

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

**Decision Notice**

**Date: 28 February 2011**

**Public Authority:** Government Office for the North East  
**Address:** Citygate  
Gallowgate  
Newcastle upon Tyne  
Tyne and Wear  
NE1 4WH

**Summary**

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The complainants requested from the Government Office for the North East ("GONE") all internal communications in connection with GONE's involvement in an appeal relating to a particular legal claim between the complainants and Blyth Valley Borough Council. The request also referred to any communications between two named individuals employed by GONE and Blyth Valley Borough Council relating to the same matter. Relevant information had already been released in response to an earlier request for the same information. In response to this request, the Council released some further information. However, it stated that it wished to withhold various parts of the information using the exceptions under regulation 12(5)(b), 12(5)(f) and 13(1) of the Environmental Information Regulations 2004 ("the EIR"). In relation to the first two exceptions, GONE considered that the public interest favoured maintenance of the exceptions. The Information Commissioner ("the Commissioner") decided that regulation 12(5)(b) was engaged in relation to some legal advice and that the public interest favoured withholding it. The Commissioner also accepted that regulation 13(1) was engaged. However, he did not accept the engagement of regulation 12(5)(f). The Commissioner requires the disclosure of this information within 35 days. The Commissioner found breaches of regulation 5(1), 5(2), 14(2) and 14(3) of the EIR.

## The Commissioner's Role

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

## Background

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2. The information requested in this case relates to a legal claim brought by the complainants against Blyth Valley Borough Council. The Commissioner understands that as a result of this legal action, the complainants were successful in quashing policy H4 of the Blyth Valley Core Strategy which related to affordable housing. The claim was allowed in the first instance on 20 May 2008 and the Council's subsequent appeal was dismissed by the Court of Appeal on 29 July 2008. The judgment is publicly available on the following website:

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/861.html>

## The Request

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3. On 19 January 2010, the complainants wrote to GONE. They referred to a previous request dated 9 June 2008 that had been considered by the Commissioner under case reference FER0242536 and indicated that they wished to resubmit the same request for a fresh consideration. For clarity, the previous case brought to the Commissioner was closed because the complainants agreed to make a new request in order to see if the change in circumstances since the previous request (i.e. the legal action had ended) would result in a decision to disclose previously withheld information. This new request forms the basis of this complaint.
4. The letter referred to above dated 9 June 2008 contained a number of comments relating to the legal claim that was ongoing at the time because the Council had appealed to the Court of Appeal regarding an earlier judgment that had not been in its favour. The complainants explained that it had come to their attention that there had been some communication between a named employee of Blyth Valley Council and

a named employee of GONE. The complainants referred to a letter sent to the Council by GONE in which the following statement appeared:

*"...the government office therefore considers that it would be desirable for there to be a stay of execution on the quashing of policy H4, and also for the appeal to be expedited".*

The complainants expressed their concern about the involvement by GONE which they felt had been inappropriate in the circumstances. Contained within the letter are the requests that form the subject of this complaint. The Commissioner understood the terms of the request to be as follows:

- "...please provide us with...a copy of all internal communications in connection with this matter"
  - "Please provide us with full particulars of any correspondence, or a full note of any communications, as between [named employees of GONE and Blyth Valley Borough Council].
5. When a response had not been received by GONE within the statutory time limit of 20 working days, the complainants wrote to GONE on 19 February 2010 to enquire about progress.
  6. GONE replied on 23 February 2010 apologising for the delay. It stated that it had not been possible to respond within 20 working days because of the need to consult with Northumberland County Council (the successor to Blyth Valley Council). It stated that it was still awaiting a reply but hoped to respond by 17 March 2010.
  7. GONE wrote to the complainants again on 17 March 2010. It confirmed that it held information falling within the scope of the request. It explained that it had enclosed some additional information that it now felt could be disclosed. However, it added that some information had been withheld because it remained excepted under regulation 12(5)(b) and 12(5)(f) of the EIR and the public interest continued to favour withholding the information. It stated that it had enclosed a table showing the details of the specific redactions that had been made.
  8. Although GONE offered the complainants an internal review of the decision, at this point the complainants complained directly to the Commissioner.

