

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

### Decision Notice

**Date: 3 November 2009**

**Public Authority:** Department of Energy & Climate Change  
**Address:** 3 Whitehall Place  
London  
SW1A 2HD

### Summary

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The complainant requested copies of all information held by the public authority about a decision to produce a document entitled 'Onshore Wind Energy Planning Conditions Guidance Note'. The public authority disclosed some information but redacted individuals' names from these documents on the basis of regulation 12(3) - personal data and withheld further documents on the basis of regulations 12(4)(d) – incomplete data; 12(4)(e) – internal communication; 12(5)(b) – course of justice; and 12(5)(f) – interests of the person who provided the information.

The Commissioner has concluded that all of the withheld information constitutes information about emissions and therefore regulation 12(5)(f) cannot be relied upon to withhold any of the information. The Commissioner has also concluded that some of the information withheld on the basis of 12(4)(e) does not constitute internal communications. However, the Commissioner has concluded that some information does fall within the scope of regulations 12(4)(d) and 12(4)(e) respectively and the public interest favours maintaining each exception. The Commissioner has concluded that regulation 12(5)(b) does provide a basis to withhold some information and the public interest favours maintaining the exception. In disclosing the information the Commissioner has decided is not exempt, the public authority can only use regulation 12(3) to withhold the names of the individuals not already named in the published version of the Guidance Note. The Commissioner has therefore ordered disclosure of all information falling within the scope of the request except that which the Commissioner has concluded is exempt on the basis of regulations 12(5)(b) and 12(3).

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

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

## Background

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2. The document which is the focus of the request, 'Onshore Wind Energy Planning Conditions Guidance Note', was commissioned by the Renewable Advisory Board (RAB) in 2006. The Guidance note aimed to set out a best practice guidance document for planners and consenting bodies in drawing up planning conditions for onshore wind energy developments. The final version of the guidance was subsequently published on BERR's website in October 2007.
3. The RAB is an independent non-departmental public body that provides advice to government on how to meet its renewable energy objectives. The RAB is sponsored by the government department which is responsible for energy policy. Throughout the lifecycle of this request and subsequent complaint to the Commissioner, the government department sponsoring the RAB changed due to machinery of government changes.
4. When the Guidance was first being produced the RAB was sponsored by the Department for Trade and Industry (DTI). By the time the complainant submitted his request to the Department for Business Enterprise and Energy Reform (BERR) in June 2007 it had taken over sponsorship of RAB. In October 2008 responsibility for energy policy was transferred to the newly created Department for Energy and Climate Change (DECC).
5. Therefore throughout this notice the references to the name of the government department responsible for the report changes to reflect the various machinery of government changes.
6. However, the Commissioner is satisfied that it is appropriate to serve this notice on the DECC as the public authority with current responsibility for handling this request.

## The Request

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7. On 15 June 2007 the complainant submitted the following request to the DTI:

'I make the following request pursuant to section 1 of the Act in respect of all correspondence, names of the consultees, the remit, all drafts, revisions and discussions ("the information") relating to the decision to produce and the production of the onshore wind energy planning conditions guidance

referred to in the letter from Lester Hicks of the Department of Communities and Local Government to all planning authorities in England dated 23 November 2006 and referencing the url [www.dti.gov.uk/energy/sources/renewables/policy/renewables-advisory-board/planning/page35020.html](http://www.dti.gov.uk/energy/sources/renewables/policy/renewables-advisory-board/planning/page35020.html)

8. On 2 August 2007 BERR provided the complainant with a response to his request. This response explained that as the information being sought was about wind energy and the planning process it was appropriate to deal with it under the EIR rather than under the Act. The response went on to respond to each part of the information request in turn:
  - In respect of the names of those consulted by the DTI over the Guidance, BERR provided the complainant with the list of organisations who were asked to contribute and the names of individuals at each of these organisations.
  - In respect of the drafts and revisions of the guidance BERR explained that this information was exempt from disclosure on the basis of regulation 12(4)(d) as this information constituted material which was still in the course of completion or related to unfinished documents or incomplete data.
  - In respect of all correspondence, the remit and discussions relating to the decision to produce and the production of the guidance, BERR argued that this information was exempt from disclosure on the basis of 12(5)(f) which provides an exception to the disclosure of information which would adversely affect the interests of the person providing it to the public authority.
  - BERR also explained that it considered that some of this information was exempt from disclosure by virtue of regulation 12(4)(e) which provides an exception to disclosure for information which constitutes internal communications.
  - BERR noted that all of these exceptions were qualified but it had concluded that the public interest favoured maintaining the exceptions.
9. The complainant contacted BERR on 6 August 2007 and asked it to undertake an internal review of its decision to refuse to disclose the information he had requested on the basis of the exceptions cited in the previous paragraph.
10. BERR provided the complainant with the outcome of the internal review on 1 October 2007. BERR's response explained that it had concluded that a small amount of information had been incorrectly withheld and copies of this material were provided to the complainant. However, BERR noted that it had redacted the names and contact details of the individuals mentioned in it on the basis of regulation 12(3) as well as information that did not fall within the scope of the request. BERR also informed the complainant that it had concluded that the exceptions contained at sections 12(4)(d), 12(4)(e) and 12(5)(f) had been correctly relied upon to withhold the remainder of the information. In addition, BERR explained that it also believed that some of the withheld information was also exempt from disclosure on the basis of regulation 12(5)(d) because it constituted legal advice and requests for such advice.

## The Investigation

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### Scope of the case

11. The complainant contacted the Commissioner on 20 November 2007 in order to complain about BERR's decision to refuse to disclose the information that he requested. The Commissioner understands that this complaint covers the redactions made on the basis of regulation 12(3) to the documents that were disclosed at internal review and the decision to withhold complete documents on the basis of the other exceptions set out above.

### Chronology

12. On 16 September 2008 the Commissioner contacted BERR and asked to be provided with unredacted copies of all of the information that falls within the scope of the complainant's request and detailed submissions to support its position that this information was exempt from disclosure on the basis of exceptions contained in the EIR, namely:
  - Regulation 12(3) – personal data;
  - Regulation 12(4)(d) – material still in the course of completion; unfinished documents or incomplete data;
  - Regulation 12(4)(e) – disclosure of internal communications;
  - Regulation 12(5)(f) – adverse affect to the interests of persons who provided the information; and
  - Regulation 12(5)(b) – course of justice
13. The Commissioner asked BERR to ensure that in replying it clearly identified which exceptions it considered to apply to which parts of the withheld information.
14. The Commissioner received a substantive response from BERR on 24 October 2008 which enclosed copies of the documents that had been withheld. BERR provided some further arguments to support its position that this information was exempt from disclosure on the basis of the above exceptions but largely referred the Commissioner to the arguments set out in its refusal notice of 2 August 2007 and the internal review response of 1 October 2007. BERR also provided the Commissioner with unredacted copies of the documents provided to the complainant at the internal review stage.

