

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

### Decision Notice

Date 9 July 2008

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

### Summary

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The complainant wrote to the Department for Culture, Media and Sport (DCMS) to request information about the Minister of Culture's issuing of a certificate of immunity from listing regarding Borthwick Wharf, Deptford. DCMS released much of that which was requested but withheld the remainder under section 36 (Prejudice to effective conduct of public affairs) and section 42 (Legal professional privilege) of the Freedom of Information Act. The Commissioner has found that the information requested was environmental information and that the request should have been handled under the Environmental Information Regulations 2004 (EIR).

Under the EIR, the Commissioner has decided the following:

- The information withheld under section 42 is exempt from disclosure under the exception at regulation 12(5)(b) (Course of justice);
- Apart from the names of officials and third parties, the exception at regulation 12(4)(e) (Internal communications) is engaged in relation to the information withheld under section 36. However, in all the circumstances of the case, the public interest in maintaining the exception does not outweigh the public interest in disclosure;
- In relation to the withheld names of officials and third parties, the Commissioner considers that this information is personal data and exempt from disclosure under exception at regulation 13 (Personal data);
- Several procedural breaches of the legislation under Regulations 5, 11 and 14 were committed by the Department in its handling of the request.

The Commissioner therefore requires DCMS to disclose the information withheld from the complainant, subject to the redaction of the names of officials and third parties and the document to which exception 12(5)(b) is engaged.

## The Commissioner's Role

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1. Because the information requested is considered to be environmental in nature, the Commissioner has made a decision as to whether the request was dealt with in accordance with the requirements of Part 2 of the Environmental Information Regulations (EIR). The EIR came into force on 1 January 2005, 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. The complainant wrote to DCMS on 19 September 2005 regarding the Minister of Culture's issuing of a certificate of immunity from listing regarding Borthwick Wharf, Deptford. In relation to this certificate, the complainant explained that he had received two Inspectors' reports from English Heritage. He then requested the following information:
  - i. Copies of the other documents that comprised the "relevant papers" perused by the Minister.
  - ii. Copies of all other communications, whether internal or external, in whatever format, including such things as notes of telephone conversations, relating to Borthwick Wharf.
3. DCMS responded to the complainant on 21 October 2005, in which it confirmed that it holds the requested information but stated that it may be exempt from disclosure either under section 35(1)(a) (the formulation of government policy) or section 36(2)(b) (would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purpose of deliberation.) However, DCMS then explained to the complainant that it needed to consider the balance of the public interest and estimated that it would take an additional twenty working days in order to reach a decision on this matter.
4. The complainant wrote to DCMS on 1 November 2005 to complain about the way his request has been handled, for the following reasons:
  - i. The response of 21 October 2005 was outside the twenty working day limit for response.
  - ii. Decisions whether to list a building or issue a certificate of immunity from listing under the Planning (Listed Buildings and Conservation Areas) Act 1990 are the application of policy not its formulation or development.

- iii. The "Department" rather than a Minister of the Crown has taken the decision to withhold the information under section 36, and there is no provision in the Act for a Minister of the Crown to make a retrospective decision under section 36.
  - iv. Section 36(2)(b) is incapable of application to the totality of the request as neither the relevant documents nor the other communications can consist solely of opinions or advice.
5. DCMS wrote to the complainant on 15 November 2005, in which it stated further to its response of 21 October 2005 it required an additional twenty days to complete its considerations. It also explained that it was dealing with the request for an internal review separately but would prefer to keep for its final response the concerns raised about sections 35 and 36.
  6. DCMS wrote to the complainant on 30 November 2005, in which it explained that it received the request of 19 September 2005 the following day. It then acknowledged that the response of 21 October 2005 should have been sent by 18 October and so was three days late.
  7. DCMS wrote to the complainant again on 13 December 2005, in which it stated that further to its letter of 15 November 2005, it required an additional five working days to complete its considerations.
  8. On 20 December 2005 DCMS provided a substantive reply to the request of 19 September 2005. The response contained the following:
    - i. An annex containing the papers perused by the Minister in making his decision to issue a Certificate of Immunity, other than the copies of those already in the possession of the complainant.
    - ii. An annex containing most of the other communications, internal or external, requested. However, DCMS stated that it cannot provide certain of these communications, being certain communications between officials and ministers and also legal advice, because they are exempt from disclosure under, respectively, section 36 and 42 of the Act.
  9. DCMS put forward the following justification in respect of the application of the exemptions:

"With regard to those communications exempt under s36, a Minister has given his opinion as per s36(2) that there is a risk that disclosure of this information would or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Officials need to be able to put their views and recommendations candidly to Ministers, and they may be inhibited from expressing themselves if they know that these views and recommendations are likely to be put in the public domain."