## The Investigation

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### Scope of the case

9. On 10 May 2010, the complainants contacted the Commissioner to complain about the way their request for information had been handled. The complainants specifically asked the Commissioner to consider GONE's refusal to provide the requested information.
10. A letter dated 2 June 2008 from GONE to the Council was attached to one of the emails which fell within the scope of the request. The Commissioner understands that this letter was provided to the complainants during the course of the legal proceedings because, in their original request dated 9 June 2008, they refer to receiving a witness statement with a letter from GONE of 2 June 2008 attached. They quote directly from this letter. In view of this, the Commissioner has not considered the disclosure of this information as part of his investigation.
11. Information relating to the request was disclosed during the Commissioner's investigation. As the issues relating to this information were informally resolved by the disclosure, they have not been addressed in this Notice.

### Validity of complaint

12. The Commissioner would usually not accept a complaint unless a complainant provides evidence that the public authority in question had conducted an internal review. This is because internal reviews afford public authorities the opportunity to reconsider their decision and correct any errors that may have been made prior to a complaint to the Commissioner. In this case, the Commissioner decided to exercise his discretion to consider the complaint without an internal review because the reasons for non-disclosure were substantially similar to those argued in the previous complaint to the Commissioner under reference FER0242536, and it appeared in the circumstances to be particularly unlikely that an internal review would affect the outcome.

### Chronology

13. On 18 August 2010, the Commissioner wrote to the complainants to set out his understanding of the requests and the nature of the complaint.

14. On 27 August 2010, the Commissioner wrote to GONE. The Commissioner noted that it did not appear that attachments to the emails in question had been included within the bundle of withheld correspondence. He asked GONE to provide this information together with an explanation of whether it was seeking to withhold the attachments. The Commissioner also noted that a number of names and email addresses had been redacted from the withheld emails because GONE had determined that they were “not relevant to the request”. The Commissioner explained that he was not satisfied with this approach because the names formed part of the emails. The Commissioner asked GONE to consider the disclosure of the names. The Commissioner also requested a small amount of additional supporting arguments concerning the exceptions as he did not feel that it was necessary to revisit his previous investigation in great detail.
15. On 6 September 2010, the complainants replied. They did not challenge the Commissioner’s understanding of the request or the nature of the complaint. They confirmed that they required disclosure of all of the withheld information, including the names and email addresses that GONE felt were not relevant to the request.
16. Unfortunately, a delay occurred at this stage when GONE did not reply to the Commissioner’s correspondence by the set deadline. The Commissioner was advised that GONE had asked the Department for Communities and Local Government (“DCLG”) to respond on its behalf. A response from DCLG was received on 4 October 2010. For clarity, although this Notice refers to responses from GONE from this point onwards, these responses were supplied to the Commissioner by DCLG acting on its behalf although the Commissioner understands that GONE was consulted about the responses.
17. On the subject of the additional attachments that had not been provided to the Commissioner previously, GONE stated that it was able to disclose one of them to the complainants. In relation to a draft letter referred to in one of the emails, GONE stated that it had not been able to locate the attached draft, although it had a copy of the final version of the document which it provided to the Commissioner. As noted in the “Scope” section of this Decision Notice, the Commissioner understands that this letter had already been provided to the complainants during the course of the legal proceedings. Regarding the redacted names, GONE stated that it was willing to disclose the names of lawyers involved in the case as this information was largely in the public domain already. However, it explained that it felt disclosure of the other names would breach the first Data Protection Principle of the Data Protection Act 1998 (“the DPA”). It therefore sought to rely on regulation 13(1).

18. On 19 October 2010, the Commissioner sought some further information from GONE in order to ascertain whether, on the balance of probabilities, any further information was held.
19. GONE replied on 29 October 2010. It responded to the Commissioner's questions and supplied documents relating to its records management procedures.
20. Following some comments made in GONE's response, the Commissioner found it necessary to query whether GONE had in fact identified all the information it held that was relevant to the request. He wrote to GONE on 1 November 2010 to query this and to ask it to disclose to the complainant all the information that it was willing to disclose.
21. GONE replied on 16 November 2010. It stated that it had identified a further relevant document which it felt should be withheld under regulation 12(5)(b) and 12(5)(f) of the EIR for the same reasons it had already provided. It also confirmed that it had written to the complainant disclosing the information that it had agreed to disclose.