### Findings of fact

15. Planning conditions are 'requirements attached to a planning permission to limit, control or direct the manner in which a development is carried out'.<sup>1</sup> Conditions are required to meet six criteria: they must be necessary; relevant to planning; relevant to the development being permitted; enforceable; precise; and reasonable in all other respects.

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<sup>1</sup> Definition taken from the Planning Portal Glossary: [www.planningportal.gov.uk](http://www.planningportal.gov.uk)

16. The Guidance note discusses the following types of condition which can be applied to wind energy developments: general; aeronautical; archaeology; construction and access; decommissioning; ecology and ornithology; electrical connection; electromagnetic production and interference; landscape and visual impact; noise; and shadow flicker.
17. The exempt information which falls within the scope of this request is voluminous in nature and largely consists of emails chains. In order to assist his investigation and analysis of this complaint the Commissioner created a schedule which lists all of the exempt information – with the exception of that already disclosed to the complainant with redactions made on the basis of regulation 12(3) - and details the exception which BERR considers to apply to each piece of information. A copy of this schedule will be provided to the public authority but in order not to disclose any of the withheld information a copy of the schedule will not be provided to the complainant. For the purposes of creating this schedule the Commissioner has defined a piece of information as an individual email chain.
18. The only exception to this is for the email chains which have been withheld on the basis of regulation 12(4)(e) because for the reasons set out in detail below the Commissioner believes that the application of 12(4)(e) has to be considered on an email by email basis, rather than an email chain by email chain basis.

## Analysis

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### **Regulation 2(1) – Why is the information ‘environmental’ information and what kind of ‘environmental’ information is it?**

19. Regulation 2(1) of the EIR defines ‘environmental information’ as any information in any 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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

20. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
21. In its refusal notice BERR explained that it considered the EIR to be applicable to this request because the information being requested was about wind energy and the planning process.
22. The Commissioner has considered the withheld information and agrees with BERR that it constitutes environmental information as defined by the EIR. However, the Commissioner has also decided that the withheld information also relates to information on 'emissions'. This has a fundamental affect on this case as BERR has sought to rely on 12(5)(e) to withhold a significant amount of information and regulation 12(9) states that:

'To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs [12]5(d) to (g)'.
23. The Commissioner has set out in the following paragraphs why he considers the withheld information to be environmental information which relates to emissions:
24. The Commissioner notes that although the guidance note focuses on a range of planning conditions with only 2 pages of the 25 page published version of the guidance discussing the 'noise' condition, a significant proportion of the withheld information focuses on the 'noise' condition. This information contains discussions on the noise waves which emanate from windfarms.
25. The Commissioner therefore believes that this information – i.e. the information which is on noise associated with windfarms – falls within the scope of the EIR by virtue of the fact that it falls within the scope of regulation 2(1)(b). For information to fall within the scope of regulation 2(1)(b) the Commissioner believes that the following criteria have to be met:
  - The information itself must be **on** a factor;
  - The factor (not the information itself) must affect or be likely to affect the elements in 2(1)(a).
26. As noted above, a significant proportion of this information is on noise which is listed in 2(1)(b) as a factor. The Commissioner is satisfied that it is well

documented that noise waves generated by windfarms (both infrasound and low frequency noise) affect the air in immediate vicinity of windfarm; air is listed in 2(1)(a) as one of the states of the environment. Thus the parts of the information which are on noise in the withheld information constitute environmental information by virtue of regulation 2(1)(b).

27. The Commissioner has previously determined in decision notice FER0184376 that for the purposes of the EIR 'noise' constitutes an emission.<sup>2</sup>
28. The basis of this finding is as follows:
29. Although the Commissioner acknowledges that noise is listed in regulation 2(1)(b) alongside emissions, as a factor, he believes that 2(1)(b) should be interpreted as meaning the noise can be characterised as an emission. In the Commissioner's opinion information can be characterised as falling within one or more of the factors listed in regulation 2(1)(b); in other words noise and emissions are not mutually exclusive.
30. In reaching this position the Commissioner has been mindful of the views expressed by the Tribunal in *OFCOM v ICO & T-Mobile* (EA/2006/0078). In this case the Tribunal considered whether information relating to radio wave energy, transmitted from a mobile phone transmitter, could be considered to be information relating to information on an emission. In reaching a decision on this the Tribunal stated:

'It is conceivable that those drafting the Directive did intend the word "emissions" to have a narrower meaning for the purposes of regulation 12(5)(e) than would normally be applied to it. However, no guidance appears in the Directive to assist us in deciding whether it should be interpreted in that way. The 16th recital suggests that the grounds for refusal to disclose should be interpreted in a restrictive way. It follows that any exception to such a ground should be given a broad interpretation. Against that background we believe that we should only apply the more restrictive meaning if we are given clear guidance to that effect. We do not believe that we are provided with such guidance by the Implementation Guide. The Aarhus Convention itself does not cross refer to the definition in the IPPC directive. Even if it did it need not necessarily follow that the same definition should be adopted (again without any direct cross reference to it) for the purposes of interpretation of either the Directive or the EIR. Although recital 5 of the Directive states that it is intended that it be broadly consistent with the Aarhus Convention, there is no suggestion that the Directive is intended to implement the terms of the Convention in the same way that a national measure, such as the EIR, is intended to implement a Community Directive and thereafter to be interpreted in a manner that complies with it. Nor is there any provision within the Aarhus Convention itself, or among its recitals that indicates what meaning should be applied to the word. For all of these reasons we conclude that "emissions" in both sub paragraph (b) of the definition of environmental

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<sup>2</sup> [http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fer\\_0184376.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fer_0184376.pdf)

information and regulation 12(9) should be given its plain and natural meaning and not the artificially narrow one set out in the IPPC Directive. As we have indicated it is accepted, on that basis, that radio wave radiation emanating from a base station is an emission.' (Tribunal at para 25).

