

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

Decision Notice

Date: 22 November 2010

Public Authority: Solihull Metropolitan Borough Council
Address: Council House
PO Box 18
Solihull
B91 9QS

Summary

The complainant requested a copy of a contract between the Council and a named developer in relation to the redevelopment of Shirley town centre. The public authority dealt with the request under the provisions of the Act, disclosing a redacted version of the information in question. The Commissioner's decision is that the information is environmental and that the Council should have responded to the request under the provisions of the EIR. His decision is that some information was correctly withheld but that other information should have been disclosed. The Commissioner has therefore ordered disclosure of all information falling within the scope of the request, except that which the Commissioner has concluded is exempt under regulation 12(5)(e). The Commissioner has also identified procedural shortcomings in the way the Council handled the complainant's request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. 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

3. In the early 1990's, Solihull Metropolitan Borough Council (the "Council") became increasingly concerned that Shirley town centre was in decline. This led to the 'New Heart of Shirley' concept, which was to provide a mixed use retail based development in the town centre. This proposal was subsequently included in the Council's Unitary Development Plan (UDP). The Council identified a potential site within the existing town centre and produced a development brief for the scheme. The Council needed to appoint a commercial development partner to take the development of Shirley town centre forward and, following a competitive tender process in 2003, a developer was selected.
4. A conditional development agreement between the Council and the developer was drawn up and exchanged in May 2004. The agreement (the contract referred to in the request) sets out the basis on which the scheme must be delivered. The agreement has been the subject of a number of variations since its creation. The withheld information that this Notice considers is contained within a recent revision of the agreement. The agreement sets out the objectives of the development in accordance with the development brief, the contractual commitment of the developer to deliver the development and contractual commitment of the Council to transfer the land to the developer, subject to the financial and other terms set out in the agreement. It remains a conditional agreement; a number of conditions need to be satisfied before the Council will transfer the land to the developer for the development to proceed. For example, while the Council does own most of the land required, there are some outstanding interests which need to be acquired. To this end, a Compulsory Purchase Order was confirmed in December 2008.

The Request

5. On 8 November 2009 the complainant wrote to the Council and requested:

"A copy of the contract between Shirley Advance and Solihull MBC"

and

"A copy of any contracts between Asda (Wall Mart) and Solihull MBC".

6. The Council provided a response on 14 January 2010 in which it disclosed a redacted version of a development agreement between Shirley Advance ("the developer") and the Council. The Council explained that the development agreement provided was the most recent version. The redacted sections of the agreement were withheld by virtue of sections 40(2) and 43 of the Act. In addition, the Council confirmed that no contracts were in place between Asda (Wall Mart) and the Council.
7. The complainant requested an internal review of the Council's decision on 22 January 2010. Following a series of exchanges between the complainant and the Council, on 5 February 2010 the Council wrote to the complainant with details of its internal review. The Council maintained most of the redactions under sections 40(2) and 43 of the Act, but disclosed some of the redacted information that had previously been withheld by virtue of section 43.

The Investigation

Scope of the case

8. On 21 February 2010 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 whether the information withheld by virtue of section 43 should be disclosed. The complainant confirmed that he did not want to pursue his complaint in respect of the information withheld by virtue of section 40(2), and that he did not wish to pursue his complaint in respect of the second part of the request, relating to a contract between Asda and the Council.
9. The information withheld by virtue of section 43 consists of a number of values, percentages and clauses within the development agreement. These items have been listed below, using the Council's terminology, along with the page or paragraph number of the agreement for clarity:
 - The "Premium" (page 12)
 - Rejection Notice (two redactions within paragraph 13.18(a) and one within paragraph 13.22)

- Incurred Costs (one redaction within paragraph 29.2(a) and one redaction within paragraph 29.2(b))
- Schedule 3 (in its entirety - pages 80-91)
- 'Purchase Price' (within Schedule 6 - pages 97-98)

