

Environmental Information Regulations 2004

Decision Notice

Date: 7 September 2010

Public Authority: English Heritage
The Historic Buildings and Monuments
Commission for England

Address: Kemble Drive
Swindon
SW2 2GZ

Summary

The complainant requested emails and correspondence relating to the Lancaster Canal Corridor Development for a three year period. The public authority originally provided some information and withheld further information under sections 36(2) and section 42(1) of the Freedom of Information Act (the Act). It released further information at internal review but continued to rely on both exemptions. The case was referred to the Commissioner.

The Commissioner considered that the information was environmental and asked the public authority to reconsider it under the Environmental Information Regulations (EIR). Further information was disclosed leaving three items of information that were being withheld by virtue of the exception found in Regulation 12(4)(e) [internal communications]. The Commissioner has considered the application of this exception and has concluded that it was applied correctly. He considers that the exception is engaged and that the public interest in maintaining it outweighs the public interest in disclosure. He has also found procedural breaches in the authority's handling of the request. He requires no remedial steps to be taken.

The Commissioner's Role

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

Background

2. Lancaster is a historic city in the North West of England with a rich legacy of historic architecture reflecting former prosperous times and its industrial past.
3. The Lancaster Canal Corridor Development is a project that was to be undertaken by Centros Miller. It would have resulted in the destruction of over 30 buildings with 18 in conservation areas in the historic city. These would have been replaced by a new retail development in large blocks.
4. Lancaster City Council's Planning Committee approved the outline planning application and referred the application to the Government Office for the North West.
5. The public authority was against the plans going ahead. It explained in its public statements¹ that it would lead to the demolition of historic buildings and their replacement by others alien to the city's character. It asked for the plans to be reviewed and adapted to cater for the historic character of the site. It did not deny that regeneration was necessary.
6. It explained that its concerns were such that it had written to the Government Office for the North West to recommend that the outline planning application to be called in for a decision by the Secretary of State for Communities and Local Government under section 77 of the Town and Country Planning Act 1990. This section allows for planning issues to be referred directly to him instead of being the responsibility

¹ Such as the press statement dated 9 December 2008 that can be found at the link below: <http://www.savebritainsheritage.org/docs/articles/LancasterEH.pdf>

- of individual local planning authorities. This was the first time it had made such a recommendation in the North West since 2001.
7. The scheme was also opposed by SAVE [a group that campaigns to Save Britain's Heritage], the Council for British Archaeology, the Victorian Society and the Georgian Group among others. The architecture and urban design came under particular criticism, and a historic bridge was also under threat.
 8. On 15 January 2009 the Secretary of State chose to issue a direction under section 77 of the Town and Country Planning Act 1990. He explained that the reason he took this action was that the scheme might conflict with national policies on important matters. In particular there were concerns that it did not comply with the Development Plan, the land might not be physically suitable, the development would not be sustainable and would not accord with government planning policies.
 9. In June and July 2009 there was a public local inquiry conducted as the first stage of the Secretary of State's consideration of this issue. The developer did not take part in it and the Council defended its decision by itself. The public inquiry recommended that the planning permission was refused and for conservation area consents also to be refused.
 10. During the course of the Commissioner's investigation, on 21 December 2009, the Secretary of State communicated his final decision about the development. He explained that he agreed that the planning permission should be refused², because the application was not in accordance with the development plan or national policy. While the proposal would lead to sustainable economic development, he explained that those considerations were not of sufficient weight to determine the application other than in accordance with the development plan. The conservation area consents were also refused.

The Request

11. The official name of English Heritage is the Historic Buildings and Monuments Commission for England. It is defined as a public authority through Schedule 1 of the Act under this official name, which is transposed into the EIR by Regulation 2(2)(b)(i). It is also the Government's statutory advisor on historic environment.

² <http://www.savebritainsheritage.org/docs/articles/SoS%20Decision.pdf>

12. On 19 January 2009 the complainant requested the following information from the public authority:

'I write to request under the Freedom of Information Act copies of all emails and correspondence relating to the Lancaster Canal Corridor Development issued and received between 2005 and 2009 [19 January 2009].'

13. On 29 January 2009 the public authority contacted the complainant to seek clarification of what was sought. As a result, the request was narrowed in an email from an employee of the complainant on the same day [the formatting has been changed by the Commissioner and the numbers added to give clarity to this Notice]:

'I write.. to confirm the correspondence concerning the Lancaster Canal Corridor Development which [complainant redacted] would like to be released to him.

He would like to see copies of correspondence between English Heritage and:

[1] Government Office of the Northwest;

[2] Lancaster City Council;

[3] Members of the public; and

[4] Journalists.'