31. The Commissioner finds the comments of the Tribunal persuasive. In particular he has noted the Tribunal's statement that the definition of emissions, 'should be given its plain and natural meaning...'
32. In considering the 'plain and natural' meaning of the word emission the Commissioner has considered the definitions in the Oxford English Dictionary of the words emission and emit. It defines the word 'emission' as 'something emitted', and the verb 'emit' as (amongst other things): 'Give off, send out from oneself or itself, (something imponderable, as light, sound, scent, flames, etc.)'
33. In light of this the Commissioner believes that the information contained within the exempt information which is on noise generated by windfarms is also information on emissions generated by windfarms.
34. However, the Commissioner accepts that the remainder of the exempt information does not focus on the noise condition or noise generated by windfarms. Rather it discusses other aspects of the guidance note, for example other planning conditions or the six criteria which planning conditions must meet.
35. Nevertheless the Commissioner believes that this information can still be said to be environmental information on emissions for the following reasons:
36. The Commissioner believes that the remainder of the information which does not directly discuss the noise condition or noise generated by windfarms is environmental information by virtue of regulation 2(1)(c). For information to fall within the scope of regulation 2(1)(c) the Commissioner believes that the following two criteria have to be met:
  - The information itself must be on a measure or activity;
  - The measure or activity (not the information itself) must affect, or be likely to affect, the elements and factors in 2(1)(a) and (b), or be designed to protect the elements in (a).
37. Regulation 2(1)(c) provides a broad range of examples of measures, including policies, legislation, plans and programmes. Set against this list the Commissioner believes that the guidance note which is the focus of this request can be said to be a measure falling within regulation 2(1)(c) particularly because the list of examples contained at regulation 2(1)(c) should be regarded as non-exhaustive. Given the broad reading of the phrase 'information on', the Commissioner believes that remainder of the withheld information which discusses various aspects of this guidance, and includes draft sections of the final version of the guidance, can also be said to be information on a measure falling within the scope of regulation 2(1)(c); in effect it is information which is closely related to the measure itself, i.e. the final piece of guidance.



38. Furthermore the Commissioner is conscious of the effect of regulation 12(9) which states that the exceptions contained at 12(5)(d) to (g) are dis-applied not just when information is on emissions, but also to the extent that the information to be disclosed 'relates to' information on emissions. Moreover, the Commissioner believes that regulation 12(9) should be interpreted to not simply to mean emissions that have already taken place but can also include past, present and future emissions. In the Commissioner's opinion the remainder of the information – i.e. that which focuses on planning conditions other than noise – relates to the information on emissions, i.e. the information on the noise condition. This is because both categories of information are held for the common purpose of creating the Guidance Note and thus are closely related. Furthermore, having reviewed the withheld information carefully the Commissioner notes that given the structure of some of the withheld documents the information on the noise condition and information on other conditions contained within these documents are so physically intertwined, it is difficult to conclude that they are not related to each other. In reaching this conclusion the Commissioner is conscious of the comments of a number of Information Tribunals that the term 'relates to' should be interpreted broadly as well as the Tribunal's comments quoted in paragraph 30 which emphasise that 12(9), and its effect of restricting the application of 12(5)(d) to (g), should be interpreted broadly.
39. In conclusion the Commissioner's position is that the parts of the withheld information which are directly concerned with noise generated by windfarms constitutes information on emissions by virtue of regulation 2(1)(b). Furthermore, the parts of the withheld information which do not directly discuss noise generated by windfarms can still be said to be information on emissions by virtue of regulation 2(1)(c) and 12(9).

### **Exceptions**

40. As noted above in the Chronology section, BERR has relied on a number of exceptions as a basis upon which to refuse to disclose the withheld information. The Commissioner has considered the application of each exception in turn beginning with the application of regulation 12(5)(b).

### **Regulation 12(5)(b) – course of justice**

41. BERR has argued that the documents numbered 1 to 8 in the attached schedule are exempt from disclosure by virtue of the exemption contained at regulation 12(5)(b) of the EIR.
42. Regulation 12(5)(b) provides an exception to disclosure of information where a 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 and inquiry of a criminal or disciplinary nature'

43. In the case of *Kirkaldie v Information Commissioner & Thanet District Council* (EA/2006/0001) the Information Tribunal set out what it considered the purpose of this exception to be:

‘The purpose of this exception is reasonably clear. 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 right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.’ (Tribunal at para 21).

44. The Commissioner is also conscious of the views of a Tribunal in *Rudd v Information Commissioner & The Vederers of the New Forest* (EA/2008/0020) which stated that:

‘...the Regulations refer to ‘the course of justice’ and not ‘a course of justice’. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone, has long been recognized as an integral part of our adversarial system.’ (Tribunal at para 29).

45. The Commissioner therefore accepts that legal professional privilege is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase ‘course of justice’.

### **Is the exception engaged?**

46. In order to reach a decision as to whether the information is engaged the Commissioner has first considered whether the information withheld under regulation 12(5)(b) is subject to legal professional privilege.
47. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
48. The Commissioner understands that the category of privilege BERR is relying on is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege.

49. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and answer which can usually be found by inspecting the documents themselves.
50. The Commissioner has reviewed the material contained within documents 1 to 8 and is satisfied that it constitutes communications between BERR and its legal advisers (albeit that the legal advisers are employees of BERR) or communications which reflect such communications, the sole or dominant purpose of which is the provision of legal advice. The Commissioner is therefore satisfied that the information contained in documents 1 to 8 is subject to legal professional privilege.
51. The Commissioner has gone on to consider whether the disclosure of documents 1 to 8 would have an adverse affect on the course of justice.
52. In reaching a decision on whether disclosure would have an adverse affect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council* (EA/2005/0026 & EA/2005/0030) in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse affect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
53. The submissions BERR provided to support its position that the disclosure would adversely affect the course of justice were brief. However, they focused on the argument that disclosure would affect its ability to obtain sound legal advice because those asking for the advice would be inhibited from setting out in full the issues in question. Furthermore, the lawyer providing the advice would be inhibited in fully analysing the points at issue, including setting out where necessary any strengths or weaknesses of the advice that was being provided.
54. In reaching a view on whether regulation 12(5)(b) is engaged in this case the Commissioner has considered the comments of the Tribunal in EA/2008/0020 in which the Tribunal considered whether the disclosure of legal advice obtained by a public authority would have an adverse affect on the course of justice. In that case the public authority argued that amongst other reasons disclosure of legal advice would:
  - It would adversely affect its ability to obtain legal advice in respect of other decisions or issues affecting the authority and its responsibilities.
  - It would undermine the relationship between the authority and its lawyers, inhibiting the free and frank exchange of views on its rights and obligations.
  - Disclosure would lead to the authority not speaking frankly in the future whilst seeking advice.

- Disclosure could lead to reluctance in the future to record fully such advice, or legal advice may not be sought – leading to decisions being made that would potentially be legally flawed.

55. After considering these arguments the Tribunal was satisfied that these matters related to the course of justice and that disclosure would have an adverse affect upon them.
56. Having taken into account the similarities of these arguments which were accepted by the Tribunal and those relied upon by BERR, and in particular the content of the information contained in documents 1 to 8, the Commissioner accepts that disclosure of these documents would more likely than not adversely affect the course of justice. Regulation 12(5)(b) is therefore engaged.