"Following the Minister's opinion, we considered whether the balance of the public interest lay in providing you with the information or in maintaining the exemption

- and withholding the information. We concluded that the balance lay in withholding the information because, although we considered openness as a factor in favour of release, we considered that this was outweighed by the potential detriment to the candour necessary in internal communications. We reached the same conclusion with regard to the information containing legal advice, particularly as we operate under a strong presumption that all legal advice is privileged.”
10. On 10 January 2006 the complainant requested an internal review of the DCMS response of 20 December 2006. He requested that the following points be addressed:
    - i. The general poor quality of photocopies supplied, illegibility of many of the manuscript comments, manuscript comments near the edge of pages have been lost;
    - ii. Details of nine documents which he can identify as missing from the disclosures without being specifically withheld (details provided) and a concern that there may be others which have been improperly withheld;
    - iii. That there is a *risk* that disclosure of the information withheld under section 36 would or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation is a much lower threshold than the test under section 36 that disclosure *would be likely to* have these consequences;
    - iv. Section 42 is invoked solely with regard to information containing legal advice and not in relation to memoranda or other communications seeking legal advice. Such communications are missing from the disclosures;
    - v. That a claim to legal professional privilege could be maintained in legal proceedings merely invokes section 42 but does not affect the balancing exercise;
    - vi. A considerable number of documents disclosed have had names and other details blacked out. No reason for this method of withholding information has been given. Civil servants were involved in the decision making process as part of their duties in carrying out their employment and should have realised that their names were liable to be released. Some of the documents disclosed are public documents as they concern a current planning application.
  11. On 22 February 2006 DCMS wrote to the complainant to inform him that it had not yet been able to conclude the internal review due to it taking longer than anticipated. It informed the complainant that it aimed to send a response by 15 March.
  12. On 16 March 2006 DCMS wrote to the complainant to inform him that it had not yet been able to complete all aspects of the review and now aimed to do so by 29 March 2006. However, DCMS stated that it had completed the part of the review

in relation to 'missing documents' and set out in an annex each of the nine complaints in relation to individual documents, followed by the Department's response.

13. DCMS confirmed to the complainant the following in relation to the 'missing documents':
  - i. Two DCMS consultation letters about the consideration of whether to issue a Certificate of Immunity from listing should have been disclosed, instead of solely the responses. Due to an oversight this did not happen. A copy of this information was enclosed but with names of the sender and recipient redacted as being 'not relevant to the request'.
  - ii. A report recommending that the building is of listable quality was not held at the time of compiling the response to the request.
  - iii. References to other cold stores were not considered to fall within the scope of the request, although details of where this information can be obtained were supplied to the complainant. References to guidance on Certificates of Immunity from listing were also not considered to fall within the scope of the request, but were now being enclosed.
  - iv. Following a search of its paper and electronic records it had established that the other documents referred to by the complainant were not held by the Department.
  - v. In the course of investigating the various aspects of the internal review, the Department had revisited the information held on Borthwick Wharf. It stated that when it has concluded all the remaining aspects of the review, it would confirm whether any other information which should have been disclosed on 20 December 2005 was not disclosed.
14. On 21 April 2006 DCMS wrote to the complainant to advise him that the internal review had been completed. Its outcomes were as follows:
15. General
  - i. The complainant has been provided with comprehensive replies about the lateness of the initial response.
  - ii. Additional photocopies of the material that was considered of poor quality have been provided.
  - iii. The claim to have identified that certain information was missing from the enclosures with the Department's letter of 20 December 2005 has been addressed.
  - iv. The Department did not complete the assessment of all the information related to the request by 18 October, in order to comply with section 10 of the Act. The Department was therefore not in a position to release the 'non exempt' information with the letter of 21 October 2005. Further, because there was a delay in completing the assessment of all the information, the initial response of 21 October 2005 did not cite all the exemptions that were ultimately found to apply.

