Tribunals Service
Information Tribunal

IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Information Tribunal Appeal Number: **EA/2008/0065**

Information Commissioner's Ref: **FS50122058**

Decided on the papers	**Decision Promulgated**
On 27th March 2009	**On 28th May 2009**

BEFORE

CHAIRMAN

Fiona Henderson

LAY MEMBERS

Henry Fitzhugh

Rosalind Tatam

B E T W E E N :

CREEKSIDE FORUM **Appellant**

- and –

THE INFORMATION COMMISSIONER **Respondent**

- and –

THE DEPARTMENT FOR CULTURE MEDIA AND SPORT **Additional Party**

Subject matter:

Environmental Information Regulations 2004
Request for information, Reg 5

Public interest test, Reg 12(1)(b)

Exceptions, Regs 12(4) and (5)

- Legal professional privilege 12(5)(b)

Personal data, Reg 13

Cases:

Kircaldie v IC and Thanet DC EA/2006/001

Rudd v IC and the Verderers of the New Forest EA/2008/0006

Archer v IC and Salisbury District Council EA/2006/0037

Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and EA/2005/0030

Maiden v IC and Borough Council of West Norfolk EA/2008/0013

DBERR v IC and Friends of the Earth EA/2007/0072

Bellamy v ICO and Secretary of State for Trade and Industry EA/2005/0023

Corporate Office of the House of Commons v IC and Others EA 2007/0060 and others

Young v IC and Department for Environment of Northern Ireland EA/2007/0048

Billings v IC EA/2007/0076

Decision

The Tribunal refuses the appeal in relation to grounds I and III and allows the appeal in part in relation to ground II and amends the Decision Notice FS50122058 dated 9th July 2008 as set out below. The information to be disclosed (as defined in Confidential Schedule 2 below) should be provided to the Creekside Forum within 30 days from the date of this Decision.

We direct that the Confidential Schedule 1 to our Reasons for Decision (information that should remain withheld) should remain confidential. We further direct that Confidential Schedule 2 to our Reasons for Decision should remain confidential until the information has been disclosed.

Information Tribunal **Appeal Number: EA/2008/0065**

SUBSTITUTED DECISION NOTICE

Dated 28th May 2009

Public authority: **Department for Culture, Media and Sport**

Address of Public authority: **2-4 Cockspur Street,**

London SW1Y 5DH.

Name of Complainant: **Creekside Forum**

The Substituted Decision

Having reviewed the disputed information against which legal professional privilege is claimed under regulation 12(5)(b), all references in the Decision Notice dated 9th July 2008 to "an email" are deemed to read "2 emails and the attachments thereto".

The following paragraphs should be substituted for or added to those of the same number that appear in the Decision Notice dated 9th July 2008.

Exception 13 – Personal data

46(b) Names of people making third party representations

Private Individuals

i(a) In light of DCMS' policy, individuals acting in a private capacity (as itemized in Confidential Schedule 1) do not have an expectation that their details might be released to third parties.

i(b) Release of this information into the public domain would identify both the names and the personal views of people making representations to the Department.

i(c) These individuals are acting in a private capacity and cannot be expected to be accountable or publicly responsible for their views or representations.

i(d) Whilst Creekside Forum have a legitimate interest in this personal data, its usefulness is reduced in light of its specificity to a private individual.

i(e) The negative consequences of disclosure to the data subjects would be disproportionate in contrast to the legitimate interests of Creekside Forum, and consequently unnecessary and unwarranted.

i(f) The itemized information in Confidential Schedule 1 can therefore be withheld under regulation 13(1) by virtue of regulation 13(2)(a)(i), as disclosure would be unfair and would contravene the first data protection principle.

Individuals acting in a public capacity or on behalf of an organization

46(b)ii(a)In light of DCMS' policy, individuals acting in a public capacity or on behalf of an organization (commercial or otherwise) do have an expectation that their details might be released to third parties unless they had expressed concern to the DCMS.

ii(b) Release of this information into the public domain would identify both the names and the professional views or representative views of the organization.

ii(c) These individuals are acting in a public or representative capacity, and would have an expectation that their details might be released to third parties:

A unless they had expressed their concerns about release to the DCMS,

B unless they were of insufficient seniority to be accountable to the public or their organization,

C unless there are specific reasons from the context of the withheld material for finding that disclosure would be unfair or unwarranted.

ii(d) The Appellants have a legitimate interest in this personal data.

ii(e) The personal data which falls within any of the categories outlined in paragraph 46(ii)(c) A-C above are identified in the Tribunal's Confidential

Schedule 1 (attached to the determination below) and should not be disclosed as such disclosure would be unfair and would contravene the first data protection principle.

iii(a) Those individuals whose personal data is defined in paragraph 46(b)ii(a) above which does not fall within any of the categories outlined in 46(ii)(c) A-C above are identified in the Tribunal's Confidential Schedule 2 (attached to the determination below). This personal data should therefore be disclosed, as disclosure would not be unfair and would not contravene the first data protection principle.

The Decision

66. The public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

i) Regulation 13 in relation to the decision to withhold the names of:

a) junior civil servants,

b) individuals acting in a private capacity (as identified in Confidential Schedule 1),

c) individuals acting in a public or representative capacity with a low level of responsibility and accountability, or who had expressed concern regarding the release of their details, or for whom disclosure would be unwarranted (as identified in Confidential Schedule 1).

67. However, the following elements of the request were not dealt with in accordance with the EIRs:

i) Regulation 5(1) and 5(2) (duty to make available environmental information on request) in relation to

(a) – (c) [as before in the Decision Notice of 9th July 2008]

d) Incorrectly withholding the personal data as itemized in Confidential Schedule 2 in purported reliance upon regulation 13 was in breach of regulation 5 of the EIRs.

Steps Required

68. The public authority is required to take the following step to ensure compliance with the EIRs:

Disclose within 30 days the information withheld from the complainant, as identified in the Tribunal's Confidential Schedule 2.

Dated this 28th day of May 2009

Signed

Fiona Henderson

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. On the 19th September 2005, the Appellants wrote to the Department for Culture Media and Sport (DCMS) requesting information regarding the issuing of a certificate of immunity from listing (COI), in relation to Borthwick Wharf, Deptford, by the Minister of Culture. The Appellants made reference to receiving a letter and enclosures signed by Ms Mandy Barrie on 14th September 2005 and a copy of a letter to Rt. Hon Nick Raynsford MP from the Minister for Culture, Mr David Lammy MP. The Appellants' information request states:

   "In his letter Mr Lammy states that he has "looked at all the relevant papers". Ms Barrie's enclosures are two inspector's reports from English Heritage dated December 2004 and February 2005.

   We should be grateful if you would forward to us copies of the other documents that comprised the "relevant papers" perused by the Minister.

   Furthermore we ask for copies of all other communications, whether internal or external, in whatever format, including such things as notes of telephone conversations, relating to Borthwick Wharf".

2. They were provided with a substantive reply on 20th December 2005 supplying some of the information but withholding the rest under sections 36 and 42 of the Freedom of Information Act 2000 (FOIA).