### **The public interest test**

57. Regulation 12(5)(b) is subject to the public interest test set out at regulation 12(1) which states that a public authority can only rely on an exception contained within 12(4) or 12(5) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

### **Public interest factors in favour of disclosing the information**

58. In its refusal notice, internal review and letter to the Commissioner, BERR identified a number of public interest arguments in favour of disclosing the information falling within the scope of the request. The Commissioner believes that these are relevant to the assessment of 12(5)(b) and has therefore summarised them below:
59. There is a public interest in greater transparency in order to make government more accountable and increase trust.
60. Disclosure would allow the public to make a more effective contribution to policy making.
61. There is a public interest in people being able to assess the quality of advice being provided to, and considered by, the DTI in preparation of the Guidance and as a result being confident that it was being prepared on the basis of the best information available.
62. The complainant also highlighted the following public interest arguments in favour of disclosing the withheld information:
63. Disclosure would allow the public to assess whether the decision making process in relation to the compilation of the Guidance was fair; the complainant noted that a number of the stakeholders who contributed to the Guidance derived an income from the wind farm industry and there was the potential for a conflict of interest.

64. The complainant highlighted the fact that the Guidance had the potential to affect a significant number of people given the fact that it would be used by planning bodies throughout the UK.

### **Public interest factors in favour of maintaining the exception**

65. BERR has argued that it would not be in the public interest if communications between a lawyer and the client were disclosed. This is essentially because of the prejudicial effects set out in the above paragraphs.

### **Balance of public interest factors**

66. In considering the balance of the public interest under regulation 12(5)(b), although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

‘The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty that those in favour of maintaining the exemption’. (Tribunal at para. 41).

67. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:

- how recent the advice is;
- whether it is still live;

68. In terms of disclosure he also considered the following factors:

- number of people affected;
- transparency of the public authority's actions.

69. With regard to the age of the advice the Commissioner accepts the argument advanced by a number of Information Tribunals that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of the decision making process.

70. In many cases the age of the advice is closely linked to whether the advice is still live; advice is said to be live if it is still being implemented or relied upon and

therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

71. The Commissioner has reviewed the advice which falls within the scope of this case and believes that it is accurate to describe it as recent – the advice in question dates from late 2006 and the complainant submitted his request in June 2007. Furthermore the Commissioner considers the legal advice at the time of the request to be live and moreover it is possible that legal advice was being relied upon to support a number of decision making processes, i.e. not just the preparation of the Guidance.
72. However, the Commissioner agrees with the complainant that the Guidance has the potential to affect a significant number of people given that it is Guidance that will be used by planning authorities across the UK.
73. Turning to the final factor, that of transparency and accountability, in the Commissioner's opinion the Commissioner recognises that BERR did disclose some, albeit not a huge amount of information, at the internal review stage. Furthermore, having reviewed the legal advice which has been withheld the Commissioner notes that it represents a relatively small proportion of the information that has been withheld and only relates to a small proportion of the Guidance. Therefore in the Commissioner's opinion disclosure of the legal advice would not necessarily add a huge amount to the public's understanding of how the Guidance document as a whole was produced.
74. In conclusion, when taking into account the strong inbuilt weight in favour of protecting legal professional privilege, the fact that this information is recent and still being relied upon and the fact that disclosure would not add substantially to the public's understanding of how the Guidance was drafted, the Commissioner believes that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
75. The Commissioner has therefore concluded that BERR was correct to withhold the documents numbered 1 to 8 on the basis of regulation 12(5)(b).

**Regulation 12(4)(d) - material still in the course of completion or unfinished documents.**

76. BERR has argued that the documents numbered 9 to 12 in the schedule are exempt from disclosure by virtue of the exception contained at regulation 12(4)(d).
77. Regulation 12(4)(d) allows a public authority to withhold information if:

‘the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.’
78. The exception is class based, therefore if information falls within the scope of regulation 12(4)(d) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to any particular purpose.

79. The Commissioner has reviewed the contents of documents 9 to 12 and is satisfied that they contain draft versions of the report or constitute communications which directly discuss draft versions of the report. Therefore the Commissioner is satisfied that documents 9 to 12 fall within the scope of the exception contained at 12(4)(d).

### **The public interest test**

80. Regulation 12(4)(d) is a qualified exception and therefore subject to the public interest test set out at regulation 12(1).

### **Public interest factors in favour of disclosing the information**

81. In the Commissioner's opinion the public interest arguments in disclosing the information which is exempt on the basis of regulation 12(4)(d) are broadly similar to the public interest arguments set above in relation to the exception contained at regulation 12(5)(b).

### **Public interest factors in favour of maintaining the exception**

82. In relation to the public interest test under 12(4)(d), BERR explained to the Commissioner that it had considered releasing the requested information before publication but had concluded that this would not be in the public interest for a number of reasons:
83. Firstly, it would unfairly disadvantage others waiting for publication of the final version of the Guidance.
84. Secondly, it would not be prudent for a document that was not finalised to be disclosed as the department could find itself in a position where in effect two different versions of the Guidance would be in the public domain and this would be misleading.
85. Thirdly, the early drafts contain comments which, if made public, might allow the person making them to be identified. BERR explained that it valued its relationships with stakeholders, such as the people who contributed to this Guidance, and would not want to damage this relationship by publishing their comments in an attributable way where they had an expectation that this would not occur.

### **Balance of public interest factors**

86. In relation to attributing weight to BERR's arguments in favour of maintaining the exception, the Commissioner has not given any weight to the first factor identified. This is because the Commissioner considers information disclosed under the EIR, as with information disclosed under the Act, to effectively be a disclosure to the world. This is because save for a very small number of exceptions which did not apply here, both regimes are applicant blind. This means that if a public authority is prepared to disclose information to one applicant it is logical to

assume that it will be prepared to the same information to another applicant. Therefore, by disclosing information in response to this request, in the Commissioner's opinion BERR would be prepared to disclose the same information to another applicant.