[5] 'He would also like copies of internal correspondence (letter or email) between English Heritage employees which refer to the development.

He is happy for the time period to be narrowed to the last three years [29 January 2006 – 29 January 2009].

14. On 4 March 2009 the public authority issued a partial response. It confirmed that it held relevant recorded information and provided the information that it had identified that fell into requests [1] to [2]. It confirmed that it held no relevant information for request [3]. It provided a copy of its press release for request [4] but explained that it believed that further relevant recorded information might be covered by section 36 of the Act [prejudice to the effective conduct of public affairs]. It explained that it needed further time to conduct a public interest determination in respect of that information. It explained that it held information for request [5] but considered this information

- might be covered by sections 36 and section 42 [legal professional privilege]. It explained that it needed further time to conduct a public interest determination in respect of this information as well. It hoped to be able to provide a full response by 20 March 2009, and it provided its internal review details and the Commissioner's details.
15. On 24 March 2009 the public authority issued the remainder of its response. For [4] it confirmed that it held relevant information, but explained that it considered they were exempt by virtue of section 36(2)(c) and that that the public interest in maintaining the exemption outweighed the public interest in disclosure. It said that there was a public interest in full accountability in the decision making process, however, the information would have the potential to compromise any campaign on which it embarked. It explained that it handled the press in a manner that appealed to their readership and the release of information would in its view inhibit the public debate on the scheme. It explained that in its view an informed debate was required especially as the public inquiry was about to begin and that in its view the public interest was best served in maintaining the exemption.
 16. For [5] it confirmed that it held relevant recorded information and provided nineteen documents. It explained that it was also withholding other relevant recorded information, and that it was relying on the exemptions found in sections 36(2)(b) and 42(1). It explained that in its view the public interest test was best served in the maintenance of the exemptions.
 17. On 7 April 2009 the complainant wrote to the public authority to request an internal review to be conducted into the handling of his request for information. He explained that he wanted to receive the withheld documents and was prepared to appeal to the Commissioner in order to do so.
 18. On 7 May 2009 the public authority acknowledged receipt of the request for an internal review.
 19. On 27 May 2009 the public authority communicated the results of its internal review. In respect of [4] it upheld its position entirely, but in respect of [5] it varied its decision. It explained that it was now prepared to provide two documents that it had previously withheld under section 36(2) because they were part of its submissions for the forthcoming public inquiry, but that it believed the remaining information was being withheld correctly. It explained that there was a right to appeal and provided the Commissioner's details.

The Investigation

Scope of the case

20. On 18 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- That he remained eager to see the withheld correspondence.
 - That he believed that the motivating influence behind the decision to refuse the request for the information was the impending public inquiry into the planning application for the Lancaster Canal Corridor Development; and
 - That the public inquiry had now begun and would be completed by the end of that month.
21. During the course of the Commissioner's investigation the majority of the information was released. The disclosed information will not be considered in this notice. The only information that will be considered is the information that continues to be withheld. There are three items that relate to the original request [5] and comprise of:
1. One email of legal advice.
 2. Two emails concerning its Communication department.
22. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

24. 21 July 2009: The Commissioner wrote to the complainant to ask for him to provide the appropriate documents in order for the case to become eligible. These were provided on 17 August 2009.
25. 3 September 2009: The Commissioner wrote to the public authority and asked for the withheld information and any further arguments about why the information was being withheld. A reply was received on 24 September 2009.
26. 12 October 2009: The Commissioner telephoned the public authority to ask whether the public authority had considered that the withheld information might be environmental information. He was told

- that it had not. He also asked whether the fact the public inquiry was finished would mean that more information could be released but was told that it would not.
27. 13 October 2009: The Commissioner wrote to the public authority. He explained that the withheld information was in his view environmental information and explained why. He asked that either the information was disclosed or that the information was reconsidered under the correct legislation.
 28. 26 October 2009: The public authority responded to the Commissioner. It explained that it did not consider that the withheld information was environmental as it concerned press handling issues and public relations. It asked the Commissioner to explain in more detail why he believed this information was environmental, which he did in further correspondence.
 29. 24 November 2009: The public authority explained that it had now reconsidered the request under the EIR. It explained that it was able to provide further information to the complainant and provided the Commissioner with copies of what would now be provided. It explained that it had also reconsidered what information fell within the scope of the request and had realised that some of the information it had been withholding was actually outside its scope. It explained that it was still withholding a small amount of information under Regulation 13 and 12(4)(e) and that in respect of the information withheld by virtue of Regulation 12(4)(e) the public interest favoured the maintenance of the exception. It explained that the case remained live and therefore the information deserved protection until due process had been completed, but that the majority of the documents would be provided once that process was completed. It also explained that there was a single email that was being withheld under 12(4)(e) to which legal professional privilege applied.
 30. 24 November 2009: The public authority wrote to the complainant to provide the information that it now believed could be disclosed.
 31. 30 November 2009: The complainant contacted the public authority to explain that he still wanted the withheld information and asked for the public authority to provide further detail about why it had not been provided. It did so on 1 December 2009.
 32. 7 December 2009: The Commissioner wrote to the complainant. He explained that he was now content that the request had been considered under the correct legislation and that a large amount of the