3. The Appellants wrote to the DCMS setting out the areas that they wished to have covered in an internal review in a letter dated 10th January 2006. In their interim letter dealing with documents which should have been disclosed but had been omitted Graham Holmes (Information Management Unit) stated that certain names had been redacted:

   ... "as being 'not relevant to the request'. This is in line with the way we have handled the other information we have provided. The Department's

general practice of redacting names as 'not relevant' or being exempt from disclosure under the data protection principles is being considered as part of the more substantive aspects of the internal review now in hand. We will write to you about this when we have concluded all the remaining aspects of the review and, depending on the outcome of the review, may subsequently disclose the redacted information."

4. The internal review was completed and its conclusions set out in the letter from Nicholas Holgate, Chief Operating Officer, dated 21st April 2006 which upheld the original decision in relation to sections 36(2)(b)(i) and (ii) and section 42(1) and maintained the exemptions. Additionally the DCMS noted:

   "I have reviewed the reasons for the redaction of certain names and other details. From the context of your original request of 19 September 2005, we were of the view that the names of junior officials of the Department and names of third parties that we corresponded with was not the core information which you were seeking. This should have been made clearer in our original response and we apologise for any ambiguity caused by this omission.

   ... I have asked officials to give further consideration to the release of this information and to advise me accordingly. I will write to you again about this separately and expect this to be within 20 working days from now.".

5. Having failed to meet its own 20 working day deadline and having been written to by the Appellants on 19th June, the DCMS wrote again on 21st June, 5th July and 1st August stating that it was continuing to work on the request for the release of the redacted names, and that the Department would aim to respond by a fresh deadline. It did not meet any of these deadlines and never concluded the review.

6. The Appellants complained to the Commissioner on 9th June 2006. From the Decision Notice it is apparent that no action was taken by the Commissioner for approximately 15 months, until 6 September 2007 when the Commissioner contacted DCMS to request certain information in order to progress his investigation. The redaction of the information was included in the

Commissioner's investigation, notwithstanding that the review on this point was never concluded.

7. The Commissioner issued a Decision Notice on 9th July 2008 (some 25 months after the original complaint) finding that the request should have been handled under the Environmental Information Regulations 2004 (EIR) and finding that:
   - the information withheld under section 42 FOIA was exempt from disclosure under regulation 12(5)(b),
   - the withheld names of certain officials and third parties was personal data and exempt from disclosure under regulation 13,
   - in relation to the information withheld under section 36 FOIA, whilst regulation 12(4)(e) was engaged, the public interest was in favour of disclosure,
   - the DCMS had breached regulations 5, 11 and 14 in their handling of the request.

The Appeal

8. The Appellants appealed to the Tribunal by notice of appeal received on 7th August 2008. At the oral directions hearing on 11th November 2008, the Appellants' grounds of appeal were clarified. Grounds I – III were set down for a full hearing. Ground IV was set down for a preliminary hearing.

9. Ground IV read as follows:

   "The Commissioner delayed in the issue of a Decision Notice beyond that which was reasonable and in so doing caused prejudice to the Appellant and rendered the Decision Notice defective."

10. At a preliminary hearing decided upon the papers, pursuant to rule 10 of the *Information Tribunal (Enforcement Appeals) Rules 2005*, the Deputy Chairman, acting for the Tribunal under rule 25, considered whether ground IV of the Appeal should be summarily dismissed. For the reasons set out in the ruling dated 29th

January 2009, the Tribunal was satisfied that ground IV had no real prospect of success. It was summarily dismissed pursuant to rule 14(9) on 6th February 2009. The Tribunal's comments upon delay are set out in paragraph 90 et seq below.

11. The Tribunal first considered grounds I-III on the papers on 12th February 2009 but had to adjourn as it was apparent that the DCMS had not provided a complete copy of the unredacted disputed material. It was also unclear what material the DCMS were arguing was legally privileged, and what material had been shown to the Commissioner. The Tribunal issued directions and reconvened following further evidence from the DCMS and submissions from the Commissioner and the DCMS; the Appellants chose not to make any additional submissions.

12. The Tribunal has not felt the need to provide a confidential schedule in relation to ground III. However, brief additional reasons are given in relation to ground I referencing the contents of the withheld material in Confidential Schedule 1. In light of the necessity of detailing the reasoning behind the redaction or otherwise of each data subject's personal data, the Tribunal has drafted 2 closed schedules to the decision. The general arguments appear in this open decision:

- Schedule 1 details the names that should remain redacted pursuant to regulation 13 providing the reasons applicable to each individual. The Tribunal directs that this remains confidential.
- Schedule 2 details the names that should be disclosed providing the reasons applicable to an individual. The Tribunal directs that this is disclosed to the Appellants when the DCMS have disclosed the information .

The Questions for the Tribunal

13. Grounds I-III read as follows:

I) *The Commissioner wrongly concluded that the exception in regulation 12(5)(b) EIRs applied to an internal email from the DCMS' legal advisers because:*

a) *It would not adversely affect the course of justice,*

b) *The Commissioner should have applied the public interest balancing test at the date of the decision notice and not at the date of the original request,*

c) *The Commissioner was wrong to conclude that the public interest in maintaining the exemption outweighed the interest in disclosing the information.*

II) *In relation to the material that has been redacted in reliance upon regulation 13 EIRs:*

a) *The Commissioner erred in concluding that the names of Mr Ellson and Mr [T] constituted personal data relating to third parties,*

b) *The Commissioner further erred in concluding that disclosure of the names of:*

i) *Mr [M], and Mr [R], (campaigners in favour of supporting Borthwick Wharf)*

ii) *Planning Applicants and their agents and*

iii) *Junior civil servants*

would be unfair and would have breached the first data protection principle.

III) *The Commissioner erred in recording the public authority's duty to respond to a request for Environmental Information as set out in regulation 5(2) EIRs as being a "20 working day limit" when the public authority is under a duty to respond:*

***"as soon as possible** and **no later** than 20 working days after the date of receipt of the request".*

14. The Tribunal's powers are set out at section 58 of FOIA, which applies to environmental information cases, by virtue of regulation 18 of EIR. Section 58 states:

"(1) *If on an appeal … the Tribunal considers –*

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

15. In relation to grounds I-III above, the Tribunal is considering mixed questions of fact and law. This is not a case where the Commissioner was required to exercise his discretion.

Evidence

16. The Tribunal is in receipt of:

- 2 witness statements from Mr Harry Reeves (Deputy Director, Culture: Architecture and the Historic Environment Division) dated 12th January 2009 and 6th March 2009 on behalf of DCMS and
- unredacted copies of the disclosed material to be read in conjunction with Annex D (a schedule of the redactions to the material disclosed to the Appellants. Annex D was provided to the Commissioner with the letter of 15th October 2007 in which the DCMS set out their arguments in support of the exemptions then relied upon).
- Some of the documentation has also been served in redacted form.
- The bundle also includes considerable correspondence between the parties.

Legal Submissions and Analysis

Ground I Legal professional privilege

17. The hearing was adjourned on 12th February 2009 because it was not clear what the scope was of the legally privileged material:
    - In his witness statement dated 12th January 2009 Mr Reeves asserts that legal professional privilege (LPP) is claimed in relation to two emails. At paragraph 28 he states that (emphasis added by the Tribunal):

      *"the department has withheld ..**an internal email and reply** dated 15 June 2005 between a policy official and one of the legal department's legal advisers about the submission to the minister, the non listing decision letter and the certificate of immunity letter for Borthwick Wharf.".*

    - However, in the letter to the Commissioner dated 15 October 2007 the DCMS referred to

      "... one document, .. an internal email of 15 June 2005 (document 9 of Annex A) ..."