87. In relation to the second argument the Commissioner acknowledges that his guidance on regulation 12(4)(d) notes that 'when faced with a request for information which is as yet incomplete, public authorities must consider whether disclosure of the information would be misleading because incomplete or whether disclosure would make it difficult or impossible to complete work'.<sup>3</sup>
88. The Commissioner notes that request was submitted in June 2007 and the final version of the report was published in October 2007 and therefore there was only a relatively short period of time for BERR to have to deal with any enquires about confusion which flowed from the disclosure of the draft reports. Moreover the Commissioner is conscious that in disclosing information public authorities have the option of setting it in some wider context and thus going some way to alleviate any potential confusion.
89. Nevertheless, in the circumstances of this case the Commissioner believes that this argument does deserve to be given particular weight because the actual process of having to provide this context and explain the drafts would be likely to significantly disrupt BERR's activities. The Commissioner has reached this conclusion because the disclosure of the drafts before the final version of the Guidance could have led to enquires from a broad range of interested parties with strong views on wind farm development: e.g. private individuals, companies involved in the industry or planning bodies with a particular interest in content of the Guidance.
90. With regard to the third argument advanced by BERR the Commissioner considers that this bears some resemblance to the 'chilling effect' argument which has been considered by previous Tribunals. Basically, chilling effect arguments are directly concerned with the argued loss of frankness and candour in debate and advice which would flow from the disclosure of information which it is said would lead to poorer quality advice and less well formulated policy and decisions. The ultimate consequence of such a chilling effect is that a public authority will struggle to engage stakeholders to contribute to policy making.
91. The chilling effect can in fact encompass a number of related scenarios:
- Disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will make future contributions to that policy;
  - The idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and

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<sup>3</sup> [An Introduction to the EIR Exceptions](#)



- Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.
92. The Commissioner has established that the stakeholders who contributed to this policy were both external non-governmental organisations, e.g. the British Wind Association and civil servants within government departments. In the Commissioner's opinion the relevance of the chilling effect for each group, i.e. the external stakeholders and internal stakeholders, represented by civil servants, is slightly different.
93. In considering the weight that should be attributed to potential chilling effect in terms of civil servants the Commissioner has taken into account the general scepticism with which the Tribunal has treated such arguments when they have been advanced by other public authorities. The following quote from the Tribunal in *Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047)* accurately summarises the position of differently constituted Tribunals:
- ‘we adopt two points of general principle which were expressed in the decision in *HM Treasury v the Information Commissioner EA/2007/0001*. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential ..... Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity.’ (para 26).
94. However, the Commissioner has taken into account the comments of Mr Justice Mitting when hearing a Tribunal decision which was appealed to the High Court. Whilst supporting the view of various Tribunals that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations but rather are likely to be relevant in many cases:

‘Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as “ulterior considerations” was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give

any weight to those considerations will, if they exist at all, be few and far between.<sup>4</sup>

95. Moreover, the Commissioner is conscious that to date the Tribunal has not directly addressed the narrowest impact that has been argued - i.e. the first bullet point of the three listed above – but focused instead on the more wide ranging chilling effects.
96. In light of the various pieces of case law, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments has to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself and the timing of the request.
97. Having considered the circumstances of this case, and the arguments advanced by BERR, the Commissioner is prepared to accept that some weight should be given to the first and narrowest type of chilling effect because at the time of the request the report had not yet been published and the civil servants involved still required a safe space in which to freely and frankly make final contributions to the report.
98. With regard to attributing weight to this argument in relation to the external stakeholders, the Commissioner has also taken into account the comments of the Tribunal in two cases, *Department for Business Enterprise and Energy Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072) and *Evans v Information Commissioner and Ministry of Defence* (EA/2006/0064) in which the impact of disclosing information on lobbyists' ability to discuss issues with government in a free and frank manner was considered. Both Tribunals concluded that given that lobbyists' primary aim is to influence government they are unlikely to be easily inhibited from making a free and frank contribution.
99. However, in this particular case the Commissioner believes that communications BERR received from the external stakeholders can be distinguished from the lobbyists' communications in the two Tribunal cases quoted above. In this case the external stakeholders are in fact responding to a consultation having been invited to do so by a government department rather than attempting to lobby, in the traditional sense of the phrase, the government on behalf of particular clients. Therefore, having considered the arguments advanced by BERR and the particular circumstances of this case, the Commissioner is prepared to accept that disclosure of this drafts in June 2007 could have had a limited chilling effect on the way in which these external stakeholders may have made further contributions to the Guidance before it was published.
100. With regard to attributing weight to the public interest factors in favour of disclosure the Commissioner recognises that they are ones which are regularly relied upon in support of public interest in favour of disclosure, i.e. they focus on openness, transparency, accountability and contribution to public debate. However, this does not diminish their importance as they are central to the

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<sup>4</sup> Export Credits Guarantee Department v Friends of the Earth [2008] EWHC 638 (Admin) (17 March 2008)

operation of both the Act and EIR and thus are likely to be employed every time the public interest test is discussed. Nevertheless, the weight attributed to each factor will depend upon a number of circumstances, again the key ones being the content of the information and the timing of the request.

101. In terms of the disclosure assisting the public to make a more effective contribution to the policy making process the Commissioner notes that with regard to this particular policy, i.e. the drafting of the Guidance, by the time the complainant submitted his request the publication date for the Guidance was only four months away. Therefore the opportunity for the public to make contributions to the process was relatively small as the Guidance was in the final stages of being prepared.
102. Rather the arguments in favour of disclosure which attract more weight are those which focus on issues of transparency and accountability, in particular because of the potential for this Guidance to have an affect on a significant number of people and because of the potential conflicts of interest highlighted by the complainant; disclosure could thus increase trust as identified by BERR. However, having reviewed the amount and nature of information withheld on the basis of regulation 12(4)(d) the Commissioner is not convinced that its disclosure would greatly inform the public as to how the Guidance was published not least because there are only a small number of documents withheld on this basis and the drafts are those compiled later in the process and thus are closer to the final version of report than initial drafts and earlier discussions.
103. The Commissioner has therefore concluded that in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure.

#### **Regulation 12(4)(e) – internal communications**

104. BERR has argued that the documents numbered 13 to 26 in the schedule are exempt from disclosure by virtue of the exception contained at regulation 12(4)(e).
105. Regulation 12(4)(e) allows a public authority to withhold information if:

‘the request involves the disclosure of internal communications’.
106. The exception is class based, therefore if information falls within the scope of regulation 12(4)(e) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to any particular purpose.
107. The Commissioner recognises that neither the EIR, nor the Directive upon which they are derived from, provide a definition of what constitutes an internal communication.<sup>5</sup>

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<sup>5</sup> Council Directive 90/31EEC & 2003/4/EC:

[http://www.ico.gov.uk/upload/documents/library/environmental\\_info\\_reg/detailed\\_specialist\\_guides/european\\_directive\\_\(eur-lex\).pdf](http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/european_directive_(eur-lex).pdf)