## Analysis

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### Substantive Procedural Matters

#### Is the information environmental?

22. GONE argued that the information is environmental because it falls within regulation 2(1)(c) of the EIR. This provides that any information on measures affecting or likely to affect the elements and factors listed in regulation 2(1)(a) and (b) is environmental information for the purposes of the EIR. The Commissioner notes that the information relates to a legal action to defend a particular planning policy. The Commissioner considers that the planning policy affects or is likely to affect one of the elements in regulation 2(1)(a) i.e. the land. The Commissioner therefore accepts that regulation 2(1)(c) applies.

#### Did GONE hold the draft letter referred to in paragraph 17 of this Notice or any further relevant information on the balance of probabilities?

23. The Commissioner can consider what information was held by a public authority at the time of a request on the balance of probabilities. This involves a consideration of the scope and thoroughness of any

searches by the public authority to look for relevant information. The Commissioner will also consider, where appropriate, any explanation provided by the authority regarding why the information was not held.

24. When the Commissioner initially approached GONE about its searches, it confirmed that it had conducted a thorough search of all relevant paper and electronic records. In relation to the attachment that it was unable to locate (the draft letter), GONE explained that it believes that this was deleted once the final version was completed. It confirmed that it does not have any record of this deletion but it confirmed that it would have been in accordance with its records management procedures. It maintained that no further information was held and it explained that it did not believe that any other relevant information had been deleted, destroyed or mislaid.
25. As explained in the Chronology to this Notice, the Commissioner wrote to GONE again to ask for a more detailed explanation regarding comments it had made in its letter regarding its searches for the information. Following this, GONE identified that it held additional legal advice falling within the scope of the request. GONE was unable to provide any explanation for why this was not found earlier.
26. The Commissioner would observe that when a public authority assures the Commissioner that it has conducted thorough searches, and subsequently locates further relevant information at a later date without offering an explanation for that oversight, that inevitably casts some doubt on the adequacy of the original search. Nevertheless, the Commissioner is satisfied that whatever inadequacy there may have been in the original search, it has subsequently been rectified. Based on the extensiveness of the subsequent searches described by GONE, the Commissioner accepts that on the balance of probabilities, all relevant information has now been located.

## **Exceptions**

### **Regulation 12(5)(b) – Adverse effect to the course of justice**

27. Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect “the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”.
28. The Commissioner accepts that this exception is designed to encompass information that would be covered by Legal Professional

Privilege because this common law concept is considered to be a fundamental part of the justice system.

29. The principle of Legal Professional Privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two categories of privilege: advice privilege (where no litigation is contemplated or pending) and litigation privilege (where litigation is contemplated or pending). In this case, GONE advised the Commissioner that it is seeking to rely on litigation privilege

### **Does the information attract Legal Professional Privilege?**

30. In order to be clear about what information has been withheld under this exception and which information is being discussed in this Notice, the Commissioner has set out below an identifying description of the email with an indication of how much information has been withheld. The number in brackets refer to the numbering on the table provided by GONE. For clarity, GONE'S table contained references to duplicated information. Where this was the case, the Commissioner has not reproduced those duplications below.

- Email between two named employees in the request dated 30 May 2008 (disclosed) with attached email from external QC to employee of the Council dated 30 May 2008 (majority of email withheld) (3)
- Legal advice from external QC dated 27 May 2008 (entire document withheld)

31. Regarding the withheld information described in both bullet points above, the Commissioner noted that the information clearly represents legal advice from a qualified lawyer that was provided to Blyth Valley Borough Council regarding the litigation. As such, the Commissioner accepts that this information attracted litigation privilege.