- information previously withheld had been released. He asked the complainant whether he wished for his investigation to continue.
33. 13 January 2010: The complainant called the Commissioner. He explained that he was still waiting for a response to the telephone conversation dated 30 November 2009 and apologised for his delay in responding. From this conversation it became apparent that he had not received the letter dated 1 December 2009 from the public authority and the Commissioner agreed to proceed with his investigation.
 34. 14 January 2010: The public authority provided another copy of its letter dated 1 December 2009 to the complainant. The complainant asked the public authority to reconsider its position now the planning permission had been refused and to release the remainder of the withheld information.
 35. 15 February 2010: The public authority issued a new response to the complainant. It provided a number of further documents now the planning permission had been refused and the period for judicial review had passed. It still withheld some information by virtue of Regulation 12(4)(e) and explained why.
 36. 1 March 2010: The Commissioner wrote to the complainant to check if he was now satisfied with the information that had been provided after this further disclosure. The complainant replied that he still wished the case to proceed and would provide further arguments about why in due course.
 37. 23 March 2010: The complainant provided the Commissioner with a copy of his submissions to the public authority about why the remaining information should be released. He explained that he did not believe that the information would relate to future planning application as any future application would be significantly different. He explained that he could see no legitimate reason why the information should not be released.
 38. The public authority responded on the same day and explained that the Commissioner was looking at the application of the exceptions and that it did not plan to conduct a further review in this instance because of this.
 39. The Commissioner also wrote to the public authority to establish what information it was continuing to withhold and to gather arguments about why it took this position, and these were received on 16 April 2010.

Analysis

Substantive Procedural Matters

Is the withheld information environmental information?

40. If information is environmental then it must be considered under the EIR and not the Act. The EIR have different provisions particularly with regard to withholding information. Instead of exemptions under the Act, there are specified exceptions in the EIR that cover different areas and tend to have a narrower scope than those exemptions.
41. As detailed above, the public authority did not initially consider that the withheld information was environmental but it does now agree with the Commissioner that this is so.
42. A full copy of the legislation referred to in this Notice can be found in a Legal Annex attached at the end of this Notice.
43. The EIR define what constitutes information in Regulation 2(1). To summarise, the legislation provides six gateways for information to constitute environmental information. The Commissioner has had sight of the withheld information and considers that all of the information relevant to this request falls within the definition given at regulation 2(1)(c) of the EIR : ' Information onmeasures (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 designed to protect those elements.'
44. The Commissioner considers that information concerning the plan to develop Lancaster City would be a measure likely to affect the state of the elements of the environment. This is because the granting or denial of such a registration would determine the future use to which the land could be put, which would be likely to affect that state of the land and landscape as referred to in regulation 2(1)(a). He considers that all of the information placed correctly in its context would relate to this measure.
45. The public authority initially argued that only its final submissions to the public enquiry would have had the potential to have any effect on the state of the elements of the environment. The Commissioner considered the situation objectively as at the date of the original request (29 January 2009). He understood that at that particular time the public inquiry was about to commence. He considered that all the

information held by the public authority in respect of the development had the potential to affect the land and landscape and this was why he had determined the withheld information to be environmental. The Commissioner also believed that the act of lobbying government or campaigning against the proposals was in itself a measure likely to effect the environment as it was designed to protect an element of it.

Exception

46. As outlined in the chronology above, all the relevant recorded information was provided to the complainant except for three items:
 1. One email of legal advice (which will be referred to as 'Item one' for the remainder of this notice).
 2. An email from its Communication department to its staff ('Item two').
 3. Part of an email to its Communications department from its staff ('Item three').
47. The public authority has explained to the Commissioner that its new position in respect of these documents is that it is entitled to withhold them by virtue of the exception found in Regulation 12(4)(e) [internal communications]. It explained that in its view the public interest in maintaining the exemption outweighed the public interest in disclosure.
48. For clarity, it did not ask for the Commissioner to take Regulation 12(5)(b) [the course of justice etc] into account for item 1, despite it being an exception that is normally analogous to the legal professional privilege exemption at section 42 of the Act.
49. However, in relation to the remaining redacted information, in making his decision the Commissioner will consider the facts as they were at the time the request reached the statutory date for compliance (27 February 2009). This date has been calculated by adding twenty working days to the date of the refined request (29 January 2009). Whilst the public authority disclosed further information at a number of points as the investigation progressed, the Commissioner must consider the circumstances at the time of the original request when considering whether information can be withheld or not.