108. However, regulation 12(8) confirms that internal communications includes communications between government departments.
109. As the Commissioner has noted above, for the purposes of this exception he is of the opinion that the documents 13 to 26 have to be considered on an email by email basis rather than as email chains.
110. The Commissioner's reasoning for this is as follows:
111. In the Commissioner's opinion information provided to a public authority from a third party will not constitute an internal communication no matter how it is later disseminated within the public authority provided it can be reasonably separated from other internal communications. In practice this means that if a third party emails an individual at a public authority and that individual forwards that email to a colleague within the public authority, although the actual email between the two colleagues within the public authority will constitute an internal communication for the purposes of 12(4)(e), the original email that was received from the third party will not, despite the fact that this was effectively communicated between two colleagues at the public authority.
112. The Commissioner's rationale for this approach is as follows:
  - (i) The Aarhus Convention and the Directive (article 4(2)) were clear that exceptions contained in the EIR should be interpreted restrictively.
  - (ii) In email chains, each email could be easily separated and thus on a practical level it was easy to apply 12(4)(e) restrictively in this particular case.
  - (iii) Although 12(4)(e) is similar to the exemption contained at section 35(1)(a) of the Act which provides a class based exemption for information 'if it relates to the formulation or development of government policy', and under the Act entire email chains would fall within the scope of section 35(1)(a), regulation 12(4)(e) does not have a 'relates to' dimension and thus it can be interpreted more restrictively.
113. The Commissioner has therefore compiled a further schedule of the emails contained within documents 13 to 26. This has been appended to the version of the decision notice sent to the public authority.
114. The Commissioner has identified the following classes of email contained within documents 13 to 26:
  - Emails between two individuals at the DTI. As these are emails within one public authority the Commissioner accepts that these constitute internal communications for the purposes of 12(4)(e).
  - Emails between two individuals in different government departments, e.g. the DTI and Defra. Given the effect of regulation 12(8) the Commissioner accepts that these emails constitute internal communications for the purposes of 12(4)(e).

- Emails between an individual at the DTI but only sent or received by individuals in other administrations, i.e. the Scottish Executive or the Welsh Assembly. In the Commissioner's opinion the exception contained at regulation 12(4)(e) cannot be extended to include communications between a public authority and the Scottish Executive or the Welsh Assembly. The Commissioner's reasoning for this is as follows:
115. The organisation of government departments are effectively under the control of the Prime Minister; he can reorganise his Cabinet, abolishing or merging some departments and creating new ones to meet the demands of government as he sees fit. In essence all government departments are ultimately under his control through his appointment of ministers and the influence he exerts over the Cabinet. It therefore makes sense that for the purposes of internal communications all such departments are considered as one body, hence the effect of regulation 12(8). By contrast the Welsh Assembly and Scottish Executive are independent bodies, pursuing their own objectives and policies. They are separate administrations with their roles and authority set out in statute. It therefore seems reasonable in the Commissioner's opinion to treat these devolved administrations as separate bodies for the purposes of regulation 12(4)(e). The Commissioner finds support for this position in a decision of the Scottish Information Commissioner in which he concluded that email exchanges between the Scottish Government and the Scotland Office would not constitute internal communications.<sup>6</sup>
- Emails between an individual at the DTI and external third party contractors. There are two such contractors who have engaged in emails with the DTI in relation to the report, New Acoustics and AEA. The Commissioner has considered carefully whether for the purposes of producing the report these two external third parties could be said to be part of the DTI and thus communications between them and the DTI would constitute an internal communication. The Commissioner has concluded that these two third parties should not be considered as part of the DTI for the purposes of regulation 12(4)(e) and thus such emails do not fall within the scope of that exception.
116. The Commissioner's reasoning for this is as follows:

The Commissioner notes the comments in the Information Tribunal's decision in *Department for Transport v Information Commissioner*, EA/2008/0052, which involved the consideration of regulation 12(4)(e). The Tribunal stated that whether the exempt information constituted an internal communication was a question of fact and law and moreover it suggested that:

'We do not consider that it is possible, or desirable, to attempt to devise a standard test as to what amounts to internal or external communication, for example by reference to the nature of the communication or its audience. It will depend on the context and facts in each situation'. (Para 96).

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<sup>6</sup> [Decision 052/2008, Mr Stuart Nicolson and the Scottish Ministers](#)

117. In considering the engagement of 12(4)(e) in this case in relation to the third parties, the Commissioner has borne in mind these comments of the Tribunal. Furthermore, the Commissioner has taken into account the actual findings of the Tribunal in respect of whether 12(4)(e) was engaged in that case. This case involved a request for a copy of a draft report prepared for the Department for Transport and HM Treasury by Sir Rod Eddington, the former Chief Executive of British Airways, on the future of the UK's transport policy. The Tribunal ultimately concluded that regulation 12(4)(e) was engaged.
118. In brief summary in the DfT case the Tribunal concluded that regulation 12(4)(e) was engaged on the basis that:
- In preparing the report in question Sir Rod was firmly 'embedded' into the civil service – he had his office at the DfT and used business cards showing the logos of both the DfT and HM Treasury;
  - Sir Rod had access to the confidential thoughts of the Ministers who commissioned the report and was thus invited into the 'safe space' of policy development within the DfT and HM Treasury;
  - Although Sir Rod provided the overall direction of the report and was ultimately responsible for its conclusions, the study was managed and run by senior civil servants.
  - The drafts of the report had limited circulation.<sup>7</sup>
119. The Commissioner has also considered the findings of a more recent Tribunal decision, *South Gloucestershire Council v Information Commissioner* (EA/2009/0032). The requestor in this case sought copies of independent development appraisals carried about for the Council by external consultants. In this case the Tribunal concluded that the appraisals did not fall within the scope of the regulation 12(4)(e) on the basis that:
- The consultants in question were not integrated into the Council: they were not seconded to the Council or otherwise imbedded nor did they take decisions or otherwise act on behalf of the Council; and
  - Paying attention to both form and to substance, and to the particular circumstances of and nature of the communications, the consultants' reports could not be properly characterised as internal communications of the Council.<sup>8</sup>
120. Whilst the Commissioner has not used the findings of the Tribunal in either case as a direct model to follow in considering the DECC's application of regulation 12(4)(e) – indeed to do so would contradict that Tribunal's comments at paragraph 96 in *DfT* that each case has to be considered on its merits – he has found that the Tribunal's conclusions have provided a useful 'real life' example against which this present case can be analysed
121. In the Commissioner's opinion the DTI's relationship with the two external third parties in question lacked the proximity Rod Eddington had with the DfT, i.e. they

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<sup>7</sup> See paragraphs 95 to 98 of EA/2008/0052.