- v. The Department revisited the information held on Borthwick Wharf and confirmed that it does not hold any further information that should have been disclosed.
- vi. With regard to the redaction of certain names and other details, from the context of the original request, it was the Department's view that the names of junior officials of the department and the names of third parties that it corresponds with was not the core information the complainant was seeking. It stated that this should have been made clearer in the original response. However, in light of the complainant's letter of 10 January 2006, it informed him that it had asked officials to give further consideration to the release of this information and would contact him about this separately within twenty working days.
16. Section 36(2)(b)(i) and (ii)
- i. The Department upheld the decision that the withheld information is properly exempt under this provision, with the public interest lying in favour of maintaining the exemption.
- ii. It stated that the information withheld under section 36 relates to the provision of advice from officials to the Minister and the exchange of views between officials on issues relating to the consideration of whether or not Borthwick Wharf merited listing. It also advised that the qualified person has given their opinion that release of this information would prejudice the interests protected by section 36 of the Act.
- iii. The complainant was informed that the following public interest factors in favour and against disclosing the information were taken into account:
- For
- Understanding the way in which Government operates, how Ministers interact with their advisers and officials, and how officials interact with one another and with third parties;
  - Greater transparency of the decision-making process provides greater accountability of Government to the public, increases trust and understanding, and maintains public confidence in the impartiality of officials.
- Against
- The public interest in transparency has already been substantially met by the disclosure of a large amount of information under cover of the letter of 20 December 2005;
  - The public interest in Ministers being able to make fully informed decisions following the candid expression of views and advice of officials.
  - Officials must be allowed to formulate advice in a free and frank manner about how the listing policy applies in individual cases. The subsequent premature release of these views and recommendations would be likely to inhibit the willingness of officials (and third parties) to engage and debate issues fully and provide such free and frank advice as necessary in the circumstances. In turn, this would damage the quality of decision-making and the Government's ability to defend its decisions.

- iv. DCMS also advised the complainant that the use of the word “risk” was a misuse in the drafting and not a matter of substance. It also clarified that at the time of writing to him on 21 October 2005, it had yet to seek the opinion of a Minister in relation to section 36 and that in the event it was decided not to rely on section 35. It also acknowledged that it was incorrect to issue an extension of time letter before deciding absolutely that s35 or s36 applied in this case and that the Department ought to have considered this information within the twenty day time limit and provided the reasoning for relying upon the exemptions cited.
17. Section 42(1)
- i. The complainant was advised that information that was exempted under section 42 was found to properly fall within this exemption as it is information in respect of which a claim of legal professional privilege could be maintained. It informed him that in this case the balance of the public interest lies in withholding this information and that the following factors both for and against disclosure were taken into account:
- For
- Transparency of decision making;
  - Knowing that Government seeks legal advice and acts appropriately in the circumstances.
- Against
- The weight attached to the confidentiality of interaction between a lawyer and his client is crucial to the effective working of that relationship.
  - Parties being free to seek the advice of their lawyer without such exchanges being made public. If this were so, there would be a reluctance on the part of the client to be as fully free and frank as might be required in the circumstances, which in turn might lead to inaccurate advice being given.
  - It is in the public interest to ensure that decisions taken by Government are taken in a fully informed legal context, and that the advice is recorded in detail and its confidentiality is protected. Such legal advice must take account of all the relevant facts, and the context in which the advice is sought. Subsequent disclosure of such advice would be likely to prejudice these aims.

## The Investigation

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### Scope of the case

18. On 9 June 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- i. A failure to respond within twenty working days;
  - ii. The conformity of the refusal notice with section 17 of the Act;
  - iii. The redaction of the names of civil servants and third parties;
  - iv. The application of the exemptions under sections 36 and 42 of the Act;
  - v. The assertions that certain documents identified by the complainant as being missing, in addition to further documents, are not held.
19. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of the EIR.