Chronology

10. On 6 April 2010 the Commissioner requested a copy of the withheld information from the Council in order to ascertain whether the exception had been applied correctly.
11. The Council provided the withheld information to the Commissioner on 29 April 2010, along with further arguments to support its decision to withhold the redacted information by virtue of section 43(2) of the Act.
12. On 5 August 2010 the Commissioner wrote to the Council to request further information relating to the commercial relationship between the Council and the developer. The Council provided its response on 2 September 2010.
13. Upon examination of the information in context, the Commissioner considered the development agreement as a whole to be environmental information as defined in regulation 2(1) of the EIR. He therefore asked the Council to reconsider its decision to withhold information, taking into account the provisions of the EIR.
14. The Council maintained its view that it was right to consider the request under the Act, but stated that if the information was found to be environmental by the Commissioner, the redacted information would be exempt from disclosure by virtue of regulation 12(5)(e).

Analysis

Substantive Procedural Matters

15. The Council considered the complainant's request for information under the Act and considered it to be exempt by virtue of section 43(2). However, the Commissioner considers that the information requested constitutes environmental information and that the correct access regime is therefore the EIR.
16. The Council provided arguments in support of its position that the information in question did not constitute environmental information. Whilst the Council accepted that the development as a whole would be

likely to affect the environment, the Council maintained that the withheld information could not influence any decisions relating to the development, and therefore could not 'affect' or 'influence' the outcomes of the project. Since the withheld information is financial in nature, the Council also argued that this financial information would not, in itself, affect the environment.

17. The Commissioner has determined that the requested information would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR, for the reasons set out below. Regulation 2(1)(c) provides that:

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

(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”.

18. The factors referred to in (a) include:

“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”.

19. In coming to his view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term “any information...on” in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

20. The Commissioner is satisfied that information regarding the redevelopment of land, including the financial elements of the

development agreement as listed in paragraph 9, falls within the definition of environmental information for the purposes of the regulations as provided in regulation 2(1)(c).

21. The information requested in this case relates to a proposed town centre redevelopment project which will involve the following (amongst other activities):

- Construction of a food store, residential units and car parking.
- Improved pedestrian links.
- A new frontage to Stratford Road.
- Improvements to parts of Shirley Park.

Specifically, the information in question is contained within a development agreement between the Council and a named developer. The redevelopment of land is a measure, as defined in regulation 2(1)(c), it is an activity likely to affect the elements and factors referred to in 2(1)(a), i.e. the land and the landscape, and the redacted information in question is "on" that measure.

Exceptions – Regulation 12(5)(e)

22. Having viewed the information request in context, and having viewed the withheld information, the Commissioner asked the Council to reconsider its position to take into account the provisions of the EIR. The Council maintained its view that it was right to consider the request under the Act but stated that if the information was found to be environmental by the Commissioner, the redacted information would remain exempt by virtue of regulation 12(5)(e). As the Commissioner has concluded that the provisions of the EIR apply to this case, he has assessed whether the information was exempt from disclosure under regulation 12(5)(e).

23. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. This exception is subject to a public interest test where the exception is engaged.

24. The Commissioner believes that in order for this exception to be applicable, there are a number of conditions that need to be met, namely:

- Is the information commercial or industrial in nature?

- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

25. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. The development agreement in question deals with the redevelopment of a town centre. In view of this, the Commissioner is satisfied that, as it relates to a business activity for commercial gain, all of the redacted information listed in paragraph 9 is commercial in nature. He therefore considers that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

26. In relation to this element of the exception, the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute. There is no need for the information to have been obtained from another party as is the case with section 41 of the Act.
27. The Council has argued that the confidentiality in this case is imposed under contractual obligation. The Confidentiality Clause contained within the agreement binds parties into keeping confidential certain terms contained within the agreement.
28. The Commissioner accepts that the circumstances and contractual terms under which the information was agreed between the Council and the developer were sufficient to create an obligation of confidence.
29. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law in view of the contractual relationship between the Council and the developer.

Is the confidentiality provided to protect a legitimate economic interest?

30. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is

designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

31. The Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. The Council explained that due to the large amount of public and commercial interest in this proposal over the past six years and due to previous information requests that the Council has received, it has been in close liaison with the developer regarding the information that can (and cannot) be released from the development agreement. In respect of this request specifically the Council contacted the developer to notify them of the request and to seek an update of their views. The Council stated that all of this contact was made by way of telephone conversations.
32. Whilst the Commissioner accepts that the development agreement as a whole is commercial in nature, and that it is subject to confidentiality provided by law, he notes that there are several different categories of redacted information within the development agreement. In order to assess whether the confidentiality was provided to protect a legitimate economic interest, the Commissioner has therefore considered, in turn, each of the five elements listed in paragraph 9. As the arguments provided by the Council were identical, some of the elements have been grouped together. In addition to specific arguments relating to this case, the Council provided general arguments to support its position that disclosure of the information in question as a whole would adversely affect the legitimate economic interests of both the Council and the developer, which the confidentiality agreement at clause 39.1 of the development agreement set out to protect.

33. Due to the circumstances of this case and the content of the withheld information, the level of detail which the Commissioner can include in this Notice about the Council's submissions to support its position in respect of this element of the exception and the Commissioner's consideration of those arguments is very limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out in detail his findings in relation to the application of the exception. This annex will be provided to the Authority but not, for obvious reasons, to the complainant.

I) The Premium

34. The Council explained that one of the conditions in the agreement to be satisfied is the developer acquiring or entering into agreements to acquire all land and property interests required to deliver the scheme. There are a variety of interests ranging from outright ownership of land to rights of way over some land. Negotiations in terms of 30 land and property interests are yet to be finalised.

35. It is not possible for the Commissioner to include any further detailed analysis in respect of the Premium, as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.

36. The Commissioner considers that disclosure of the value of the Premium alone would not necessarily have an adverse effect on the interests of the Council or the developer in question. However, the Commissioner has taken into account the timing of the request in this case. The request was made prior to the agreement becoming unconditional, and as such the Commissioner accepts that disclosure of the Premium would prejudice the commercial interests of the Council and the developer.

II) Rejection Notice, Incurred Costs and Schedule 3

37. The Council provided identical arguments for withholding the Rejection Notice, Incurred Costs and Schedule 3 of the agreement and these categories will be considered together.

38. The Rejection Notice included in the development agreement seeks to compensate the Council in the case of non-completion, or substandard completion of the development.

39. The Incurred Costs included in the development agreement relate to the contribution of the developer to external fees and monitoring fees incurred by the Council.
40. Schedule 3 of the development agreement was initially withheld in full by the Council. During the course of the Commissioner's investigation, the Council reconsidered its position and found that some information contained in Schedule 3 was not exempt and disclosed it. Therefore only part of Schedule 3 remains redacted by the Council. Schedule 3 relates to the recalculation of the value of the Premium within the agreement.
41. It is not possible for the Commissioner to include any further detailed analysis in respect of the Rejection Notice, Incurred Costs or Schedule 3 of the agreement as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.
42. The Commissioner considers that disclosure of the Rejection Notice, Incurred Costs or Schedule 3 of the agreement would not necessarily have an adverse effect on the interests of the Council or the developer in question. The Commissioner therefore considers that regulation 12(5)(e) is not engaged in respect of these elements, and that the Council incorrectly withheld the Rejection Notice, Incurred Costs, and Schedule 3 of the agreement.

III) Purchase Price (Schedule 6: 'Buy-Back Provisions')

43. The withheld information in respect of the Buy-Back Provisions relates to the purchase price, in the event that the development does not go ahead for any reason.
44. It is not possible for the Commissioner to include any further detailed analysis in respect of the purchase price, as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.
45. The Commissioner considers that disclosure of the purchase price would not necessarily have an adverse effect on the interests of the Council or the developer in question. The Commissioner therefore considers that the Council incorrectly withheld the purchase price.

Would the confidentiality be adversely affected by disclosure?

46. The Commissioner considers that disclosure of truly confidential information into the public domain would inevitably harm the

confidential nature of that information by making it publicly available and would also inevitably harm the legitimate economic interests which had been identified.