    - And later in the same letter:

      *"the information that falls within the scope of section 42 is **an** internal email date 15 June 2005 **from one of the Department's legal advisers to a policy official** about the submission to the Minister, the non listing decision letter, and the certificate of immunity letter for Borthwick Wharf. As this information **contains** legal advice, we consider that legal privilege attaches to it..."*

18. This is largely repeated at paragraphs 25, 56 and 66 of the Decision Notice. In all the Commissioner's pleadings and submissions the Commissioner had proceeded on the basis that LPP was only claimed in relation to one email from the legal adviser. This was also the case in relation to the DCMS's legal submissions dated 27th January 2009 (post dating Mr Reeves' witness statement dated 12th January 2009). At paragraph 11 of the DCMS submission it states:

*".. **the** email in question contains legal advice **from** a legal adviser to a policy officer.."*

and at paragraph 18

*"**the** email containing legal advice".*

19. In the DCMS reply dated 6th March 2009 (served in redacted form upon the Appellants) they stated that:

    - There were two emails which appeared upon the same page.
    - Attachments to the email are part of the legal advice and form part of the protected correspondence between the legal adviser and client.
    - Privilege was claimed before the Commissioner in relation to the emails and attachments.
    - They note that both emails appeared upon a single piece of paper which was why it was referred to in the singular.

20. In his response to the adjournment directions the Commissioner accepts that both emails were before him, but from the context he formed the view that LPP was only being claimed in relation to the email from the legal advisor to the policy advisor and in consequence he only considered that. The Commissioner was not provided with copies of the attachments. The Commissioner did not consider the second email or the attachments in the Decision Notice but has now undertaken that exercise as part of this appeal. Upon consideration of all the material where privilege is claimed, the Commissioner is satisfied that:

    - The documents are covered by LPP.
    - Disclosure would adversely affect LPP by impacting on and eroding the free and frank obtaining and provision of legal advice.
    - The public interest in maintaining the exception outweighs that in disclosure because of the timing of the request for information, and the withheld material does not reveal anything which gives rise to an overwhelming public interest which would override the inbuilt public interest in legal professional privilege.

21. The Tribunal is satisfied that legal professional privilege was being claimed in relation to both emails and attachments when the matter was before the Commissioner. All these documents are referenced on the face of the print out with the emails on it (itemized as document 9 of Annex A). Whilst reference to "an email" is misleading the Tribunal accepts the DCMS's explanation that what was being referred to was a single email exchange (i.e a request and a response). The Tribunal has seen the disputed material and remarks that the Commissioner should have been alerted to the fact that it was probable that the attachments were privileged from the context of the email. The Tribunal has set out its concerns relating to the way that the information request was handled at paragraph 79 et seq below.

22. Even if the Tribunal is wrong in concluding that privilege was being claimed in relation to the 2nd email and the attachments, the Tribunal has considered the position where a public authority claims an exemption for the first time before the Tribunal. In *Bowbrick v IC and Nottingham City Council EA/2005/0006* the Tribunal (differently constituted) considered the hypothetical case of a piece of legal advice which was overlooked until the case was before the Tribunal [55]:

    "...The public authority discloses the existence of the advice but contends that it is exempt under s.42 FOIA. Must s.42 be disregarded merely because the existence of this particular item of information was previously overlooked? The Tribunal considers it is in a similar position to the Commissioner as set out above, namely that we are obliged to consider any exemption claimed, even if it is claimed for the first time before the Tribunal as in this case."

23. The Tribunal is satisfied that the material was before the Commissioner, the same arguments are being advanced in relation to the whole of the material as for the single email, and that the situation has arisen out of confusion rather than a failure to consider the regulations or FOIA at the time that the request was processed. For reasons set out in paragraph 21 above the Tribunal is satisfied that it would be just to allow DCMS to rely upon regulation 12(5)(b) in front of the Tribunal in relation to the second email and the attachments.

24. The Appellants do not argue that privilege has been waived and in response to the Tribunal's adjournment directions, the DCMS argue that privilege has not been waived in the LPP material by reference in Mr Reeves' first statement to the fact that legal advice has been taken, as it does not disclose the content. Having reviewed the LPP material the Tribunal is satisfied that privilege has not been waived.

Ground Ia) It would not adversely affect the course of justice

25. The Appellants argue that the terms of section 12 EIR are not capable of including legal professional privilege and that *Kircaldie v IC and Thanet DC EA/2006/001* and the subsequent Tribunal case law regarding LPP and environmental information is wrongly decided. They argue that regulation 12(5)(b) is in fact the equivalent of section 31 FOIA (law enforcement) and not section 42. Their contention is that the Regulations transpose a European Directive that confers a community law right, LPP is omitted because it does not apply to environmental information.

26. The terms of regulation 12 state:

(1) ...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.

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

(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;

27. In the case of *Rudd v IC and the Verderers of the New Forest EA/2008/0006* the Appellant argued at paragraph 25 that:

    "...unlike FOIA where legal professional privilege is expressly itemised as an exemption (section 42) the EIRs make no direct reference to legal profession privilege under regulation 12(5)(b). Since the legislation could have been framed to expressly include legal professional privilege, he contends that there was never any intention that legally privileged documents would be caught under the regulations and that consequently "the course of justice" must relate to something else".

28. In that case the Tribunal (differently constituted) noted [26]:

    "There is no direct reference to legally privileged documents within the EIRs, conversely there is no express prohibition on privileged information being included within the exemption. The Tribunal notes that the "course of justice" is wider than legal professional privilege and includes matters beyond legal advice. In light of the importance attributed by the Courts to the ability of parties to seek and receive frank legal advice in confidence, it would be surprising if the EIRs had intended to prevent consideration of legal professional privilege when identifying the course of justice."

29. This Tribunal notes that the EIRs are more succinctly drafted than FOIA. Whilst there are parallels between section 31 FOIA and regulation 12(5)(b) they are not identical. Equally whilst regulation 12 does not explicitly name legal professional privilege, its function and substance fall under the umbrella of "the course of justice". The Tribunal agrees with the reasoning set out in *Rudd* and is satisfied that regulation 12(5)(b) is the appropriate exemption in this case

30. Additionally the Appellants argue that at the relevant time there was no course of justice to be adversely affected since by the date of the Decision Notice the time limit for judicially reviewing the COI had passed.

31. The Commissioner disputes that the judicial review time limit had passed at the relevant time (the Tribunal considers the issue of the relevant time at paragraph 36 below) and asserts along with the DCMS that the exception covers legally privileged material whether or not litigation is in progress or is expected. In accepting these arguments, the Tribunal reminds itself that LPP applies to general legal advice as well as litigation advice and LPP applies without time limit (subject to the public interest test).

32. In considering whether disclosure of the withheld material would adversely affect the course of justice, the Tribunal adopts the approach as set out in *Archer v IC and Salisbury District Council EA/2006/0037* . This case held that:

    - an adverse effect has to be identified and
    - the Tribunal must be satisfied that disclosure "would" have an adverse effect not "could" or "might".

