a further runway at Stansted Airport. The airport operator was expected to make a planning application for a second runway and so the issues were of particular sensitivity. Putting the documents into the public domain would have been likely to have prejudiced and complicated the planning process and potential public inquiry over the runway, and compromised the commercial sensitivities of any future developments.
79. The public authority also believed that the Government was under a duty to ensure that the legitimate business interests of its stakeholders, in this case the airport operator, were protected. These might have been jeopardised by the disclosure of the withheld information.
80. In addition, the public authority was of the view that the delivery of government policy in relation to the expansion of airports was very reliant on the cooperation of the airport operators. The release of material provided in response to confidential discussions with those airport operators would have significantly prejudiced future discussions and the effectiveness of relationships with the operators of Stansted and in turn other operators.
81. At the time that the public authority made its final decision regarding the request, the information that was withheld was nearly two years old. Any sensitivities regarding that information were likely to have been significantly reduced with this passage of time. It is therefore not readily apparent what harm might have been caused by the disclosure of specific pieces of information.
82. There was a considerable amount of information contained within the documents withheld by the public authority. The public authority did not identify to the Commissioner what particular harm would have been likely to have been caused by the disclosure of specific pieces of information or explain why, in each case, this would have been likely to happen. In the absence of such detailed evidence the Commissioner has been unable to conclude that disclosure could have caused any of the harm outlined by the public authority above.

### **Public interest in disclosing the information**

83. The Commissioner is aware that the future of air transport has been an issue on which there has been a very large amount of public interest and discussion. The Government's policies in this area have a potentially wide ranging impact on people's lives, the economy and the environment.
84. As the most densely populated region of the UK, the South East was likely to be most seriously affected by the expansion of air transport provision,

particularly in terms of pressures on land use and impact on local communities.

85. The development of a second runway at Stansted has the potential to have a major impact on the communities affected by it. There would be significant effect on local villages, the local landscape and on people's lives caused by the large amounts of additional traffic, noise and emissions. The new runway would also require the building of a greatly enhanced road and rail infrastructure.
86. There has been very strong opposition to the proposals from local authorities, local residents and environmental groups. There has also been opposition from some airlines which have concerns about the likely cost implications of a new runway, whether new capacity at Stansted is necessary and because they fear that the expansion of Stansted would have to be funded by cross subsidies from other airports.
87. On a broader level the issues related to the development of a second runway are relevant to the debates on emissions into the environment and global warming, particularly as it relates to air transport.
88. The disclosure of the withheld information would have been of assistance in providing a wide range of interested parties with more information on the factors and arguments considered by the Government before it decided to support the development of the second runway. This would have allowed a more informed debate. It would consequently have helped to further the public interest in the understanding of significant issues of the day.
89. Disclosure would also have furthered the public interest in promoting accountability and transparency by public authorities for decisions taken by them as it would have provided further information on the rationale behind the Government's decision to support the development of a second runway at Stansted. This in turn would have helped to increase public confidence that all relevant factors had been considered fairly and appropriately.
90. The release of the information would be of value in relation to the planning inquiry which will take place in respect of the airport operator's planning application for the development of the second runway. It would help to ensure that all the relevant information is presented at the inquiry before any decision is reached on the planning application.
91. The public interest might also be served by disclosure as it could bring to light information, not previously in the public domain, about the impact a second runway could have on public health and safety.
92. The possible development of a second runway at Stansted is clearly a complex issue with many differing factors and arguments needing to be taken into account by the Government before reaching a final decision on the correct policy to pursue. In assessing the public interest the Commissioner has taken note of the comments of the Information Tribunal in its decision in *Lord Baker*

*v The Information Commissioner and The Department for Communities and Local Government (EA/2006/0043)* that

“...we consider that full disclosure of the deliberations underlying a decision on a complex matter is arguably more important than in a simple one, where the issues may be more immediately evident.”(para 22)

93. After weighing the public interest arguments the Commissioner is not satisfied that the public interest in maintaining the exception outweighed the public interest in disclosing the information. He has therefore decided that the withheld information was not exempt from disclosure under regulation 12(4)(e).

### **Regulation 12(5)(b) – Legal professional privilege**

94. The public authority argued that five of the documents that it had withheld were subject to legal professional privilege and exempt from disclosure under the exception contained in regulation 12(5)(b). Regulation 12(5)(b) provides that the disclosure of information can be refused if it would adversely affect “...*the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal nature.*”

95. In *Kirkaldie v The Information Commissioner and Thanet District Council (EA/2006/001)* the Information Tribunal indicated that regulation 12(5)(b) “...covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.” (para 21)

96. Legal professional privilege is a set of principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between clients and their lawyers. It also covers exchanges which contain or refer to legal advice which might be imparted to the client.