<sup>8</sup> See paragraphs 23(h) and 33 of EA/2009/0032.

were not embedded into the DTI in the way that he was. Furthermore it is the Commissioner's understanding that the two consultants did not, unlike Eddington, have overall control of the direction of the report. Rather they were two, of a number of external stakeholders who contributed to the compilation of the report. On this basis the Commissioner is satisfied that neither third party could be said to be part of the DTI for the purposes of this case and emails between the third party and the DTI do not constitute internal communications. The Commissioner believes that this finding is in line with the logic adopted by the Tribunal in *South Gloucestershire Council*.

122. Therefore the emails which the Commissioner has concluded do not fall within the scope of regulation 12(4)(e), should be disclosed. For the emails which the Commissioner does accept fall within the scope of regulation 12(4)(e), as this regulation is subject to the public interest test set out at 12(1), the Commissioner must decide if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

#### **Public interest factors in favour of disclosing the information**

123. In the Commissioner's opinion the public interest arguments in disclosing the information which is exempt on the basis of section regulation 12(4)(e) are broadly similar to the public interest arguments set above in relation to the exception contained at regulation 12(5)(d).

#### **Public interest factors in favour of maintaining the exception**

124. BERR identified the following public interest arguments in favour of maintaining the exception contained at 12(4)(e):
125. Disclosure would allow individual contributors and their comments to be identified and the members of the Working Group did not agree to this. If individuals who contributed to the Guidance knew that there was a possibility that what they said would be published on an attributable basis then this could dissuade them, and other organisations, from contributing to policy making in the future. It would not be in the public interest that the government is not able to get input from stakeholders.
126. Disclosure would also reveal the contributions made by individuals within the department (and other government departments) to the Guidance and again disclosure could affect their ability to contribute to future policy making.
127. Disclosure could give a distorted view as to how individual views were treated and furthermore a misleading impression as to how the Guidance was prepared.

#### **Balance of public interest factors**

128. In relation to the first public interest argument advanced by BERR the Commissioner notes that this focuses on the public interest in protecting contributions made by external third party stakeholders. However, for the reasons

the Commissioner has set out above he has concluded that emails between such third parties and BERR do not fall within the scope of regulation 12(4)(e). Therefore he has not placed any weight on the first argument advanced by BERR.

129. In contrast, as the Commissioner accepts emails between the officials at BERR and other government departments fall within the scope regulation 12(4)(e), he does accept that the second argument advanced by BERR is relevant. Furthermore, he believes that this argument is closely related to the argument set out above in relation to 12(4)(d) – i.e. that disclosure would result in a chilling effect which would result in contributions from officials being less free and frank in the future. For the reasons set out above at paragraphs 89 the Commissioner believes that this argument should be given some weight.
130. In relation to the final argument, again for the reasons set out above, the Commissioner accepts that disclosure of this information prior to the final version of the Guidance being published, could have led to disruption of BERR's activities and thus this argument should also be given some weight.
131. The Commissioner believes that the weight that should be attributed to the public interest arguments in favour of disclosure is similar to that which should be attributed to the public interest arguments in relation to 12(4)(d). Consequently the Commissioner believes that the public interest in favour of maintaining the exception contained at regulation 12(4)(e) outweighs the public interest in disclosing the information which falls within the scope of this exception.

### **Regulation 12(5)(f) – interests of the person who provided that information**

132. BERR has argued that the documents numbered 27 to 153 are exempt from disclosure by virtue of the exception contained at regulation 12(5)(f).
133. For the reasons set out above the Commissioner has concluded that the information contained within documents 27 to 153 constitutes information on emissions.
134. Regulation 12(9) states that:
- ‘To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 5(d) to (g)’.
135. Therefore the Commissioner has concluded that regulation 12(5)(f) cannot be used as a basis to withhold documents 27 to 153 and therefore these documents must be disclosed.

### **Regulation 12(3) – personal data**

136. Regulation 12(3) states that:



'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'.

137. The relevant sections of regulation 13 to this request are the following:

- '13(2) The first condition is –
- (a) 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'

138. BERR explained that any identifying information had been removed from documents that had been provided to the complainant at internal review stage. This included:

- To/from/copyists i.e. the names of non public facing junior BERR staff;
- The names of the Guidance Note Working group ;
- Names of staff from other government departments and their addressee/signatory details;
- Redactions were also made to a presentation, drafts of the guidance note or extracts from its and other documents which contained identifying information.

139. BERR noted that the names of the Guidance Working group had been redacted because they did not agree to their identity being revealed when they agreed to be part of the group contributing to the process of developing the Guidance.

140. Furthermore, the Commissioner understands that if the Commissioner ordered disclosure of any of the withheld documents listed in the schedule – as he will do in light of the findings above – BERR's position would be that any identifying information should be withheld on the basis of the above reasoning.

141. Therefore the Commissioner has to decide whether regulation 12(3) provides a basis upon which to withhold the names that have been redacted from the information that has already been disclosed and furthermore whether it provides a basis to withhold the names contained in all of the documents listed in the schedule.

142. Although BERR did not confirm to the Commissioner which of the data protection principles it believed would be breached by disclosure of the various pieces of personal data, the Commissioner assumes that this would be the first data protection principle. This states that:

1. Personal data must be processed fairly and lawfully; and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

143. The Commissioner's guidance on section 40 of the Act (the equivalent exemption to regulation 12(3) in the Act) suggests that a number of issues should be considered when assessing whether disclosure of information would be fair including what expectations the third parties may have about what would happen to their personal data.
144. With regard to the names of the Guidance Note Working group the Commissioner notes that the final published version of the Guidance included the names of the 23 individuals, according to Annex B of the Guidance, who formed part of the 'Energy Working Group'. Furthermore, as noted above in the Chronology this list of individuals was disclosed to the complainant at the internal review stage. Therefore the Commissioner finds BERR's explanation that it had redacted the names of the 'Guidance Working group' on the basis that they would not have expected them to be disclosed to be slightly confusing. However, what is clear to the Commissioner is that there are names of various individuals contained in the withheld information, i.e. documents 1 to 153 – which are not listed in Annex B of the Guidance.
145. In the Commissioner's opinion as the names of the 23 individuals have been included in the final version of the Guidance document these individuals should have had a reasonable expectation that their names, along with the contributions they made to the Guidance, would be disclosed in response to a request under the EIR (or the Act).
146. However, in relation to the remainder of the names included in the withheld information – junior staff and contributors to the Guidance not actually named in the Guidance - the Commissioner accepts that they would have had a realistic expectation that their names and their contributions to the Guidance would not be disclosed in response to an information request and thus disclosure of these names would be unfair and breach the first data protection principle.
147. In relation to whether disclosure of the 23 names as they appear in the withheld documents meets one of the conditions in Schedule 2 of the DPA, the Commissioner considers the most appropriate condition to be the sixth which reads:
- 'The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'
148. The Commissioner has followed the approach taken by the Information Tribunal in another case involving the House of Commons: *House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc)*, in which the Tribunal interpreted the sixth condition as setting out a three part test which must be satisfied, namely
- there must be legitimate interests in disclosing the information,
  - the disclosure must be necessary for a legitimate interest of the public, and