## Chronology

20. On 6 September 2007 the Commissioner contacted DCMS to request the following information in order to progress his investigation:
- i. Copies of all information withheld from the complainant with each aspect of the information marked to indicate the exemption which has been applied;
  - ii. Any further representations DCMS wishes to make about the application of the exemptions;
  - iii. Justification for the redaction of the names of civil servants and third parties from the information supplied to the complainant;
  - iv. Confirmation as to whether any other information falling within the scope of the request was held by the Department at the time of responding to the complainant's request.
21. DCMS responded to the Commissioner on 15 October 2007. Its submission included copies of the documents withheld from the complainant. It stated that all the information was exempt under section 36 apart from an internal email which was being withheld under section 42.
22. DCMS also informed the Commissioner of the following reasons behind its decisions in this case:
23. DCMS' policy regarding personal and contact details of listing applicants
- The Department's policy is generally not to release the names and addresses of private individuals who make listing applications. It does not want ordinary members of the public to be deterred from making applications for listing out of concern that these details might be released to third parties, some of whom may not be happy about the decision to list (or de-list). The same policy is adopted in respect of individuals working on behalf of, or representing, an organisation where they express concern about the release of their name and contact details.
  - The release of the names of those making third party representations (as well as those of the Department's officials) was quite significant in terms of the material released and a final decision as to whether to disclose these names



or withhold them was never reached due to the work that would have been required.

24. Section 36

- The Department's application of section 36 was particularly influenced by the close proximity in time between the listing decision letter about Borthwick Wharf, dated 14 September 2005, and the complainant's request made on 19 September 2005.
- The complainant has been provided with a copy of the letter sent to all the relevant parties in September 2005 informing them of the decision not to list Borthwick Wharf. This contained a summary of the evidence that had been considered by the Secretary of State and her reasons for reaching this decision. It also provided two Inspectors' reports from English Heritage dated December 2004 and February 2005.
- In the event that the Commissioner concludes that section 36 does not apply, it is considered that references in the withheld information to the identities of those who have made representations about Borthwick Wharf to be exempt under section 40 of the Act, as this is personal information.

25. Section 42

- The information that falls within the scope of section 42 is an internal email from one of the Department's legal advisers to a policy official.
- The information contains legal advice and there were no copy recipients to it and the advice was not circulated outside of the Department. As such, privilege was not considered to have been waived.

### **Findings of fact**

26. The Secretary of State is required by law to compile a list of buildings of special architectural and historical interest. When a building is listed the only factor which is relevant and which English Heritage, the Secretary of State's statutory advisers on the Historic Environment, and the Secretary of State, can take into account, is whether it possesses special architectural or historic interest. The criteria for assessment are laid down in Planning: Policy Guidance Note 15, Planning and the Historic Environment. In considering whether to add a building to the list, Ministers will be provided with a submission that summarises all relevant arguments and offers a recommendation based on the strength of these arguments. If there are opposing views then the submissions must explain why the decision maker has reached their conclusion.
27. Once a decision has been made a letter is prepared for the listing applicant and the owner of the building if different; this will explain the reason for the decision. This information is a distillation of the arguments included in the submission. The decision not to list Borthwick Wharf was taken on 14 September 2005.

## Analysis

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### Procedural matters

#### Regulation 2 – Interpretation

28. The Commissioner considers that the requested information falls within regulation 2(1)(c) of the EIR. This defines *any information* on the following as being environmental and therefore subject to the EIR:

*“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 measure designed to protect those elements.”*

29. The Commissioner considers that the listing process including the decision to list or not list a building is an administrative measure likely to affect the elements and factors listed in (a) and (b) such as land and landscape. Information about the decision is environmental information because it is information on the operation of the listing process as a measure, which is likely to affect the two elements listed above. The process will have an effect because a decision not to list a building, which opens up potential for it to be demolished, has an effect on the landscape around the area of a building. A decision to list a building will have the effect of preserving the existing landscape.
30. The full provisions of regulation 2 can be found in the legal annex. Having viewed the information withheld from the complainant, the Commissioner therefore concluded that it is environmental information as defined by the EIR. This means that DCMS handled the complainant’s request under the incorrect legislation.

#### Regulation 5 – Duty to make available environmental information on request

31. The relevant provisions of Regulation 5 state that:
- (1) 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.
  - (2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
32. The Commissioner notes that the information requested by the complainant to which DCMS did not apply an exemption was not supplied to him until 20 December 2005. This response therefore exceeded the statutory timescale for response, constituting a breach of Regulation 5(2).
33. The Commissioner also addressed the complainant’s concern about missing documents and other requested documents stated by DCMS as not being held.

He assessed the DCMS submission to the complainant of 16 March 2006, in which it provided information falling within the scope of the request to which it had not applied an exception and had not previously released to the complainant. By not having supplied this information within twenty working days of the initial request, DCMS committed a further breach of Regulation 5(2).