97. There are two separate categories within legal professional privilege. Legal advice privilege applies where no litigation is contemplated or pending. Litigation privilege applies where litigation is contemplated or pending. The Commissioner is satisfied that in this case no litigation was contemplated or pending in relation to the advice that was sought and given. He has therefore concluded that legal advice privilege is the appropriate category to consider in this case.

98. For advice privilege to apply, a document must have come into existence for the sole or dominant purpose of either giving, or getting legal advice from a professional legal adviser. Having inspected the documents in question the Commissioner is satisfied that they fall within these criteria and that they therefore attract advice privilege. He is also satisfied that, where legal advice was sought or given, it involved a professional legal adviser.

99. The Commissioner has considered whether legal professional privilege might have been waived by the public authority by publicly disclosing information in

any of the documents in question. He has concluded that there is no evidence to suggest that this has occurred.

### **Adverse affect**

100. The Commissioner notes that for the exception under regulation 12(5)(b) to be engaged a public authority must demonstrate that disclosure would adversely affect one or more of the matters the regulation refers to. He accepts that it is not necessary for a public authority to prove that prejudice would occur beyond any doubt whatsoever. However, it will need to demonstrate that prejudice is more probable than not.
101. The public authority was of the view that disclosure would have adversely affected its ability to obtain legal advice in respect of other decisions or issues affecting it. Disclosure in this case would have made its officials and lawyers less willing in future to speak frankly when asking for and giving legal advice. It would also have led to a reluctance in the future to record fully advice that was provided. This could result in decisions being taken which were legally flawed and consequently affect the effectiveness of the public authority in fulfilling its responsibilities.
102. The Commissioner accepts that if the information which is subject to legal professional privilege were to be disclosed to the public this would undermine the principles on which it is based. He also accepts that it would adversely affect the public authority's ability to obtain legal advice in future which would have a detrimental effect on it as an organisation.
103. Having considered the arguments, the Commissioner is satisfied that in this case it is more probable than not that disclosure of the legal advice, and the requests for advice, would have adversely affected the course of justice and therefore that the exception provided by regulation 12(5)(b) is engaged.

### **Public Interest Test**

104. Under regulation 12(1)(b) all the exceptions provided by the EIR are subject to a public interest test. The Commissioner therefore considered whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

### **Arguments in favour of disclosure**

105. The Commissioner acknowledges the strong public interest inherent in releasing environmental information. The release of this type of information is important to enable the public to participate in environmental decision-making and have access to justice.
106. The Commissioner also recognises that there is an inherent public interest in government being transparent and accountable in relation to the advice it has received, particularly when it relates to a sensitive area such as airport expansion.



107. There is, in addition, a public interest in individuals having access to information that helps them understand and participate in the debate on environmental issues. In this case, access to legal advice might have provided the public with an opportunity to gain a greater understanding of some of the issues behind the Government's decision to support the development of a second runway at Stansted. This is of particular significance in this case as there is the potential for a large number of people to be affected by the development of the airport.

### Arguments in favour of maintaining the exception

108. The Commissioner acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view supported by the Information Tribunal. In *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*, the Tribunal stated that

“there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest” (para 35).

109. The Commissioner recognises that there is a need for reasonable certainty relating to confidentiality and the disclosure of legal advice. Without this, the principle of confidentiality would be undermined and the quality of legal advice may not be as full and frank as it ought to be, if there were a risk that it would be disclosed in the future. In *Bellamy* the Tribunal observed

“it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...”(para 35).

110. There is clearly a strong argument that public authorities should be able to obtain full and frank legal advice in confidence. Legal advice necessarily highlights both the strengths and weaknesses of a particular position and so if legal advice obtained were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR. In *Bellamy* the tribunal stated that “under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned” (para. 8). It can be argued therefore, there is a strong public interest in ensuring that legal professional privilege applies equally to all parties, so that they are on a level footing.

111. In this case the legal advice was only sought and provided just over a year before the request was made and therefore was relatively recent at that time. It was linked to the proposals for the expansion of Stansted Airport. When the public authority applied this exception the final decision in relation to these proposals was still a long way in the future. The advice was still therefore live and very relevant to the policy that was being pursued.