Regulation 12(4)(e)

Is the exception engaged?

50. Regulation 12(4)(e) provides that a request for information may be refused if it involves the disclosure of internal communications. This

exception is also subject to a public interest test that will be considered later. The first step is to see if the three pieces of withheld information can be correctly seen to be internal communications. On the next page, the Commissioner will consider each item in turn:

Item One

51. Item one constitutes legal advice from an internal lawyer of the public authority to members of that public authority. As the information is between two departments of the same public authority and is a communication (an email) – then the Commissioner accepts that it is an internal communication.

Item Two

52. Item two constitutes an email between one employee and two other employees of the same authority. It is copied to two other employees. The Commissioner considers that as the information is a communication (an email) and is between only its members of staff – then it does constitute an internal communication.

Item Three

53. Item three constitutes part of an email (three lines) between one employee and two other employees of the same authority. The Commissioner considers that as the information is a communication (an email) and is between only its members of staff – then it also constitutes an internal communication.

The public interest test

54. As explained above the exception is subject to a public interest test. Under Regulation 12(1)(b) information may only be refused if an exception applies and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 12(2) explains that the public authority must apply a presumption of disclosure when considering the information. This means that in the event that the weight of public interest is evenly balanced, the information should be disclosed. The Commissioner has undertaken a public interest test in respect of each item of information withheld under 12(4)(e).
55. As explained at paragraph 49 above, 27 February 2009 is the point at which the Commissioner has considered his decision. The Tribunal has stressed the fact that the date is important a number of times,

including in *Scotland Office v the Information Commissioner* [EA/2007/0070]³:

'...[T]he timing of a request is of particular importance. Disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within Government. As a general rule, the public interest in maintaining an exemption diminishes over time.' [paragraph 70]

56. Mindful of the presumption in favour of disclosure, the Commissioner has considered the public interest in favour of maintaining the exception and whether, in all of the circumstances of this case, it outweighs the public interest in disclosing the information. Item one is significantly different from items two and three, and so he has considered the former separately, and he has structured his analysis so as to gather all the arguments for maintaining the exception, then all the arguments for disclosure, and then where he believes the balance of public interest lies in each case.

Item One

Public interest arguments in favour of maintaining the exception

57. Item one constitutes a piece of legal advice. The public authority has explained that this advice was privileged at the time of the request, and remains so now. It explained that the information came from a qualified legal adviser, made with the dominant purpose of providing legal advice and was confidential.
58. The Commissioner has considered the withheld information and finds that he agrees that the public authority can claim that legal professional privilege applies to it. There was also no waiver that led to this legal advice losing its confidentiality. He has noted the comments of the Information Tribunal ('the Tribunal') in *Calland v Financial Services Authority* [EA/2007/0136]⁴. It explained that it believed that in-house lawyers deserved the same protection as external ones. The Commissioner endorses this view. For clarity, the Tribunal stated that:

'Such a result accords with the general policy giving rise to LPP. Just the same requirements for confidentiality and candour exist

³http://www.informationtribunal.gov.uk/Documents/decisions/Scotland_Office_Determinationfinal4.pdf

⁴http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf

where an employed lawyer gives advice as when it comes from a member of the independent professions' [paragraph 35]

59. Given that the information is protected by legal professional privilege an enhanced level of protection can be expected and this must be taken into account when considering the weight of public interest in maintaining the exception. The enhanced level of protection was considered in detail by the House of Lords in *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants) [2004] UKHL 48* ('the Three Rivers case'), where Lord Rodger explained the policy reasons for the principle in respect to legal advice:

*'If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client, communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and cannot be made the subject of evidence. Of course, this means that, from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available. As Lord Reid succinctly remarked in *Duke of Argyll v Duchess of Argyll 1962 SC (HL) 88, 93*, "the effect, and indeed the purpose, of the law of confidentiality is to prevent the court from ascertaining the truth so far as regards those matters which the law holds to be confidential." [paragraph 54]*

60. The public authority has explained that it believes that the public interest favours the maintenance of the exception in this case. It explained that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to individuals. Furthermore, the public authority highlighted the following specific public interest arguments in favour of not disclosing the requested information falling within the scope of legal professional privilege.