34. The Commissioner also concluded that DCMS breached Regulation 5(1) in relation to the information withheld from the complainant that he ultimately found was not covered by an exception. This information should therefore have been released (see exceptions analysis below).
35. However, having considered DCMS' representations to the complainant of 16 March 2006, together with its submission of 15 October 2007 (including copies of the information to which exceptions were applied), the Commissioner is satisfied that there is no further information held by the Department falling within the scope of the request for which it has not now accounted.

### **Regulation 11 – Representations and reconsideration**

36. Regulation 11 provides that where an applicant makes representations to a public authority if it appears to him that it has failed to comply with a requirement of the EIR:

“A public authority shall notify the applicant of its decision...as soon as possible and no later than 40 working days after the receipt of the representations.”

37. The Commissioner notes that the complainant requested an internal review of the Department's decision on 10 January 2006. However, the Department did not inform him of the full outcome of its review until 21 April 2006. This constitutes a breach of Regulation 11(4).

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

38. The relevant provisions of Regulation 14 are as follows:

- (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.
- (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.
- (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).

39. The Commissioner notes that DCMS response of 21 October 2005 did not notify the complainant of the formal application of any exemption to the requested

information. Instead, this notification was delayed until 20 December 2005. This constitutes a breach of Regulation 14(2) and 14(3).

40. In addition, by failing to deal with the request under the correct legislation, the refusal notice of 20 December 2005 constituted a further breach of Regulation 14(3).

## Exceptions

### Exception 13 – Personal Data

41. The DCMS submission to the Commissioner of 15 October 2007 contained references to all individuals referred to in the information requested by the complainant which were withheld, together with details of the documents in which they were recorded.
42. The Commissioner notes that DCMS withheld from the information requested by the complainant names of private individuals and third parties and names of officials from the Department. These names were either redacted from documents disclosed to the complainant or contained within documents being withheld in their entirety under section 36 of the FOI Act.
43. The Commissioner did not consider whether exception 12(4)(e) was engaged in respect of this information (as the alternative to section 36 of the FOI Act). This is because he is satisfied that the exception under regulation 13 applies to these references. The provisions of regulation 13 can be found in the legal annex.
44. In relation to regulation 13(1), the Commissioner is satisfied that this particular information is personal data as defined in the Data Protection Act 1998. That Act defines personal data as:

*...data which relate to a living individual who can be identified-*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller...*

45. In relation to 13(2), the Commissioner considers that release of this information would contravene the first data protection principle, which requires that:

*“Personal data shall be processed fairly and lawfully, and, in particular, shall not be processed unless-*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 2 is also met”*

46. The Commissioner’s decision is based upon the following analysis of this information, which led him to conclude that disclosure would be unfair, in this case:

#### a) Department Officials

- i. The withheld names are those of junior officials. Coupled with the nature of the information in this case, the Commissioner does not consider that these officials should be publicly responsible or accountable for their involvement in decisions of the Department. The Commissioner considers that relating these officials' names to the information released to the complainant would have this consequence and that disclosure of the names in the context of documents in which they were recorded would therefore be unfair. Rather, he believes that in this case, accountability for these decisions more properly rests at the departmental/more senior/Ministerial levels.
- ii. The Commissioner does not consider there to have been a reasonable expectation that Officials who are recorded in the documents falling within the scope of the request would be likely to have their names released under FOI/EIR as part of the disclosure of internal communications about the matter in question. This is also the case because disclosure of these names would not increase the public's understanding of the matter in question; otherwise it would be less likely to be the case that these officials could reasonably expect their names to not be disclosed in connection with this material.

#### b) Names of people making third party representations

- i. These individuals do not have an expectation that their details might be released to third parties.
  - ii. Release of this information into the public domain would identify both the names and views of people making representations to the department.
  - iii. These individuals are acting in their private capacity and cannot be expected to be accountable or publicly responsible for their views or representations.
47. The names in a) and b) can therefore be withheld under regulation 13(1) by virtue of regulation 13(2)(a)(i) , as disclosure would be unfair and would contravene the first data protection principle.