47. For the reasons set out in this Decision Notice and within the confidential annex, the Commissioner has concluded that the exception is not engaged in respect of the Rejection Notice, Incurred Costs, Schedule 3 or the Purchase Price. This is because the Commissioner is not persuaded that there are legitimate economic interests which require the protection of confidentiality. Because the exception is not engaged in respect of this information he is not required to consider the public interest test in relation to its disclosure.
48. In relation to the Premium, the Commissioner considers that the first three elements of the test cited at paragraph 24 of this Notice have already been established. The Commissioner therefore considers that disclosure of this information into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests which have been identified. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the Premium.

Public interest test

49. As stated in paragraph 23 above, even if regulation 12(5)(e) is engaged, regulation 12(1)(b) provides that the information must still be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information".
50. The Commissioner has therefore gone on to consider whether in the case of the Premium, the public interest in maintaining the exception outweighs the public interest in disclosure of this information. In doing so he has given consideration to the detriment that disclosure would cause to the economic interests of the parties involved and the extent to which there is a wider public interest in preserving the principle of confidentiality. Whilst there is an inherent public interest in preserving confidentiality the Commissioner is cautious about placing significant weight on the generic argument. In the context of the exception at 12(5)(e) he considers that arguments concerning the undermining of confidentiality will carry more weight when related to the specific circumstances of the case.
51. The Council is of the view that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

52. The Commissioner recognises the general public interest in furthering the understanding of and participation in the public debate on issues of the day and the promotion of accountability and transparency in the spending of public money.
53. The Council also identified a specific public interest in knowing whether the Premium in question represents value for money and stated that disclosure would benefit individual members of the public involved in current land acquisition negotiations by enhancing their bargaining position.

Public interest arguments in favour of maintaining the exception

54. The Council identified a number of arguments in favour of maintaining the exception. The Council argued that, whilst it recognised the need for openness and transparency in public services, it felt that a balance should be struck between secrecy and transparency to allow a public body to conduct its business in a competitive environment. The Council maintains that a proportionate, or measured, approach to accountability is required to ensure that the Council's commercial interests are not harmed. The Council's opinion is that a certain amount of decision making has to be performed "behind closed doors" in order for effective business to be conducted.
55. More specifically, the Council argued that, since it considered that disclosure would prejudice the successful delivery of the scheme in question, its disclosure would not be in the public interest. The Council maintained that there is a public interest in the completion of this scheme. Further, any harm caused to the profits of the Council would decrease its potential capital receipts and therefore its ability to pass these benefits onto the citizens of the borough.
56. The Council argued that the public interest lies in securing the best financial deals and outcomes for the Council, and, by extension, the citizens of Solihull.

Balance of the public interest arguments

57. The Commissioner is mindful of the fact that there will always be some inherent public interest in preserving confidentiality, but the Commissioner will be cautious about placing significant weight on this generic argument. The Commissioner has taken into account the

presumption in favour of disclosure provided in regulation 12(2) of the EIR.

58. The Commissioner is of the view that there is generally a strong public interest in public authorities being accountable for the decisions they made and the money they spend. The Commissioner also notes that the public interest has been satisfied to a certain degree by the majority of this development agreement having been made available in the public domain.
59. In reaching a decision in respect of where the public interest in this case lies, the Commissioner considers that the following factors are of particular significance:
 - The timing of the complainant's request
 - The nature of the commercial and financial information contained in the withheld information, and
 - The specialised and limited market to which the development agreement relates
60. The Commissioner notes that negotiations relating to the purchase of a number of pieces of land were ongoing at the time of the request. Disclosure of the information in question would directly impact on the development if it were to be disclosed before the agreement became unconditional. The Council stated that they would be content to disclose this information once the agreement has become unconditional, which further strengthens the argument that disclosure would harm this specific development at this vulnerable stage in the process.
61. The Commissioner agrees that the role of the Council is to secure the best deals for itself as a public authority, and for the citizens of Solihull. The Commissioner considers that the public interest in the transparency of the Council's involvement in the development has already been addressed to a certain extent by the disclosure of the vast majority of the development agreement. He also considers that the additional transparency afforded by disclosure of this element would not be augmented to any significant degree.
62. The Commissioner does not consider that it would be in the public interest to disclose information which could undermine the Council's future negotiating position, nor would it be in the public interest to release information which would ultimately be detrimental to its council taxpayers.