61. It explained that public authorities need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice may well include arguments in support of the final conclusion as well as counter arguments and as a consequence legal advice may well set out the perceived weaknesses of the public authority's position. Without such comprehensive advice, the public authority's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.
62. Disclosure of legal advice has a significant prejudice to the public authority's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.
63. The authority explained that at the time of the request the legal advice was live and that the matter was in its view still not settled as there was a prospect of the plans being resurrected albeit in a different form. It explained that it was important that the public authority was not prejudiced in its dealings with the project in the future. It also explained that the alternative would be that public authorities are reluctant to take legal advice and this could lead to decisions being taken that are legally unsound. Not only would this undermine the public authority's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided.
64. The public authority concluded that given the substantial public interest in maintaining confidentiality of legal professionally privileged material, it is likely to only be in 'exceptional circumstances' that this will be outweighed by the public interest in disclosure. It explained that the advice remains live as it is still being relied on and this also must strengthen the substantial public interest in maintaining confidentiality in this case.
65. The Commissioner recognises that there is a strong public interest in enabling persons to obtain appropriate legal advice and assistance. It is important that public authorities can have frank communications with their lawyers with a high degree of certainty that the exchanges are not liable to be disclosed without consent and potentially used against

them. According to Sir Gordon Slynn in *AM&S Europe Ltd v European Commission* (1983) this public interest...

*"springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons real and legal, that they should be able to know what they can do under the law what is forbidden, where they must tread circumspectly, where they run risks."*⁵

66. The Commissioner is supported by a significant body of case law to uphold the view that there is a strong public interest factor that favours the withholding of privileged information under the Act, which the Commissioner believes is also relevant when considering the position under the EIR. For example, the Information Tribunal in *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry* [EA/2005/0023]⁶ noted that:

'there is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.'
[paragraph 35]

67. The public authority has also provided other arguments that favour the withholding of the specific information at the relevant time. These can be summarised as it believing there would be a 'chilling effect'. It explained that it was important for members of staff to be able to express their views in an uninhibited manner and that there was a good chance that if they understood that whilst a matter was still live their comments would be disclosed they would be more guarded, to the detriment of general administration and decision making. It explained as statutory adviser it was essential that its staff feel able to have candid and honest discussions, during which all options were discussed. This argument is commonly summarised as the 'chilling effect' argument. They were summarised in *Scotland Office v the Information Commissioner* [EA/ 2007/0070] as arguments relating to:

'the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause' [paragraph 64]

⁵ *AM&S Europe Ltd v European Commission* (1983) QB 878, 913

⁶http://www.informationtribunal.gov.uk/Documents/decisions/bellamy_v_information_commissioner1.pdf

68. Having considered the nature of item one, the Commissioner believes that these arguments have weight, due to the timing of the request and the stage the planning process was at, at the time. He believes that the arguments also interrelate with those connected to legal professional privilege which he has considered above. He has when considering the weight of this factor looked at whether the prospect of disclosure would lead to improved advice and debate. He believes that given the information that has already been disclosed the legal advice itself would not lead to such an improvement. He therefore regards the 'chilling effect' arguments outlined above as having some weight in respect to this item.

69. The public authority has also raised arguments about the necessity for a 'safe space' to formulate its policy, debate 'live' issues and reach decisions without being hindered by external comment. This idea was summarised in *Scotland Office v the Information Commissioner* [EA/2007/0070] as:

'the importance of preserving confidentiality of policy discussion in the interest of good government' [paragraph 64]

70. The Commissioner accepts that there is a need for a 'safe space' to formulate policy, debate 'live' issues, and reach decisions without being hindered by external comment and/or media involvement. The Commissioner's view is that, whilst part of the reason for needing a 'safe space' is to allow free and frank debate, the need exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under the EIR. However, he believes that when the request was made, time in respect of the information covered by the legal advice had passed by. This is because the press release on 9 December 2008 had already explained the public authority's position which accords with the legal advice that it had received. In addition the Commissioner is not certain that the lawyer in this case required the same flexibility as a policy maker as the direction of policy formation was less in its control. On the circumstances of this case, he believes that the press release has reduced the need for 'safe space' in respect to this item as the policy was already pronounced at the date of compliance. This does not change the fact that the advice remains live and that it is being relied upon.

71. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in withholding the information:

- the inbuilt weight of the concept of legal professional privilege;
- the likelihood and severity of harm arising by disclosure to that concept and the decision making process;
- that the advice is live increasing the inbuilt weight above; and
- the real possibility of a 'chilling effect' in respect of the disclosure of the information at the statutory time of compliance.