#### **Exception 12(4)(e) – Internal Communications**

48. The Commissioner studied the information that DCMS withheld under section 36 of the FOI Act. This was made up of eight documents consisting of:
- Draft letters
  - Internal minutes and submissions
  - Draft decision letters
49. However, during the course of the investigation the Commissioner determined that the information is environmental and should have been dealt with under the

EIR. However, the Commissioner is satisfied that the information withheld under section 36 also falls within the scope regulation 12(4)(e). (However, the Commissioner considered references to officials and third parties under exception 13 instead; see above. His analysis of the information withheld with regard to regulation 12(4)(e) therefore excludes these names.)

50. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. Regulation 12 states that a public authority may refuse to disclose environmental information if (a) an exception to disclosure under (4) or (5) applies; and (b) in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 12(2) also provides that a public authority shall apply a presumption of disclosure.
51. In determining the public interest under Regulation 12(4)(e), the Commissioner took into account the nature of the information withheld from the complainant and considered the public interest in disclosing the information and the public interest in maintaining the exception:

Public interest factors in favour of maintaining the exception:

- i. The risk that disclosure could inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
- ii. The need for officials to be able to freely develop their views and recommendations; in order to protect the quality of decision-making.
- iii. The prejudicial effects that release might have on the relations between civil servants and ministers and to the involvement of civil servants in the decision-making process.

Public interest factors in favour of disclosing the information:

- i. Understanding the way in which Government operates.
- ii. Providing further information to enable greater understanding of the decision made in this listing process, which could potentially lead to the destruction of an historic building.
- iii. Transparency in decision-making, in relation to the listing process.
- iv. Promotion of debate about the process as to how decisions are made whether or not to list buildings.
- v. Promoting the accountability of Government for decisions taken, in particular the listing decision taken to which that compliant relates.
- vi. Promoting public participation in decision making in matters relating to the environment.

- vii. For the public to see the “full picture” of the information used in the decision making process.
52. The Commissioner has carefully considered the arguments put forward by DCMS about the importance of officials being able to provide candid advice and potential damage to the quality of government decision making. However in this case, the Commissioner finds these factors carry little weight as he does not believe the disclosure of the information in this case will result in the harmful effects described. His reasons for reaching this conclusion are as follows:
- i. Much of what is contained within the documents is already in the public domain due to the substantial body of information previously provided by DCMS to the complainant and submissions sent to other interested parties.
  - ii. Disclosure of this information would not be likely to harm the decision making process or prejudice the position of DCMS if released. This is because the Commissioner does not consider its contents to be sensitive, particularly with regard to:
    - the nature of the deliberation;
    - views expressed; and
    - the way in which the information is presented, which is generally formal in nature.
  - iii. The Commissioner also notes the following in relation to the content of this information:
    - differences between the content of this information and that already released are minor and do not relate to any matters of substance; and
    - no internal differences of views on the matter can be ascertained.
  - iv. By the time the complainant had made his request the Minister had made the decision and the need to protect a ‘safe space’ to provide candid advice had reduced.
53. The Commissioner has also considered the decision of the Information Tribunal in *Lord Baker v the Information Commissioner and DCLG (EA/2006/043)*. The case concerned submissions made to a Minister related to a decision to grant planning permission. The Commissioner believes reasoning set out by the Tribunal in paragraph 18 of its decision can apply in this case. The Commissioner agrees with the Tribunal’s observation that in providing advice to support a decision making process officials may become more rigorous and disciplined in view of the prospect of further public scrutiny.
54. The argument put forward by DCMS that transparency is already met by the large volume of information is not a factor to which the Commissioner has given weight. The focus must be on the disclosure of the withheld information and the Commissioner believes there is a significant public interest in the public seeing the whole picture of all the information used in the decision making process, rather than summarised forms. The public interests factors in favour of the

maintenance of the exception listed above carry some weight but are also reduced to some extent by the fact substance of some of the information is in the public domain already. The Commissioner has also taken into account the presumption in favour of disclosure contained in regulation 12(2).

55. Therefore, in the circumstances of the case, the public interest in maintaining the exception does not outweigh the public interest in disclosure. All the information to which Regulation 12(4)(e) is engaged (which DCMS considered to be exempt under section 36 of the Act) should therefore be released apart from names of junior officials and third parties (but including details of Departmental Ministers).