- even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms & legitimate interests of the data subject.
149. The Commissioner has touched upon the legitimate interests in disclosure above when considering the public interest test in relation to the other exceptions. That is to say, the legitimate interest in disclosing information which ensures that the processes surrounding the drafting of the Guidance are accountable and transparent, especially given the potential conflicts of interest highlighted by the complainant.
150. With regard to the necessity test, the Commissioner is mindful of the Tribunal's (and subsequently the High Court's) consideration of the House of Commons case involving Leapman, Brooke and Thomas. In brief summary, the Tribunal concluded that the system MPs' used to claim the additional costs allowance was so flawed that there was no public confidence in it so that disclosure of virtually of all of the withheld information was necessary in order to achieve the objectives that it described as accountability, transparency, value for money and the health of democracy.
151. In the circumstances of this case the Commissioner has not been provided with any evidence to suggest that the process by which the DTI and BERR compiled the Guidance was one which was fundamentally flawed – as in the example in the previous paragraph. Rather, the necessity of disclosure in this case is due to more generic legitimate interests involving accountability and transparency. However, without disclosing the names of those who formed part of the Energy Working Group, when disclosing documents 8 to 153 (with the exception of the LPP docs), it will not be possible to identify the particular weight placed upon the contributions of particular stakeholders and thus it would be possible to address some of the legitimate interests identified in the above paragraphs.
152. The Commissioner believes that the consideration of unwarranted interference is essentially an exercise of weighing up the cumulative value of the public interest factors in favour of disclosure established in the preceding section against the prejudice to the rights, freedoms and legitimate interests of the data subject in which disclosure may result. In effect, this consideration is similar to the balancing exercise set out at section 2 of the Act and the public interest test which must be applied to qualified exemptions.
153. With regard to any prejudice against the individuals' rights, freedoms and legitimate interests the Commissioner notes that the comments made by these individuals contained in the withheld information were all made in their professional capacity either as civil servants or as private sector contributors to a government sponsored project. Therefore the contributions do not relate to their private life and thus any harm to their privacy which the DPA is ultimately designed to protect will be minimal. In contrast the Commissioner believes that the public interest in disclosing documents 9 to 153 with the 23 names not redacted are strong and compelling and outweigh any prejudice to those 23 individuals' privacy. The Commissioner also believes that this public interest extends to disclosure of the workplace contact details of the 23 individuals if they

appear in the requested information as the public may have a legitimate interest to contact them to in relation to their work in this subject area.

154. On this basis the Commissioner believes that the disclosure of the 23 individuals' names listed in Annex B of the Guidance contained within the documents already provided to the complainant and the disclosure of the same names in the documents would be fair, lawful and meet the 6<sup>th</sup> condition. Regulation 12(3) does not therefore provide a basis upon which to withhold these names and the contact details of these individuals.

### **Procedural Matters**

155. Regulation 14(3) of the EIR sets out what a public authority must do when it refuses a request for environmental information:

'The refusal shall specify the reasons not to disclose the information requested, including –

(a) any exception relied on under the regulations 12(4), 12(5) and 13...'

156. Although the BERR provided the complainant with a refusal notice citing regulations 12(4)(d), 12(4)(e) and 12(5)(f) as a basis upon which to refuse to disclose the requested information it did not cite regulations 12(3) and 12(5)(b) which it later relied upon to some parts of the information falling within the scope of the complainant's request. This constitutes a breach of 14(3).

157. Regulation 5(1) requires that a public authority will make environmental information available upon request. Regulation 5(2) states that requested information should be made available no later than 20 working days after the receipt of the request. By failing to provide to the complainant the information that the Commissioner has decided is not expect from disclosure, the Commissioner therefore finds that BERR breached regulations 5(1) and 5(2).

### **The Decision**

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158. 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) The documents in the schedule numbered 1 to 8 are exempt from disclosure on the basis of regulation 12(5)(b) and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.
  - (ii) The documents in the schedule numbered 9 to 12 are exempt from disclosure are exempt from disclosure on the basis of regulation 12(4)(d) and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

- (iii) The documents in the schedule numbered 13.1 to 13.7; 13.11; 15.4 to 15.5; 16.1 to 16.3; 19.1 to 19.4; 20.1 to 20.2; 21.1; 22.1; 23.1 to 23.4; 25.1 to 25.3 and 26.11 are exempt from disclosure on the basis of regulation 12(4)(e) and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.
  - (iv) Regulation 12(3) provides a basis upon which to withhold the names and contact details of all individuals other than the 23 individuals listed in Annex B of the Guidance.
159. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- (i). The documents in the schedule numbered 13.8 to 13.10; 14.1; 15.1 to 15.3; 17.1 to 17.4; 18.1 to 18.4; 24.1 and 24.2 are not exempt from disclosure by virtue of regulation 12(4)(e).
  - (ii). The documents in the schedule numbered 27 to 153 are not exempt from disclosure by virtue of regulation 12(5)(f).
  - (iii) Regulation 12(3) does not provide a basis upon which to withhold the names and contact details of the 23 individuals listed in Annex B of the Guidance.

## Steps Required

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160. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- (i) Disclose to the complainant the documents in the schedule numbered 13.8 to 13.10; 14.1; 15.1 to 15.3; 17.1 to 17.4; 18.1 to 18.4; 24.1, 24.2 and 27 to 153 inclusive.  
  
In line with his findings in relation to regulation 12(3) the 23 names of the individuals listed in Annex B of the Guidance should not be redacted nor should their workplace contact details. However, all other names and contact details can be redacted.
  - (ii) To provide the complainant with copies of the documents already disclosed to him at internal review stage with the 23 names and workplace contact details in Annex B of the Guidance not redacted.
161. 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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162. 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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163. 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)

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.

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 3<sup>rd</sup> day of November 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Legal Annex

### Environmental Information Regulations 2004

#### Regulation 2(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);

### **Regulation 5(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.

### **Regulation 5(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.

### **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 12(8)**

For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

### **Regulation 12(9)**

To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

### **Regulation 13(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.

### **Regulation 13(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.

## Data Protection Act 1998

### Part I

- 1) In this Act, unless the context otherwise requires—

“personal data” means 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,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

### Schedule 1

The first principle states 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 3 is also met.

## Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.
2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary—
  - (a) for the administration of justice
  - (b) for the exercise of any functions conferred on any person by or under any enactment
  - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
  - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.  
  
(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.