33. In *Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and EA/2005/0030* – the definition of "would" in the context of the words "would prejudice" was considered. In that case "would" was defined as more probable than not. The Tribunal has held in *Maiden v IC and Borough Council of West Norfolk EA/2008/0013* that the *Hogan* definition of "would" is transferrable to "would adversely affect", and hence applicable to Regulation 12(5)(b). This Tribunal adopts this approach.

34. In identifying the adverse effect the Tribunal accepts the arguments advanced by the DCMS in their letter of 15th October 2007, namely:

    - confidentiality is crucial to the effective working of the relationship between lawyer and client,
    - *"It is in the public interest to ensure that decisions taken by Government are taken in a fully informed legal context, and that the advice is recorded and reported in detail and its confidentiality is protected. Such legal advice must take account of all the relevant facts, and the context in which the*

advice is sought. Subsequent disclosure of such advice would be likely to prejudice these aims".

35. In light of the above the Tribunal is satisfied that regulation 12(5)(b) EIRs is engaged and goes on to consider the public interest test.

The public interest test

36. The Appellants argue that the time to apply the adverse effect test and the public interest test is the date of the decision notice. This has been considered in the case of *DBERR v IC and Friends of the Earth EA/2007/0072* (at paragraph 104 et seq) which reviewed the Tribunal case law on the topic and rejected the concept of a "*moving target*" for the date of the public interest test concluding that this was not Parliament's intention and (at para 110 and 111) that:

"..the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA.

We make the same finding in relation to the timing of the application of the public interest test under EIR."

This Tribunal finds no basis for departing from that analysis.

37. The Appellants believe that the submission to the Minister was incomplete and inadequate and that by the compilation of the dossier for the Minister, a junior official has effectively made the decision to issue the certificate of immunity from listing and that the same person was responsible for suggesting to the planning applicants that the application was made and that this should have been drawn to the Minister's attention but was not.

In favour of disclosure

38. The Commissioner records the public interest factors in favour of disclosure that he has identified (paragraph 17 of the Decision Notice) as:

- Transparency of decision making,
- Knowing that Government seeks legal advice and acts appropriately in the circumstances.

39. In taking these factors into consideration the Tribunal notes that transparency of decision making includes the following factors in the public interest:
    - it promotes accountability,
    - it assists people to determine whether a public authority was acting properly,
    - it provides a barometer of how well specific individuals are performing their duties (from the nature and quality of any problems highlighted),
    - it assists people to understand the reasons why decisions have been taken,
    - the ensuing debate improves future decision making,
    - it provides the public with the information to enable them to challenge decisions,
    - it reassures the public where decisions have been lawfully reached.

    The Tribunal is of the view that whilst they are factors in favour of disclosure, they are of less significance in this case (than might occur in other cases) in light of the substantial amount of information already disclosed in relation to the COI decision.

40. In conducting its own balancing exercise this Tribunal adds the following additional factors in favour of disclosure:
    - if legally privileged material were evidence of malfeasance or fraud or corruption then there would be a very strong public interest argument in favour of disclosure. (The Tribunal has reviewed the withheld material in this case and can confirm that this is not the case here.)
    - Despite the long history of legal professional privilege and its perceived importance in the English legal system, Parliament did not make it an absolute exemption.
    - The EIRs contain a specific presumption in favour of disclosure.
    - There is significant local public interest in this matter (as evidenced in the correspondence disclosed).

Against disclosure

41. The DCMS rely upon the case of Bellamy v ICO and Secretary of State for Trade and Industry EA/2005/0023 where the Tribunal conducted a review of the Higher Courts' case law. *Bellamy* concluded:
"*As can be seen from the citation of legal authorities regarding legal professional privilege, there is a strong element of 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 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, of which this case is not one".*

42. In arguing upon the pivotal importance of LPP within the legal system, in their submissions dated 6th March 2009 they also rely upon *re L (a minor) (Police Investigation: Privilege)* [1997] AC 16 at p.32E (which was cited in *Bellamy*) and which found that:
"The public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being available to courts when deciding cases."

43. The Tribunal reminds itself that whilst there are similarities, *Bellamy* is not a carbon copy of this case, having been decided under FOIA. The EIRs contain an explicit presumption in favour of disclosure set out in regulation 12(2) which does not appear in FOIA. Additionally notwithstanding the body of precedent Higher Courts' case law, LPP was not made into an absolute exception. Consequently there will be circumstances where the public interest in disclosure will equal or outweigh the inbuilt weight (derived from the higher case law) that attaches to LPP, and that each case must be decided upon its own facts.

44. The Commissioner set out the public interest arguments that he identified, against disclosure at paragraph 17 of the Decision Notice (which largely correspond with the DCMS's representations to the Commissioner in their letter of 15th October 2007):

- *"The weight attached to the confidentiality of interaction between a lawyer and his client is crucial to the effective working of that relationship.*
- *Parties being free to seek the advice of their lawyer without such exchanges being made public. If this were so, there would be a reluctance on the part of the client to be as fully free and frank as might be required in the circumstances, which in turn might lead to inaccurate advice being given,*
- *It is in the public interest to ensure that decisions taken by Government are taken in a fully informed legal context, and that the advice is recorded in detail and its confidentiality is protected. Such legal advice must take account of all the relevant facts, and the context in which the advice is sought. Subsequent disclosure of such advice would be likely to prejudice these aims."*

45. This Tribunal has considered the disputed information, and notes the following additional public interest factors in favour of upholding the exception:
    - At the date of the request the information was still current, judicial review proceedings were in contemplation.
    - Disclosure under FOIA or EIR puts public authorities at a disadvantage vis a vis private individuals who are not subject to disclosure of legal advice on this basis.
    - Full and frank legal advice aids public authorities in compliance with their legal obligations.
    - Ad hoc legal advice might be sought orally, without relevant supporting documents to avoid potential future disclosure, which could lead to misunderstandings and a lack of a proper record of what advice was sought or given.
    - Considerable information on this matter is already in the public domain including the submission to the Minister.

46. The Tribunal has considered the disputed legal advice and applied the general reasoning set out above to the specifics of the withheld information in Confidential Schedule 1. The Tribunal is satisfied that taking all the above

matters into consideration the balance of public interest lies in withholding the disputed information.

Ground II Redaction of personal data.

47. The applicable legislation is set out below.

Regulation 12 EIRs states:

(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 13 provides:

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

(2) The first condition is -

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene -

(i) any of the data protection principles; ...

48. Regulation 2(4)(d) of the EIRs adopts the definition of personal data from the Data Protection Act 1998 (DPA). This is found in section 1(1) DPA and states:

"personal data" means data which relate to a living individual who can be identified –

a) from those data; or

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

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

49. The first data protection principle (which is found in Schedule 1 of the DPA) states:

    *1. Personal data shall be processed **fairly** and lawfully, and in particular, shall not be processed unless –*

    a) at least one of the conditions in Schedule 2 is met...

    Part II of Schedule I assists in the interpretation of the principles in Part I in particular when determining whether personal data are processed fairly:
    1 (1) "... regard is to be had to the method by which they are obtained, in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed".

50. Schedule 2 provides inter alia:
    1. The data subject has given his consent to the processing,
    ...
    6.(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject..."