32. Litigation privilege may cease to apply if the privilege has been waived i.e. it has been shared in circumstances where it loses its confidentiality. GONE advised the Commissioner that there were no circumstances which apply to this case that would mean that the information had ceased to be confidential. In the absence of any evidence to the contrary, the Commissioner accepts this position.

### **Would disclosure have caused an adverse effect?**

33. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse effect" resulting from



disclosure of the information as indicated by the wording of the exception.

34. Regulation 12(5)(e) is engaged in circumstances where there would be an adverse effect. In accordance with another Tribunal decision *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".
35. GONE argued that disclosure of information that is subject to litigation privilege would have an adverse effect on the course of justice through a weakening of the general principle behind Legal Professional Privilege.
36. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described Legal Professional Privilege as, "a fundamental condition on which the administration of justice as a whole rests".
37. The Commissioner accepts that disclosure of the legal advice would more probably than not undermine the important common law principle of litigation privilege and therefore undermine the course of justice in general. It was apparent to the Commissioner that the complainants strongly feel that the fact that the litigation has now ended means that the prejudice ceases to exist. The Commissioner does not agree that is the case in relation to the legal advice because of the general importance of the principle that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice.
38. As the Commissioner was satisfied that disclosure of the legal advice would have adversely affected the course of justice at the time of the request, he has gone on to consider the public interest test associated with regulation 12(5)(b) in relation to that information.

### **Public interest arguments in favour of disclosing the requested information**

39. The EIR specifically state that a presumption in favour of disclosure should be applied. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.

40. In addition to the above general considerations, the Commissioner also appreciates that decisions concerning planning matters can potentially affect a significant amount of people and there is generally a greater expectation of transparency surrounding planning matters because of this.
41. The Commissioner also appreciates that the legal case in question had been concluded in 2008 and the request that is the subject of this case was not made until 2010. Further, the judgement is also in the public domain. The public interest in withholding information generally diminishes over time.

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

42. The Commissioner's published guidance on Legal Professional Privilege states the following:

*"Legal Professional Privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. This in turn ensures the administration of justice".*

43. In light of the above, there will always be a strong argument in favour of maintaining Legal Professional Privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy case when it stated that:

*"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."*

44. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

### **Balance of the public interest arguments**

45. The Commissioner appreciates that in general there is a strong public interest in public authorities being as accountable as possible in relation to planning issues, particularly those that have the potential to affect a significant amount of people in area. The Commissioner

- accepts that disclosure of the legal advice in question may help the public to consider more fully the detail of the approach made to GONE to assist the Council with its legal preparation.
46. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the Council's right to consult with its lawyers in confidence.
47. In the Commissioner's view, the content of the legal advice itself would not add to the public understanding of the involvement of GONE in this matter to the extent that it would justify its disclosure. There is already significant transparency about the case. The judgement has been published and the complainants have a copy of the letter in which GONE made their comments regarding the case.
48. Having considered the nature of the advice, the Commissioner can see no obvious signs of wrong-doing or evidence that the Council misrepresented the advice it received.
49. Although the Commissioner appreciates that the legal claim that the information relates to was concluded some time ago, the Commissioner's view is that the advice is still relatively recent and, for the reasons above, the public interest in disclosure is not sufficient enough in the particular circumstances to justify the undermining of the general principle behind Legal Professional Privilege as discussed earlier in this Notice.
50. The Commissioner would also add that he is aware that the complainants have a personal interest in this information because of their dissatisfaction with GONE's involvement. However, the Commissioner must consider the wider public interest and he finds that this is not strong enough in the circumstances.
51. For the reasons above, the Commissioner's view was that the public interest in maintaining the exception in relation to the legal advice outweighed the public interest in disclosing it.

**Regulation 12(5)(f) – Adverse effect to the person who provided the information**

52. The Commissioner has identified the relevant withheld information below:
- Email dated 29 May 2008 between the two employees mentioned in the request (majority of sentence in second paragraph redacted) (1)

53. For clarity, GONE also relied on regulation 12(5)(f) to withhold the legal advice already discussed above in this Notice. As the Commissioner has already set out that he is satisfied that the legal advice had been correctly withheld using regulation 12(5)(b), he will not also consider the application of regulation 12(5)(f) to this information.