Public interest arguments in favour of disclosing the requested information

72. Arguments for maintaining the exception need to be balanced against the arguments in favour of disclosing the legal advice; Parliament did not intend the exception to be used absolutely where it concerns legally privileged material. Indeed the Tribunal's decision in the case *Mersey Tunnel Users Association v Information Commissioner and Mersey Travel* [EA/2007/0052]⁷ underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by the public authority, in particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore the advice concerned issues which affected a substantial number of people. It stated that:

" We find, listing just the more important factors, that considering the amounts of money involved and numbers of people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority's actions and reasons, that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining it..."

[paragraph 51]

73. In *Pugh v Information Commissioner v Ministry of Defence* [EA/2007/0055], the Information Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "a significant group of people".
74. As the proposed development of Lancaster would affect most people local to the area and particularly those who had expressed strong opinions on the idea, it seems likely that the subject matter of the requested information would affect "a significant group of people". This argument therefore must be considered as a factor that favours the disclosure of the information. It can be argued that the development could impact on the local resident who may have gained job opportunities and/or additional services as a result of it.

⁷http://www.informationtribunal.gov.uk/Documents/decisions/MerseyTunnelDecision_website.pdf

75. The public authority provided generic arguments in favour of disclosure. It explained that in favour of disclosure there is a public interest in transparency in decision making by a public authority. The Commissioner agrees that this is so. He believes that public confidence is necessarily dependent on such transparency and on the demonstration by a public authority that it has satisfied all applicable laws and acted with clear probity.
76. The Commissioner notes that in addition it is important to promote accountability and transparency in the successful use of public funds to oppose a private development as in this case. He believes that the approach has had an impact on the environment, and disclosure of the legal advice relied upon by the public authority in making these decisions may aid understanding of the decisions taken. The information in question may enable the public gain a greater understanding on the legal basis of its approach and enhance the wider public debate about this development.
77. The complainant has also argued that any future development would necessarily be very different to the one under discussion and that this should intensify the public interest in disclosure. Having considered the withheld information in context, the Commissioner does not necessarily believe that this is correct on the circumstances of the case.
78. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in disclosing the information:
- The number of people who were likely to be affected;
 - The potential improvement in accountability; and
 - Transparency of the public authority's action.

Balance of the public interest arguments

79. The Information Tribunal in *Calland v Information Commissioner and the Financial Service Authority* (EA/2007/1036) explained the Tribunal's approach when considering the balance of public interest to information that is legally privileged [although it was in respect to the Act, the Commissioner believes the arguments apply with equal weight under the EIR]:

'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications

between lawyer and client, which the client supposes to be confidential.' [paragraph 37]

80. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164. In *Dr Thornton v Information Commissioner* (EA/2009/0071)⁸, the Tribunal usefully distilled the High Court's approach into six principles [these have been slightly rewritten so they apply to the terminology of the EIR]:
1. there is a strong element of public interest inbuilt in the concept;
 2. there need to be equally strong countervailing factors for the public interest to favour disclosure;
 3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exception;
 4. as a general rule the public interest in maintaining an exception diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the concept;
 5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
 6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.
81. In respect of this item the Commissioner believes that the strong inbuilt public interest argument concerning the protection of the concept of legal professional privilege is important in this case. He notes when considering the fourth point that this legal advice was live at the time of the request and is still 'live' and this intensifies the strength of protection that is to be expected. He believes that this case represents the circumstances that were envisaged as being protected. In addition the 'chilling effect' argument adds further weight to the public interest in maintaining the exception.

⁸ At paragraph 15.

82. The Commissioner has seen the withheld information. In his view it does not raise any concerns that the public authority may have misrepresented the advice which it has received in pursuit of a policy which appears to be unlawful, or where there are clear indications that it has ignored unequivocal advice.
83. The Commissioner has considered the weight of the public interest factors in disclosure, including the fact that the plan may affect a significant number of people, but is not convinced that together they constitute equally strong countervailing factors that would override the public interest factors in maintaining the exception. He does not consider that there is much within the legal advice that would advance the considerable public debate that is already occurring in respect of the development and does not believe that the presumption of disclosure is weighty enough to challenge the public interest factors that favour the maintenance of the exception in respect of this item.
84. For the above reasons, he is satisfied that the public interest in maintaining the exception outweighs the public interest in disclosure for item one. He therefore determines that the exception found in Regulation 12(4)(e) has been relied on correctly for item one.

Items Two and Three

85. Items two and three both concern the same issue and the Commissioner believes that he can analyse the public interest test for both together. He cannot reveal what the exact issue is as to do so would destroy the integrity of the withheld information.