Ground II (a) *The Commissioner erred in concluding that the names of Mr Ellson and Mr T constituted personal data relating to third parties*

51. The Appellants contend that Mr Ellson (Chairman of the Creekside Forum) and Mr T (Secretary) are not third parties, being office holders of the Appellant organization, and in the case of Mr Ellson being the author of the original information request. The Tribunal notes that this ground is misconceived, since

if the Appellants were right on this point, the information would not be disclosable under the EIRs by virtue of Regulation 5(3) which provides:

*"**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.*

...

(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".

52. The Commissioner argues that Mr Ellson wrote **on behalf of** an unincorporated campaign group, his personal data is therefore not the same data as that of the Appellant organization, he and his colleague are therefore third parties. The Tribunal agrees with this analysis. Mr Ellson writes "we" denoting the organization and not "I" which would have denoted a personal capacity. He made the information request on headed paper, and gave his position within the organization, and is asking for the information in the context of the aims of the organization. Mr Ellson is a separate entity from the organization and so must be his colleague.

b) The Commissioner further erred in concluding that disclosure of the names of:

i) Mr M, and Mr R, (campaigners in favour of supporting Borthwick Wharf)

ii) Planning Applicants and their agents and

iii) Junior civil servants

would be unfair and would have breached the first data protection principle

53. There is no dispute that the disclosure of personal data constitutes processing within the terms of the DPA and EIR. The Tribunal is not able to confirm or deny whether Mr M and Mr R have had their names redacted from the disclosed

information since those named in the redactions forms the disputed information. The Tribunal addresses its open remarks in relation to ground II(b)(i) to the position of all those writing in a private capacity.

54. In the letter to the Commissioner dated 15th October 2008 the DCMS make reference to the Department's policy regarding personal and contact details of listing applicants, which:

"*is generally not to release the names and address of private individuals who make listing applications. We do not want ordinary members of the public to be deterred from making applications for listing out of concern that these details might be released to third parties....*

We have been operating our policy of not releasing personal details of private individuals as a matter of practice for many years... we consider that those writing to us do so, on the understanding and expectation that we will apply this policy".

In his first witness statement dated 12th January 2009 Mr Reeves sets out the Department's policy in relation to individuals who make representations in relation to listing matters, at paragraph 22:

"such names should not be released because those private individuals would expect their details to remain confidential and that the effectiveness of the listing regime depends on the trust and confidence of those individuals who make representations".

55. Mr Reeves' second statement dated 6th March 2009 clarified that the policy is not written, but is applied so that the public are not deterred from participating in the listing process (para 7). It is adopted because of concerns in relation to the safety of individuals, and their protection from harassment as listing decisions are often contentious. Although there is no active attempt to publicize the policy, if a member of the public were to enquire whether their personal data would be disclosed in these circumstances, the Tribunal assumes this is what they would be told. Additionally from the practice operated by the public authority it is likely that there would be some public understanding that this is what the policy is, in light of the past actions of the public authority. The Tribunal is satisfied therefore

that individuals writing in a private capacity would be entitled to have the expectation that the policy would be applied and that their personal data would not be disclosed without their prior consent. In light of the interpretation of "fairness" set out in Part II of Schedule I the Tribunal has regard to the fact that disclosure contrary to the policy that was being applied could result in a member of the public being misled as to the purposes for which their personal data were to be processed. The Tribunal is satisfied that disclosure in these circumstances would be unfair.

56. Even if the Tribunal were wrong and the lack of publicity for the policy meant that there was no such public expectation dependent upon the DCMS's policy, the Tribunal goes on to consider whether any of the conditions in Schedule 2 are met. Clearly in cases where an individual has consented to disclosure subsequent disclosure could not be said to be unfair.

57. The Appellants argue that under regulation 9(1) EIRs, (the duty to provide advice and assistance to information requestors) that there was a positive duty to write to the data subjects seeking their consent. The Tribunal notes that regulation 9(1) states:

    A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

58. From the evidence before us it would appear that at least some of the data subjects were contacted by DCMS to obtain consent. The Tribunal was not provided with details of who was contacted or the wording of any communication seeking consent. There is no direct information in relation to the majority of data subjects and the Tribunal does not know whether they were contacted or not. The Tribunal does not consider it appropriate to adjourn the case to obtain these details since they have been provided with the responses of those who have consented and those who refused, and are assessing whether the Decision Notice was correct on the facts as they existed at the relevant time. However, the Tribunal observes that it would have been appropriate to have had evidence clarifying the circumstances in which consent was sought.

59. The Appellants assert that Mr M and Mr R were not contacted to ask for their consent, but would have been happy to provide it. The Appellants have not provided evidence from Mr M and Mr R confirming this. As set out above the Tribunal cannot confirm whether Mr M and Mr R were amongst those whose names were redacted and reiterates, as set out above, that the DCMS have only provided evidence in relation to the responses received. The Tribunal makes the general observation that whilst individuals may not object to their fellow campaigners knowing that they wrote certain letters and the details of their home address, email and telephone numbers, they may be less enthusiastic for that to become public information. Disclosure under EIRs is considered to be to the general public notwithstanding that it is disclosed to a particular requestor in response to their request.

60. In relation to all the data subjects, the Tribunal goes on to consider the balance between the legitimate interests of the 3rd party to whom the data would be disclosed (the Appellants) and the prejudice to the rights and freedoms or legitimate interests of the data subject (pursuant to Schedule 2 paragraph 6(1).) The applicable test was considered in detail in the *Corporate Office of the House of Commons v IC and Others EA/2007/0060 and others* a case dealing with the disclosure of MPs' expenses. In this case the Tribunal (differently constituted) identified the questions to be applied in assessing the competing interests (paras 58-62):

> *" While it is proper to recognise the public interest in the disclosure of official information as being relevant under condition 6, we think it is important not to lose sight of the principal object of the DPA, which is to protect personal data and allow it to be processed only in defined circumstances. The first part of condition 6 can only be satisfied where the disclosure is 'necessary' for the purposes identified. The second part of condition 6 is an exception: even where the disclosure is necessary, we must still go on to consider whether the processing is unwarranted in the particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects".*

61. In that case the Tribunal accepted that:

"the word 'necessary' as used in the Schedules to the DPA carries with it connotations from the European Convention on Human Rights, including the proposition that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim being pursued ...

... we consider that for the purposes of condition 6 two questions may usefully be addressed:
(A) whether the legitimate aims pursued by the applicants can be achieved by means that interfere less with the privacy of the MPs (and, so far as affected, their families or other individuals),
(B) if we are satisfied that the aims cannot be achieved by means that involve less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the MPs (or anyone else).

Question (A) assists us with the issue of 'necessity' under the first part of condition 6. Question (B) assists us with the exception: whether the processing is unwarranted in the particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.".

62. It is the DCMS's case that under schedule 2 paragraph 6 this processing (disclosure of the personal data to the Appellants) is not necessary for the Appellants' legitimate interests. The Appellants argue that disclosure is necessary for their legitimate interests. Their case is that the redactions make the documents unreadable. Throughout their submissions it is clear that their aim in seeking this material is to assist them in lobbying, campaigning against and challenging the decision to issue the certificate of immunity from listing in relation to Borthwick Wharf and its consequential demolition and the redevelopment of the site. The Tribunal accepts that these constitute the legitimate interests of the Appellants.