63. For the reasons set out above, the Commissioner is therefore of the view that the public interest in maintaining the exception outweighs the public interest in disclosing the Premium. Therefore the Commissioner is satisfied that the Council correctly withheld the Premium in reliance on the exception under regulation 12(5)(e) of the EIR.

Procedural Requirements

Regulation 5

64. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
65. The complainant initially requested the information on 8 November 2009. On 14 January 2010, the Council disclosed a redacted version of the agreement. Therefore the Commissioner considers that the Council breached regulation 5(2) in respect of the information disclosed on 14 January 2010 for failing to make it available within 20 working days following receipt of the request.
66. At internal review, on 5 February 2010, the Council disclosed further information within the scope of the request. The Commissioner finds that the Council breached regulation 5(2) in respect of the information disclosed on 5 February 2010 for failing to make it available within 20 working days following receipt of the request.
67. As the Commissioner has concluded that some of the information requested was not exempt by virtue of regulation 12(5)(e), he considers that the Council breached regulation 5(1) in failing to make this information available on request, and regulation 5(2) for failing to make it available within 20 working days following receipt of the request.

Regulation 14

68. Regulation 14 of the EIR requires a public authority to inform a complainant in writing as soon as possible and no later than 20 working days from the date of the request if it is refusing to supply the information requested. It is also obliged to specify the reasons for not disclosing the information, state the regulation that applies and the matters that it considered in reaching its decision with respect to the public interest test. The authority must also tell the applicant that they

can make representations (and appeal the decision) to the authority and that they ultimately have a right to complain to the Commissioner.

69. The Council failed to consider the request under the EIR. As such, the Commissioner concludes that the Council breached regulations 14(1), 14(2) and 14(3) of the EIR for failing to issue a refusal notice no later than 20 working days after receipt of the request stating the exception being relied on and the matters considered in reaching its decision with respect to the public interest under regulation 12(1)(b).

The Decision

70. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The Council was entitled to rely on the exception at regulation 12(5)(e) in relation to the Premium contained within the development agreement and the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

- The Council incorrectly relied on the exception at regulation 12(5)(e) in relation to all other withheld information contained in the development agreement.
- The Council breached regulation 5(2) in respect of the information disclosed on 14 January 2010.
- The Council breached regulation 5(2) in respect of the information disclosed on 5 February 2010.
- The Council breached regulation 5(1) and 5(2) in relation to the information that the Commissioner has concluded not to be exempt under regulation 12(5)(e).
- The Council breached regulation 14(1), 14(2) and 14(3) for failing to issue a proper refusal notice under the EIR within 20 working days.

Steps Required

71. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To disclose the Rejection Notice, Incurred Costs, Schedule 3 and Purchase Price within the development agreement.
72. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

73. 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.

Other matters

74. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Internal review

75. In relation to desirable practice in relation to the conducting of internal reviews, paragraph 61 of the Code of Practice issued under regulation 15 of the EIR recommends:

"Complaints procedures should be clear and not unnecessarily bureaucratic. They should be capable of producing a prompt determination of the complaint..."

76. In his Good Practice Guidance No. 5, the Commissioner qualifies this further by explaining that he does not expect an internal review to have more than one stage. The Commissioner is concerned that, despite his guidance on the matter, the Council operates an internal review procedure which consists of more than one stage. In light of this the Commissioner recommends that the Council amend its current internal review procedures as a matter of urgency.

Right of Appeal

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.

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 22nd day of November 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

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

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

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

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

Regulation 12 (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be

entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

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

of the enforcement and appeal provisions of the Act applied by regulation 18.

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 –

- (h) international relations, defence, national security or public safety;
- (i) 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;
- (j) intellectual property rights;
- (k) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (l) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (m) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (n) the protection of the environment to which the information relates.