### **Have parts (i) to (iii) of the exception been met?**

54. Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect “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 public authority is entitled apart from these Regulations to disclose it; and
  - (iii) Has not consented to its disclosure”
55. GONE specifically confirmed to the Commissioner that it considered that all parts of the exception (i) to (iii) as described above had been met. Having considered the nature of the information and the circumstances of the communication, the Commissioner accepts that the first two parts of the exception were met. It had been apparent from the Commissioner’s earlier investigation that GONE had consulted Blyth Valley Borough Council about disclosure of the information and that it had not consented. GONE has confirmed that it has also consulted with the Northumberland County Council, which has now replaced Blyth Valley Borough Council, and that it continues to object to the disclosure. In view of this, the Commissioner accepts that part (iii) was also satisfied.

### **Would disclosure have caused an adverse effect?**

56. This exception cannot be engaged unless a public authority can demonstrate that the interests of the person who provided the information would have been adversely affected by the disclosure. As explained in paragraph 34 of this Notice, “would” means “more probable than not”.
57. GONE advised the Commissioner that it had placed considerable weight on the fact that the Council had refused to consent to the disclosure. It explained that it believed disclosure in the face of this opposition would damage its future relationship with the Council because it would cause

it to be less confident about sharing information with GONE in the future. GONE also argued that in this scenario, the quality of the advice it could offer would be affected and this in turn would adversely affect the interests of the Council. It also added that the disclosure may have wider consequences in that it would make other organisations less confident about sharing information with it. It appears that GONE did not appreciate that the only interests relevant in this exception are those of the party who provided the information. As such, this particular argument was irrelevant.

58. The Commissioner considered the withheld comment in question. He notes that the information represents a free and frank opinion. Having considered the nature of the comment, the Commissioner was not persuaded that disclosure would adversely affect the interests of the Council for the reasons presented by GONE. Ultimately, the Commissioner was not of the view that if the Council did not express such opinions in the future this would have any significant effect on the productivity of its relationship with GONE. The Commissioner did not consider that there was any convincing reason why disclosure of the comment would discourage the Council from seeking advice or other information from GONE in any other context where that advice or information would be beneficial to it. The Commissioner would also add that the purpose of the legislation is not to protect public authorities from embarrassment.
59. The Commissioner considers that the threshold to justify non-disclosure under this exception is a high one. In view of the above, the Commissioner was not persuaded on the strength of the arguments presented that disclosure of the information at the time of the request would have adversely affected the interests of the Council. He has not therefore gone on to consider the application of the public interest test.

### **Regulation 13(1)**

60. This exception provides that personal data that is not the requester's own personal data is excepted from public disclosure if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA.

### **Is the withheld information personal data?**

61. GONE has informed the Commissioner that it is seeking to withhold names and email addresses that appear in the following emails:
- Email between two employees named in the request dated 29 May 2008 (1)

- Email between two employees named in the request dated 30 May 2008 with attachment dated 29 May 2008 (2) (for clarity, the Commissioner also noted that the same name had been redacted when it appeared as a "CC" at the end of legal advice dated 30 May 2008) (7) and (8)
62. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The Commissioner is satisfied that the names and email addresses relate to living and identifiable individuals and he therefore accepts that this information is personal data.

### **Would disclosure contravene the first principle of the DPA?**

63. The first principle of the DPA is most relevant in this case and provides that personal data should only be disclosed in fair and lawful circumstances. The Commissioner has considered the issue of fairness below. In considering this, the Commissioner finds that it is useful to balance the consequences of any disclosure and the reasonable expectations of the data subject, with principles of accountability and transparency.