63. The Commissioner disputes that redaction makes the documents unreadable, and the DCMS in their reply (dated 31st October 2008 para 23) argue: "*Disclosure of personal data is normally entirely unnecessary to understand a substantive*

decision." The Tribunal notes that whilst it may be possible to understand a substantive decision, the complexities of how the decision was arrived at and the amount of input an individual has had would also be apparent from the unredacted information. Knowing who is lobbying, who has been consulted, their seniority and role can add to the understanding of a substantive decision. Equally having a named contact and knowing who in an organization has the portfolio (their role and rank) is also information which is included within the terms of the request which is not being provided.

64. Having considered the unredacted information the Tribunal is satisfied that whilst redaction does not make the documents impossible to understand the personal data may be necessary to some extent (dependent upon the context of each document) because:
    - redaction makes documents harder to understand individually (if it is not clear whether the same person has made a comment or if it is another person),
    - redaction makes it more difficult to follow the history of the correspondence,
    - there is a benefit to the Appellants in knowing the status of those whose views have been sought, followed or rejected,
    - the personal data provides a point of contact to further their lobbying,
    - the personal data of opponents assists them in knowing the weight of the case that they have to meet (to use a general example not connected to this case, the professional opinion of a Professor may be said to carry more weight than someone with fewer qualifications).

65. When considering individuals writing in a private capacity the following should also be taken into consideration when defining "necessity". In their letter of 15 October 2007 the DCMS added:

    "We do not want ordinary members of the public to be deterred from making applications for listing out of concern that these details might be released to third parties, some of whom may not be happy about the decision to list (or de-list). For example, the listing applicant and the third party are often members of the same community, live in close proximity and might be known to each other.".

66. The Tribunal would add to this the concerns of individuals that they might become exposed to public scrutiny and that this would be a significant invasion of their privacy. An individual acting in a private capacity might not expect e.g. to be named in a newspaper.

67. In relation to individuals acting in a private capacity the Tribunal notes that the documents themselves have been disclosed in redacted form so that for example the quantity of support/opposition is known and the arguments advanced. In the context of the Appellants' legitimate interests set out above, knowing the identity of an individual acting in a private capacity has limited use. For this reason we are satisfied that in relation to these data subjects the legitimate aims pursued by the applicants can be achieved by means that interfere less with the privacy of the data subjects (i.e. through disclosure of the material in redacted form as has already taken place) and disclosure of the personal data is not necessary. The Tribunal has compiled a schedule (Confidential Schedule 1) which lists the individuals which fall into this category and justifies the applicability of regulation 13 by direct reference to the withheld material for the reasons set out above.

Ground IIbii *Planning Applicants and their agents*

68. In considering this ground the Tribunal notes that the Appellants have not seen the list of redacted names and the Tribunal has therefore considered the position of all those writing on behalf of organizations (including non-commercial organizations). In the same letter of 15th October 2007 the DCMS added:

> *"We also adopt the same policy* [of non disclosure] *in respect of individuals working on behalf of, or representing, an organisation (some of whom may be non-commercial) where they express concern about the release of their name and contact details..."*

69. It does not appear that the DCMS applied this policy uniformly. Mr Ellson believes that his name and the name of his colleague have been redacted from the disclosed information. The DCMS assert that only the letter of 13th May contains Mr Ellson's name and it has been disclosed unredacted. There is no dispute that his colleague's name was redacted. The Tribunal notes that Mr

Ellson's name appears as a redaction upon Annex D and that as someone writing in his capacity as Chair of a non-commercial organisation who had not expressed concern about the disclosure of his name and contact details, had DCMS policy been followed it would not have been redacted.

70. Although there is no active attempt to publicize the policy, if a member of the public acting in a representative capacity were to enquire whether their personal data would be disclosed in these circumstances, the Tribunal assumes this is what they would be told. Additionally from the practice operated by the public authority it is likely that there would be some public understanding that this is what the policy is, in light of the past actions of the public authority. In light of this expressed policy the Tribunal is satisfied that no individual working on behalf of or representing an organisation (including lobbying groups) would have an expectation that their details would remain private unless they had expressed a concern. Being representatives of an organisation there would be less general expectation of privacy. The contact details are work or those of the organization concerned rather than home details. They are no doubt accountable to their membership or company and would therefore expect some degree of scrutiny. As such the Tribunal is satisfied that disclosure of personal data in these categories would not prima facie be unfair, however, the Tribunal must still be satisfied that it meets one of the conditions in schedule 2.

71. In cases where consent has been given, clearly disclosure should take place if it has not already done so.

72. The DCMS asserts that it is the organisation not the names that are important and there is therefore no legitimate interest in disclosure of individual details. The Commissioner does not consider that there is an appreciable difference between the disclosure of private individuals' details and individuals representing 3rd parties. The Tribunal disagrees.

73. The Tribunal takes into consideration the factors outlined in paras 60 et seq above in assessing the Appellants' legitimate interest and whether disclosure is "necessary". The Tribunal is satisfied that in the case of an organization there is a greater importance attributable to the disclosure of the personal data. The

rank, status, interests and qualifications of a person in an organization are of relevance in assessing the weight to be given to their opinion. It is relevant to know who holds the "portfolio" for a particular matter both in terms of providing a point of contact and in terms of understanding the approach of that organization.

74. There are some Councillors who have had their personal data redacted. They are acting in a public capacity and whilst not strictly speaking part of an organization are dealt with here because they are elected and publicly accountable officials. The extent to which they are aware of local issues in their ward is relevant and material. Being involved in their official capacity they cannot have any expectation that their details would be withheld.

75. The Tribunal adopts the arguments advanced in relation to the seniority of civil servants set out in para 79 et seq below in concluding that the more junior a representative is in an organization the less necessity there is to disclose their name and the more unwarranted the intrusion. For example there is little benefit in knowing the name of e.g. an administrator who "pps" the Chairman's signature.

76. In determining whether the disclosure would be fair, the Tribunal has regard to the method by which the personal data was obtained (Part II Schedule I section 1(1)), and finds that there is a difference between an expert organisation who has been approached to provide an opinion, and a lobbying organization which approaches the public authority as part of a campaign, or a commercial organization who stands to gain by their involvement in the process. The former might be seen to be a more reluctant participant in the process.

77. The Tribunal has therefore considered the names of those writing on behalf of organizations on a case by case basis and created 2 schedules. Those whom the Tribunal has decided should remain redacted are listed in Confidential Schedule 1 which provides specific reasons referencing the withheld material on the facts. Confidential Schedule 2 lists those whom the Tribunal has decided should not have been redacted and provides specific reasons on the facts. Whilst the Tribunal directs that Schedule 1 should remain confidential, the

Tribunal directs that the Confidential Schedule 2 should only remain closed until the information has been disclosed to the Appellants.