Public interest arguments in favour of maintaining the exception

86. The public authority explained that the withheld information related to its press strategy, that the issue is still live, and was so at the time of statutory compliance. The Commissioner has considered the withheld information and is satisfied that it concerns a live issue and that this issue was live at the time of statutory compliance.
87. The public authority also explained the nature of its press strategy and why this leads to the need for internal communications to be protected. It referred to the guidance issued by the Ministry of Justice on press releases and communications advice⁹, which provides a 'working assumption' about this sort of information. This explains that draft press lines and/or communications advice should be withheld by virtue of exception 12(4)(e), because communications advice and press

⁹ <http://www.justice.gov.uk/guidance/foi-assumptions-press.htm>

handling strategies are likely to have been prepared in advance of a policy announcement or event; they are necessarily speculative and their release may undermine the preparation for ministers who are required to deal with those events. It also explained that it was necessary for frank discussion and to ensure candid assessments are made throughout the policy process. The Commissioner is uncomfortable with public authorities adopting 'working assumptions'. He believes that every case should be dealt with on its individual merits and that the public interest in disclosure should receive consideration in every case. However, he does accept the applicability of a number of these arguments to this specific case.

88. The first is the 'chilling effect' argument that has already been explained in paragraphs 67 and 68 above. The Commissioner is satisfied that the disclosure of this information when the matter is live will be likely to have a 'chilling effect'. Having considered the exact information, he is satisfied that its release is likely to lead to inhibited rather than full and frank advice and this is a strong public interest factor that favours the maintenance of the exception. He is not content that the quality of the public debate would be enhanced from the disclosure in a way that would adequately counteract the weight of this factor. He agrees with the public authority that the likely consequence of the 'chilling effect' would lead to the detriment of general administration and decision making.
89. The second is the 'safe space' argument that was explained in paragraphs 69 and 70 above. In contrast with item one, he is satisfied that the public authority is correct that the information relates to a 'live' issue and the disclosure of the information at the time of statutory compliance would have led to the loss of a 'safe space', specific to the policy debate to which the information relates. The Commissioner accepts that there is a need for a "safe space" to formulate policy, debate "live" issues", and reach decisions without being hindered by external comment and/or media involvement. The Commissioner's view is that, whilst part of the reason for needing a 'safe space' is to allow free and frank debate, the need exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under the EIR. He believes that the need for 'safe space' is a strong public interest factor that favours the maintenance of the exception in this case.

90. The public authority specifically cited the Tribunal case of *Lord Baker v the Commissioner and the Dept for Communities and Local Government* [EA/2006/0043]¹⁰ ('Lord Baker'). It acknowledged that every case should be considered on its own merits, but explained that the similarity in subject matter and arguments support its position in this case. This case also concerned information in respect of a Planning Application that had been taken up by the Secretary of State and discussed the application of Regulation 12(4)(e). The Tribunal found against the Commissioner's decision in that case and ordered the information to be disclosed. However, this was because the decision had already been made by the Secretary State and the issue was no longer 'live' at the time of compliance. It did acknowledge that the 'cooling effect' and 'safe space' arguments were valid during the earlier process. The Commissioner also notes that the role of the public authority is considerably different to the DCLG in the other case (as the DCLG were responsible for the decision itself, while the public authority was merely a consultee in this case) and this also makes an important difference in the arguments that favour disclosure.
91. The Commissioner also believes that it is important to consider the potential effect of the disclosure of this information on the particular civil servants to whom it relates. It must be remembered that the civil servants are not ultimately accountable for government policy and that there was a possibility that without protection from identification at certain levels, the effectiveness and neutrality of the civil service could be compromised. The Commissioner accepts that the individuals are relatively junior and accepts that this factor has some weight, favouring the maintenance of the exception. However, he believes that the weight of this factor is limited because of the governance structure of English.
92. The public authority has also explained that the disclosure of the information may inhibit debate about the project. The Commissioner is not convinced by such arguments and will consider this issue in the arguments that favour the disclosure of the information.
93. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in withholding the information:
- the strong factor concerning the real possibility of a 'chilling effect' in respect to the disclosure of the information at the statutory time of compliance;

¹⁰<http://www.informationtribunal.gov.uk/Documents/decisions/lordbakerVinfoCommanddeptOfCommandlogov1jun07.pdf>

- the strong factor concerning the potential loss of 'safe space' to an issue that remained live at the time of statutory compliance; and
- the weaker factor concerning the protection of the specific civil servants in this case.