112. In addition, whilst the advice makes reference to Stansted Airport, it is of a nature which makes it potentially applicable to the Government's policies in relation to the development of other airports. It therefore clearly could not have been said to have been advice that had already served its purpose.
113. The Commissioner, having weighed the public interest arguments, has decided that in this case the public interest in maintaining the exception outweighs the public interest in disclosing the information and that the public authority was correct to withhold the relevant information under regulation 12(5)(b).
114. The Commissioner has attached a schedule to this notice which details his decision in relation to each of the documents held by the public authority.

## The Decision

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115. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - it correctly applied regulation 12(5)(b) to the information detailed in the schedule attached to this notice.
116. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - it failed to state in its refusal notice that regulations 12(4)(e) and 12(5)(b) were applicable to the withheld information or explain why these exceptions applied and therefore breached regulation 14(3)(a);
  - it incorrectly applied regulation 12(4)(e) to the withheld information.

## Steps Required

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117. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
  - to disclose to the complainant the withheld information, except for the information identified as exempt from disclosure under regulation 12(5)(b) in the schedule attached to this notice.
118. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Other matters

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119. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
120. The Commissioner considers that his investigation was unnecessarily delayed as a result of the public authority's continual requests for additional time to provide responses to his case officer's specific enquiries. Furthermore, he is disappointed that it was necessary to issue an Information Notice in order to elicit a proper response to his questions concerning the efforts made to locate information relevant to the request.
121. The public authority encountered numerous difficulties in locating information relevant to the request, to the extent that information which had already been disclosed to the complainant could not be found. These problems persisted throughout the Commissioner's investigation, and were a considerable obstacle to his case officer's attempts to bring the complaint to a close.
122. The public authority has admitted that there were clear failings in the records management processes in place at the Airports Policy Division at the time of the request, but has assured the Commissioner that any historical deficiencies have been addressed. Furthermore, the public authority has provided details of some of the improvements which have been undertaken since this time.
123. Whilst the Commissioner welcomes these improvements, he would like to remind the public authority that the section 46 Code of Practice sets out detailed recommendations on the practices that it would be desirable for authorities to adopt in respect of records management. The section 46 Code of Practice can be accessed at:

<http://www.dca.gov.uk/foi/reference/imp/imp/codemanrec.htm>

124. In addition, the Commissioner suggests that the public authority contact the National Archives in their capacity to provide advice on records management issues. The Commissioner considers that such an approach would complement the improvements the public authority has already made and would help to ensure that similar problems do not occur in future.

125. The relevant contact details are as follows:

<http://www.nationalarchives.gov.uk/recordsmanagement/>

[rmadvisory@nationalarchives.gov.uk](mailto:rmadvisory@nationalarchives.gov.uk)

Records Management Advisory Service (RMAS)  
National Advisory Service  
The National Archives  
Kew  
Richmond  
Surrey  
TW9 4

### **Failure to comply**

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126. 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

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127. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

128. 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.
129. 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 27<sup>th</sup> day of May 2008**

**Signed .....**

**Nicole Duncan  
Head of FOI Complaints**

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

## Legal Annex

### Regulation 2 - Interpretation

#### Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

### Regulation 3 - Application

**Regulation 3(1)** Subject to paragraph (3) and (4), these Regulations apply to public authorities.

**Regulation 3(2)** For the purposes of these Regulations, environmental information is held by a public authority if the information –

- (a) is in the authority's possession and has been produced or received by the authority; or
- (b) is held by another person on behalf of the authority.

## **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) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (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.

**Regulation 12(5)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
  - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

## **Regulation 14 - Refusal to disclose information**

**Regulation 14(1)** If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

**Regulation 14(2)** The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 14(3)** The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).



## Appendix

### Schedule detailing the Commissioner's decision in relation to the application of exceptions to the withheld documents