78. The Tribunal sets out the general principles it has taken into consideration in deciding whether the legitimate aims pursued by the applicants can be achieved by means that interfere less with the privacy of the data subjects and whether the disclosure would have an excessive or disproportionate effect on the legitimate interests of the data subjects when compiling these schedules:

    - Whether the data subject has consented or refused their consent to disclosure,
    - Whether the data subject approached the DCMS or whether they were approached,
    - Their “rank” in the organization (e.g. a “Partner” or an “Associate” in a commercial organization whose name appears on the letterhead, or the officers of a non-commercial organization, equate to someone with responsibility and management of the portfolio, whereas an “administrator” or “member” does not).
    - The content of the material: in that it is more intrusive to name a party to a conversation in which views about others are expressed than to list the recipients of a widely circulated uncontentious memo.
    - The expectation of privacy e.g. there is clearly no expectation of privacy in the context of participation in a publicly broadcast radio programme.
    - Additionally if the data subject’s name appears in the title of the organization there can be very little expectation of confidence in relation to that name.
    - If the data subject’s name appears by reference to publicly available documents which are not redacted, there can be little expectation of privacy in those circumstances.

Ground II(b)(iii) Junior civil servants

79. The DCMS disclosed the names of senior civil servants but has redacted those of junior civil servants. Their reasoning for this is set out in Mr Reeve's first witness statement at paragraph 25 in which he details the role of junior civil servants:

    "The Permanent Secretary is the highest ranking official in the department. Below this are the department's Directors General, Directors and Deputy Directors. These officials are all in senior executive and management posts with significant responsibility and they are collectively known as Senior Civil Servants. Below the senior Civil Service are a range of grades of junior officials. The highest ranked junior official is a grade A junior Official. A grade A junior official has executive and management functions, but the post is acknowledged to be clearly junior to the posts with in the Senior Civil Service. Below grade A are other, increasingly junior officials who occupy grades B (Higher Executive Officer), C (Executive Officer) and D (Administrative Officer). Officials in grades A-D are known as junior civil servants."

    From this evidence the Tribunal is satisfied that the role of junior civil servants in this case is largely administrative without significant responsibility.

80. Mr Reeves explains at para 26 that all of the officials redacted from the information occupied grades A to D and they have an expectation that:

    "their anonymity will be maintained as they perform their official functions. This is to ensure that officials who do not have a public profile and do not have personal responsibility for policies are not exposed to public censure for policies and decision on which they have advised."

    The Tribunal accepts this evidence and is satisfied that pursuant to Part II of Schedule I regard has to be paid to the way that the personal data was obtained (in the course of their paid employment for the DCMS) but that were their details to be disclosed they might be said to have been misled as to the purposes for which the personal data were to be processed (in light of the policy of which they were aware).

81. The Appellants argue that several of the names that have been redacted have been deduced or are already known to them. The Tribunal is of the view that

there is a difference between an individual with detailed knowledge having a strong suspicion as to the identity of an individual and having that confirmed. We are supported in this view by _Young v IC and Department for Environment of Northern Ireland EA/2007/0048 [33]_ where the Tribunal differently constituted held that:

> "*The fact that the Appellant may have guessed the identity of one or more of the complainants does not in any way itself justify the disclosure of the data sought.*
>
> *Disclosure cannot be justified if its purpose is either to confirm or deny the alleged content of the information."*

82. The Tribunal is satisfied that whilst "necessary" within the terms of Schedule 2 paragraph 6(2), disclosing the data of junior civil servants in this case would be to expose them to unwarranted scrutiny and publicity in circumstances which would be disproportionate to their role where the ultimate responsibility lies with those senior to them. Since the senior civil servants have been named, whilst the Tribunal notes that it would be more convenient to the swift comprehension of the documents if the junior civil servants were named, such a breach of privacy would be disproportionate and consequently unwarranted, and would breach the first data protection principle. The names which fall into this category appear in Confidential Schedule 1 which provides specific reasons referencing the withheld material on the facts.

Ground III.

Duty to respond as soon as possible under Regulation 5(2) EIRs

83. In the directions dated 11th November 2008 the Appellants indicated that they would be content for the Tribunal to issue a substituted decision notice in the following terms:

"67ia the release of the "missing documents" was in breach of the duty to do so as soon as possible and no later than 20 working days after the date of the receipt of the request,

67ib the timing of the Department's response of 20 December 2005, was in breach of the duty to respond as soon as possible and no later than 20 working days after the date of the receipt of the request".

The Commissioner opposes this rewording on the basis that it is unnecessary and does not change the substance of the Decision.

84. The Tribunal notes that within the context of the EIRs, Regulation 5 states:

***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.*

(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.

85. The Appellants contend that:

"As it stands the Commissioner's decision is highly defective in that it leads public authorities to believe that they are merely required to respond to requests within 20 working days, whereas the law requires them to respond as soon as possible".

86. The Tribunal does not agree that this is the effect of the Decision Notice. At paragraph 31 regulation 5(2) is quoted in its entirety. Regulation 5(2) is then referred to in paragraphs 32 and 33 and again explicitly in 67i (of which (a) and (b) are then specific examples). It is clear that the Commissioner is addressing his mind to the correct regulation, and that the Commissioner is not reducing the test. The synopsis is an aide to comprehension for a reader of the text and does not purports to be a complete definition of the regulation. Anyone seeking guidance would refer to the regulation it having been properly cited within the body of the paragraphs complained of.

87. The Tribunal observes that an appeal is not an opportunity for parties to become involved in a joint drafting exercise. The Tribunal considers the case of *Billings v IC EA/2007/0076* in which the Tribunal differently constituted noted that:

    "the Appeal process is not intended to develop into a joint drafting session, but only to provide relief if the Decision Notice is found not to be in accordance with the Law".

    In a case where disclosure was made on the 19th working day, the issue might arise whether the information was made available as soon as possible. In providing a cut-off date of 20 working days it provides a clear demonstration that disclosure was not made in time. This was not a case where anything turned upon what was meant by "as soon as possible". The information was not provided within the outer limit and there was clearly a flagrant breach of the regulation. The Tribunal does not find it a sensible use of public resources to be asked to decide upon academic questions which have no relevance to the facts of the Appeal in question. The Commissioner has not erred in law and as such this ground of appeal must fail.

Other Matters

88. The DCMS's handling of this information request has already been dealt with to some extent in the Decision Notice notably the Commissioner's findings of breaches under regulation 5(1) and (2), 11(4) and 14. However, the Tribunal feels that the following matters cannot go without remark.

89. The DCMS redacted names from the requested information without considering the provisions of FOIA (under which they were considering the request). When challenged by the Appellants they indicated in January 2006 that it would be:

    "considered as part of the more substantive aspects of the internal review now in hand. We will write to you about this when we have concluded all the remaining aspects of the review".

    In April 2006 the Appellants were told:

    "... I have asked officials to give further consideration to the release of this information [personal data] and to advise me accordingly. I will write to you again about this separately and expect this to be within 20 working days from now.".

90. The DCMS failed to meet its own 20 working day deadline and after prompting by the Appellants in June, wrote again on 21st June, 5th July and 1st August stating that it was continuing to work on the request for the release of the redacted names. It did not meet any of these deadlines and never concluded the review.

91. Mr Reeves states in his first statement at paragraph 19:

    "Unfortunately the department never concluded this review. This was in part due to what might be described, for want of a better phrase, as "administrative slippage".

    According to his evidence it would appear that the officials dealing with the matter at DCMS:

    "believed that the issue of the redaction of names, along with all the other issues, would be swept up by the ICO's review".