### **Reasonable expectations**

64. GONE explained to the Commissioner that the emails contained the names and email addresses of several officers at the other five former district councils in the area. GONE explained that these officers were copied into the email and it believes this was done for information purposes only. Beyond stating that it felt this information was "not relevant" to the request, GONE did not explain why the disclosure would not be fair specifically. The Commissioner understood from the context however that GONE wished to argue that the disclosure would be unfair because, as the officers were only copied in for information and were not therefore directly involved, they would not have expected disclosure of their names and email addresses.
65. GONE also explained that the remaining names and email addresses concerned officers at Northumberland County Council. It explained that the County Council's involvement was at that time limited to its role as county planning authority. However, the County Council was transformed on 1 April 2009 into a new legal entity and replaced Blyth Valley Borough Council. GONE explained that it considered that these officers had been copied in as preparation for this future hand-over. The Commissioner understands from GONE that it did not consider that any of these officers were senior.

## **Consequences of disclosure**

66. Given that the Commissioner understands that none of the officers were senior or that they were directly or substantially involved in the matter in question, disclosure could fall outside the officers' reasonable expectations and therefore represent an unwarranted privacy intrusion. The Commissioner considers that an unwarranted intrusion into an individual's privacy is in itself a detriment although he appreciates that it is unlikely that the disclosure would have any tangible impact.

## **Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure**

67. There is always some legitimate interest in the disclosure of information held by public authorities in order to promote transparency and accountability. However, in the circumstances of this particular case, the Commissioner decided that these interests were not particularly strong because he understands that the officers were not senior nor were they significantly involved in the issues. The Commissioner therefore finds that disclosure would not be fair in the circumstances. Further, even if the Commissioner had considered that the disclosure was fair, he would not have considered that it would be necessary to satisfy any legitimate interests.

## **Procedural Requirements**

68. The Commissioner was not satisfied that GONE had correctly relied on regulation 12(5)(f). He therefore finds a breach of regulation 5(1) and 5(2) because GONE failed to provide this information.
69. As GONE did not issue a refusal notice within 20 working days following receipt of the request, it breached regulation 14(2) of the EIR.
70. In its refusal notice dated 17 March 2010, the Council did not rely on any exception in order to withhold a number of names and email addresses. When the Commissioner explained that it must rely on an exception if it wished to withhold information, GONE stated that it would wish to rely on regulation 13(1). The Commissioner therefore considers that GONE breached regulation 14(2) and 14(3)(a) for failing to rely on this exception until during the Commissioner's investigation.
71. At the end of the Commissioner's investigation, GONE also identified that it held an additional item of legal advice which it considered was excepted under regulation 12(5)(b) and 12(5)(f). As it failed to claim these exceptions in relation to this information until the end of the Commissioner's investigation, it breached regulation 14(2) and 14(3).

## The Decision

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72. 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 correctly withheld the legal advice identified in paragraph 30 of this Notice because it was excepted under regulation 12(5)(b) and the public interest in maintaining the exception outweighed the public interest in disclosing the information in all the circumstances of the case.
- It also correctly withheld the names and email addresses using the exception under section 13(1).
- The Commissioner was also satisfied, by the end of his investigation that no further relevant information was held.

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

- The public authority incorrectly relied on regulation 12(5)(f) to withhold the information described in paragraph 52 of this Notice. It therefore breached regulation 5(1) and 5(2) for failing to provide this information.
- The public authority breached regulation 14(2) for failing to respond to the request within 20 working days
- The public authority breached regulation 14(2) and 14(3) for failing to rely on regulation 13(1) until during the Commissioner's investigation.
- It also breached regulation 14(2) and 14(3) in relation to the legal advice that was discovered at the end of the Commissioner's investigation because it failed to rely on the exceptions under regulation 12(5)(b) and 12(5)(f) in regard to this information until the end of the Commissioner's investigation.

## Steps Required

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74. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:



Disclose directly to the complainant the following items of information:

- The information described in paragraph 52 of this Notice that was withheld using the exception under regulation 12(5)(f)
75. 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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76. 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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77. 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](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 sent.

**Dated the 28<sup>th</sup> day of February 2011**

**Signed .....**

**Andrew White  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

### **Environmental Information Regulations 2004**

#### **Regulation 2 - Interpretation**

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

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

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

#### **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 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 the 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(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 –

- (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;

- (f) the interests of the person who provided the information where that person –

- (ii) 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 these Regulations to disclose it; and

- (iii) has not consented to its disclosure

## **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).