#### Bundle 1

No	Format	From	To	Date	Exception claimed	Commissioner's decision
1	Letter enclosing note	DfT	HMT	29/01/02	12(4)(e)	Letter not exempt. Note no longer held by public authority.
2	Paper	CAA	DfT	June 2003	S21 FOIA	Complainant not contesting public authority's decision.
3	Paper	BAA	DfT	12/05/03	S21 FOIA	Complainant not contesting public authority's decision.
4	Minute	DfT	DfT	11/07/03	12(4)(e)	Not exempt
5	Submission	DfT	SS for Transport	15/07/03	12(4)(e)	Not exempt
6	Minute	CAA	DfT	12/08/03	12(4)(e)	Not exempt
7	Report	CAA	DfT	12/09/03		No longer held by public authority.
8	Email	DfT	CAA	22/09/03	12(4)(e)	Not exempt
9	Minute	DfT	DfT	30/09/03	12(4)(e) 12(5)(b)	Exempt under 12(5)(b)
10	Minute	DfT	DfT	01/10/03	12(4)(e)	Not exempt
11	Emails	DfT	DfT	01/10/03 to 03/10/03	12(4)(e)	Not exempt
12	Minute	DfT	DfT	02/10/03	12(4)(e) 12(5)(b)	Exempt under 12(5)(b)
13	Letter	CAA	DfT	20/10/03	12(4)(e)	Not exempt
14	Minute	DfT	DfT	21/10/03	12(4)(e)	Not exempt
15	Minute	DfT	DfT	22/10/03	12(4)(e)	Not exempt
16	Emails and attachment	DfT	CAA	22/10/03 to 29/10/03	12(4)(e)	Not exempt
17	Minute	DfT	DfT	29/10/03	12(4)(e) 12(5)(b)	Exempt under 12(5)(b)
18	Email	DfT	DfT	03/11/03	12(4)(e) 12(5)(b)	Exempt under 12(5)(b)

19	Submission	DfT	SS for Transport	03/11/03	12(4)(e)	Not exempt
20	Paper	DfT		03/11/03	Disclosed	
21	Paper	DfT		03/11/03	Disclosed	
22	Emails and attachment	DfT and CAA	DfT, CAA and HMT	07/11/03	12(4)(e)	Not exempt
23	Minute	DfT	DfT	06/11/03	12(4)(e)	Not exempt
24	Letter	PM's Office	DfT	10/11/03	12(4)(e)	Not exempt
25	Minute	DfT	DfT	12/11/03	12(4)(e)	Not exempt
26	Paper			12/11/03	Disclosed	
27	Draft paper	DfT		13/11/03	12(4)(e)	Not exempt
28	Emails	DfT	HMT	13/11/03 to 14/11/03	12(4)(e)	Not exempt
29	Emails and attachment	DfT	CAA	25/11/03	12(4)(e)	Not exempt
30	Emails and attachment	DfT	CAA	20/11/03 to 21/11/03	12(4)(e)	Not exempt
31	Emails and attachment	DfT	CAA	25/11/05	12(4)(e)	Not exempt
32	Minute	DfT		25/11/03	12(4)(e)	Not exempt
33	Email	HMT	DfT	27/11/03		No longer held by public authority.
34	Emails	DfT	CAA	02/12/03	12(4)(e)	Not exempt
35	Instructions	DfT	Counsel	05/12/03	12(4)(e) 12(5)(b)	Exempt under 12(5)(b)
36	Letter	CAA	DfT	17/12/03	12(4)(e)	Not exempt
37	Email	DfT	CAA	19/12/03	12(4)(e)	Not exempt
38	Notes of High Court hearing	DfT		13/12/04 to 21/12/04	12(4)(e)	Outside scope of request.

## Bundle 2

No	Format	From	To	Date	Exception claimed	Commissioner's decision
1	Minute	SS for Transport	PM	11/03	12(4)(e)	Not exempt
2	Minute	DfT	SS for Transport	27/11/03	12(4)(e)	Not exempt
3	Paper	DfT	SS for Transport	01/12/03	12(4)(e)	Not exempt
4	Minute	DfT	Ss for Transport	21/11/03	12(4)(e)	Not exempt
5	Paper	WPSG	DfT	Undated	12(4)(e)	Not exempt
6	Paper	WPSG	DfT	Undated	12(4)(e)	Not exempt

7	Minute	DfT		Undated	Disclosed	
8	Letter	SS for Transport	Chancellor of Exchequer	Undated	12(4)(e)	Not exempt
9	Minute	SS for Transport	PM	11/03	12(4)(e)	Not exempt
10	Paper	DfT	SS for Transport	24/10/03	12(4)(e)	Not exempt
11	Minute	DfT	SS for Transport	31/01/03	12(4)(e)	Not exempt
12	Minute	DfT	SS for Transport	12/02/03	12(4)(e)	Not exempt
13	Minute	DfT	SS for Transport	27/03/03	12(4)(e)	Not exempt
14	Minute	DfT	SS for Transport	21/05/03	12(4)(e)	Not exempt
15	Minute	DfT	SS for Transport	07/07/03	12(4)(e)	Not exempt
16	Minute	DfT	SS for Transport	27/10/03	12(4)(e)	Not exempt
17	Minute	DfT	SS for Transport	24/10/03	12(4)(e)	Not exempt