**Exception 12(5)(b) – Disclosure 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 or disciplinary nature.**

56. The Commissioner notes that DCMS applied section 42 of the Act (Legal professional privilege) to an email from a legal adviser to a policy officer which contains legal advice.
57. In the Information Tribunal case of *Kirkaldie v the Information Commissioner and Thanet District Council* (EA/2006/001) the Tribunal expressed the view that the purpose of the exception under 12(5)(b) was reasonably clear, stating that it “exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial.” It continued that to do this, the exception, “covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation” (para. 21).
58. In conclusion, the Tribunal stated that it would be “reluctant to find that a public authority could not argue that a similar exemption or exception could not be applied under the correct legal instrument” (para. 44). It therefore decided that the exception under 12(5)(b) is “similar” to the exemption under section 42 of the Act. This view was also upheld in a further Tribunal decision; *Burgess v the Information Commissioner and Stafford Borough Council* [Appeal number: EA/2006/0091].
59. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI*) as “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)
60. There are two types of privilege – legal advice privilege and litigation privilege. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for



the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.

61. On the basis of the above, and having reviewed the information withheld, the Commissioner is satisfied that the correspondence to which this exemption was applied constitutes legal advice privilege, disclosure would adversely effect the interests listed regulation 12(5)(b) and the exception is engaged. He also accepts the Department's reasons for demonstrating that privilege has not been waived in this case.
62. However, Regulation 12(5)(b) is subject to the public interest test. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated that: "There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest." It concluded that "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..." (paragraph 35).
63. In summary, legal professional privilege was referred to as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases. It also confirmed that when considering the public interest it is not relevant to consider the number of individuals affected by the issue. (paragraph 35) The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale. (paragraph 35)
64. Against the arguments for maintaining the exception in this case, the Commissioner considered public interest arguments in favour of disclosure, as listed above (paragraph 17) and in addition the specific public interest in seeing the legal reasoning that lay behind the decision..
65. The Commissioner considers all the arguments favouring disclosure, when applied to the content and context of the withheld information, to carry weight. However, in the circumstances of this particular piece of information, the Commissioner considers that the arguments for disclosure are outweighed by the arguments in favour of maintaining the exception under 12(5)(b). The Commissioner has therefore concluded that in this case the public interest in disclosing this information is outweighed by the public interest in maintaining the exception.

## The Decision

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66. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
- i. Regulation 13 in relation to the decision to withhold the names of third parties.
  - ii. Regulation 12(5)(b) in relation to the email from a legal adviser to a policy officer.
67. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. Regulation 5(1) and 5(2) (Duty to make available environmental information on request) in relation to:
    - a) The release of the 'missing documents', in breach of the 20 working day limit;
    - b) The timing of the Department's response of 20 December 2005, in breach of 20 working day limit; and
    - c) Incorrectly concluding that the public interest favoured withholding the information to which exception 12(4)(e) was engaged (excluding details of officials and third parties).
  - ii. Regulation 11(4) (Representations and reconsideration) in relation to the timing of the internal review.
  - iii. Regulation 14 (Refusal to disclose information) in relation to the timing and content of the Refusal Notices.
  - iv. Incorrectly applying the exception under regulation 12(4)(e) (Internal communications) (excluding the names of junior officials and third parties).

## Steps Required

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68. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:
- Disclose the information withheld from the complainant, subject to the redaction of:
- i. Names of officials and third parties; and
  - ii. Information covered by the exception at regulation 12(5)(b).
69. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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70. 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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71. 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).

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 9<sup>th</sup> day of July 2008**

**Signed .....**

**Steve Wood**  
**Assistant Commissioner**

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

## Legal Annex

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### Regulation 2 - Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and  
“working day” has the same meaning as in section 10(6) of the Act.

**(2)** Subject to paragraph (3), “public authority” means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
  - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
  - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
  - (i) has public responsibilities relating to the environment;
  - (ii) exercises functions of a public nature relating to the environment; or
  - (iii) provides public services relating to the environment.

**(3)** Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.

**(4)** The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(b), namely –

- (a) “data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
- (b) “the data protection principles”;

- (c) “data subject”; and
- (d) “personal data”.

**(5)** Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

### **Regulation 13 – Personal Data**

**(1)** To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

**(2)** The first condition is –

- (b) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
  - (i) any of the data protection principles; or
  - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (c) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

**(3)** The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

**(4)** In determining whether anything done before 24<sup>th</sup> October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

**(5)** For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.