Public interest arguments in favour of disclosing the requested information

94. The Commissioner believes that the arguments in relation to paragraphs 74 and 76 are equally applicable in respect of these items.
95. In addition the provision of the information would remove any possible suggestion of spin. For clarity, the authority took a public position on the development and said that it was opposing it. The public interest lies in the potential reassurance that the authority's public position was supported by its analysis of the issues surrounding the development. The Tribunal stated in *Lord Baker* that the provision of the full information would enable the public to decide for itself whether spin has been applied or not and this should be a public factor that favours disclosure. The Commissioner believes that this factor has some weight in this case.
96. The complainant has also argued that any future development would necessarily be very different to the one under discussion and that this should intensify the public interest in disclosure. The Commissioner has considered the withheld information in its context and does not believe that this is correct in this case. He believes that the issue that these two items relate to was live at the statutory date of compliance and remains live at the date of this Notice.
97. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in disclosing the information:
- The presumption that favours disclosure;
 - The number of people who were likely to be affected;
 - The potential improvement in accountability;
 - Transparency of the public authority's action; and
 - The ability for the public to decide for itself whether there has been spin.

Balance of the public interest arguments

98. Having carefully considered the arguments that favour the disclosure of the withheld information and those that favour the maintenance of the exception the Commissioner's view is that the public interest lies in the maintenance of the exception for items 2 and 3. The main reason for

this view is the fact that the issue was still live and could have prejudiced the conduct of public affairs. He believes in this case that the 'chilling effect' and loss of 'safe space' are real possibilities in this case and believes, having carefully considered the withheld information, that the factors favouring disclosure do not counter the weight of these arguments in this case.

99. He therefore determines that the exception found in Regulation 12(4)(e) has been relied on correctly for both items two and three.

Procedural Requirements

Regulation 5(1)

100. Regulation 5(1) imposes an obligation on a public authority to make the recorded information that it holds available on request (subject to issuing an appropriate refusal notice when it can rely on an exception).
101. A considerable amount of information was not provided until the Commissioner's involvement and this constitutes a breach of Regulation 5(1). The Commissioner notes that the reason for this was that the public authority had failed to identify that the information was environmental and needed considering under the EIR. As the information has now been provided there are no remedial steps appropriate for remedying this breach.

Regulation 5(2)

102. Regulation 5(2) imposes an obligation on public authorities to make information available on request within twenty working days. The public authority failed to provide the information subsequently released in twenty working days. It therefore breached Regulation 5(2). As this information has now been provided there are no remedial steps appropriate for remedying this breach.

Regulation 14(1)

103. Regulation 14(1) imposes an obligation on a public authority to issue an appropriate notice in writing that complies with the other parts of the Regulation. As the public authority failed to issue such a notice before the Commissioner's involvement, it breached Regulation 14(1). As this notice has now been provided, there are no remedial steps required to remedy this breach.

Regulation 14(2)

104. Regulation 14(2) imposes an obligation on a public authority to issue an appropriate notice when it receives a request for environmental information and is refusing to provide information within twenty working days. The public authority failed to do this as it did not recognise that the information was environmental and therefore breached Regulation 14(2). As the request has been reconsidered under the EIR, there are no remedial steps required to remedy the breach.

Regulation 14(3)

105. Regulation 14(3) requires the notice issued within twenty working days to explain why it was not disclosing the information and to cite the appropriate exception under the EIR. The public authority failed to do this in time as it did not recognise the information was environmental and therefore breached regulation 14(3). As the request has been reconsidered under the EIR, there are no remedial steps required to remedy the breach.

The Decision

106. 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:

- *It applied the exception in Regulation 12(4)(e) correctly to the three items and was correct that the public interest favoured the maintenance of the exception on the date of statutory compliance [27 February 2009].*

107. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the provisions of the EIR:

- *It failed to release information that was should have been disclosed before the Commissioner's involvement and breached Regulation 5(1).*
- *It failed to release this information within twenty working days and therefore breached Regulation 5(2).*

- *It failed to issue an appropriate refusal notice that complied with Regulation 14 before the Commissioner's involvement and breached Regulation 14(1).*
- *It failed to issue this notice within twenty working days and breached Regulation 14(2).*
- *It failed to cite the exceptions it would later rely upon in twenty working days and therefore breached Regulation 14(3).*

Steps Required

108. The Commissioner requires no steps to be taken.

Right of Appeal

109. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: 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 sent.

Dated the 7th day of September 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

* Environmental Information Regulations 2001

Regulation 2 - Interpretation

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);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

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

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

“Scottish public authority” means –

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

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

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 3 – Application

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

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

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

Regulation 5 - Duty to make available environmental information on request

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 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 12 - Exceptions to the duty to disclose environmental information

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

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

and

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

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

Regulation 12(4)(e) provides that –

'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

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

Regulation 14 - Refusal to disclose information

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

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

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

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

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

*** Freedom of Information Act 2000**

Section 1 - General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

Section 36 – Prejudice to the effective conduct of public affairs

(1) This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(a) would, or would be likely to, prejudice-

- (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
- (iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

...

Section 42(1) – Legal professional privilege

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

...