92. The Tribunal notes that the DCMS were written to and informed of the complaint on 20th June 2006 and received nothing else from the Commissioner until 6th September 2007. The Commissioner's letter of 20th June 2006 did not state that the redaction would be included in the review and after notification of the complaint, the DCMS continued to assert to the Appellants in 2 further letters (5th July and 1st August) that they were reviewing the position and would provide an answer. The making and breaking of deadlines, and the failure to update the Appellants notifying them that no review was to take place is unacceptable. The Tribunal notes that it is not the responsibility of the Commissioner to undertake a statutory review under FOIA or EIR because a public authority does not have the appetite to conduct one. It deprives the information applicant of one level of decision making and it results in the Commissioner being tasked with a complaint (or a much larger complaint) which might have been avoided if the public authority had fulfilled their statutory duties.

93. In his letter to the DCMS dated 20th June 2006 the Commissioner noted:
"...Where information has been withheld because you (the Public Authority) have applied one of the exemptions in Part 2 of the Act, the case officer will need to have a copy of the information to judge whether or not any exemptions have been properly applied".

This was reinforced in the letter dated 6th September 2007 where the Commissioner asked for:

"i copies of all information withheld from Mr Ellson"

94. Despite this, the Commissioner was never supplied with the attachments to the emails against which LPP was claimed (and whose existence it is accepted by the Tribunal were apparent from the information that was sent to the Commissioner).

95. The DCMS have indicated that in light of this case they have reviewed their procedures for handling FOIA requests, however notwithstanding that assurance the Tribunal is concerned to note a cavalier approach to disclosure during the currency of this appeal.

96. At the oral directions hearing on 11th November 2008, the DCMS were directed (paragraph 17) to disclose to the Tribunal and Commissioner by 12 December 2008:

    “a copy of the disputed information”.

    i. In purported compliance with that direction the DCMS provided unredacted copies of the documents sent with the letter of August 2008 (with two exceptions).

    ii. The DCMS could not find unredacted copies of two documents in December 2008 and undertook to continue looking and serve them upon the Tribunal if found. Pursuant to the adjournment directions issued on 16th February 2009, the following became apparent:

        - No additional search had been undertaken,
        - No enquiry was made of the Commissioner to see if he had been sent and had retained a copy (he had),
        - The record keeping at DCMS was such that it was not clear what material had been sent to the Commissioner,
        - The record keeping at DCMS was such that they had not correctly filed a complete copy of the unredacted material (hence their original inability to find a complete set of the unredacted papers).

    iii. The DCMS did not serve the unredacted documents (with an indication of the redactions made) of the disclosures to the Appellants that were made prior to the Decision Notice despite them forming part of the disputed material in this appeal, until directed to pursuant to an adjournment notice dated 16th February 2009.

    iv. Whilst the DCMS did provide a copy of both emails against which they were claiming LPP they persistently referred to them (in correspondence with the Commissioner and the pleadings before the Tribunal) in the singular, which gave the impression that it was only one email in relation to which LPP was claimed.

v. The DCMS did not provide a copy of the attachments to the emails against which they were claiming LPP to the Tribunal until directed to pursuant to the adjournment on 16th February 2009.

97. In terms of the material before the Tribunal the DCMS could have provided fuller information which would have assisted the Tribunal:

- Clarification of exactly whom had been approached for consent and in what terms,
- A marked up copy of the redacted material (the Tribunal had this for part of the material but was reliant upon Annex D at other times).
- Annex D did was not always consistent with other evidence (e.g. the assertion that Mr Ellson's name was not redacted from the letter of 14th May, whereas it would appear that it was from Annex D).

98. Whilst the Commissioner should have made further enquiries in relation to the sufficiency of the material provided against which legal professional privilege was claimed in light of the reference to attachments on the fact of the emails, the Tribunal considers that the principal fault remains with the DCMS who had been asked to provide the withheld LPP material and had not provided all of it, and whose description of the information as "an email" was misleading.

99. Whilst the Tribunal has decided in the ruling of 26th January 2009 that the Commissioner's delay was not capable of forming a ground of appeal before this Tribunal, the Tribunal would note that there was a 25 month delay between the Appellants' complaint to the Commissioner and the issue of a Decision Notice and that 15 months of this was a delay in allocating the case. The Appellants clearly believe that the delay in dealing with the complaint had a detrimental effect upon attempts to prevent the demolition of Borthwick wharf. The Tribunal acknowledges that the Commissioner's office was overwhelmed at that period and that considerable improvements have been made since then, however, the Tribunal has sympathy for the Appellants who point out that such a substantial delay defeats the purposes of FOIA and the EIRs.

Conclusion

100. The Tribunal refuses the appeal in relation to grounds I and III and allows the appeal in part in relation to ground II as set out above and in the confidential schedules. The Tribunal directs that the disputed information identified in schedule 2 should be disclosed to the Appellants within 30 days of the date of promulgation of this decision. The Tribunal further directs that the second confidential schedule remain confidential until the information has been supplied to the Appellants.

101. This decision is unanimous.

Signed

Fiona Henderson,

Deputy Chairman Dated this 28th day of May 2009

IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Information Tribunal Appeal Number: **EA/2008/0065**

Information Commissioner's Ref: **FS50122058**

Decided on the papers **Decision Promulgated**

On 27th March 2009 **On 28th May 2009**

BEFORE

CHAIRMAN

Fiona Henderson

LAY MEMBERS

Henry Fitzhugh

Rosalind Tatam

B E T W E E N :

CREEKSIDE FORUM

Appellant

– and –

THE INFORMATION COMMISSIONER

Respondent

– and –

THE DEPARTMENT FOR CULTURE MEDIA AND SPORT

Additional Party

2nd Confidential Schedule

Ground II ii – Individuals representing an organization

1. John Taylor Creekside Forum – disclose. Bill Ellson Creekside Forum - disclose at p112. According to schedule D Mr Ellson's name was redacted. "John" and "Bill's" telephone numbers are given on headed paper. From his submissions Mr Ellson would appear to have consented, but no direct evidence from his colleague. Tribunal would order disclosure in any event as they are senior representatives of an organisation writing in a public capacity.

2. On the basis that these names appear to have been disclosed, the Tribunal is satisfied that there is no issue that they are required to determine in relation to:

   P100 David Kitchen – no evidence as to who he is or why his name has not been redacted.

   P133 Graeme Brown of Tessa Jowell's office not redacted therefore assume of sufficient seniority

3. Local Authority employees whose personal data should be disclosed for the reasons set out in the open decision:

   LB Greenwich Steve Crow Principle Conservation Officer – consented (David McCollum is given as Director of Strategic Planning on the letter head as department head p92 not redacted)

4. Cllr Maureen O'Mara, Cllr Jagir Sekhon, Cllr David Grant. P66. They are elected and publicly accountable officials. The extent to which they are aware of local issues in their ward is relevant and material. Having been written to in their official capacity they cannot have any expectation that their details would be withheld.

5. Senior office holders of English Heritage whose personal data should be disclosed.

   Dr Roger Bowdler (head of territorial designation) disclose as per schedule below.

   Sir Neil Cossins – Chairman of EH – seniority.

   Philip Davies – Director London Region – disclose. Seniority. NB Not redacted from p 185.

   Simon Thurley p58 – chief executive of English Heritage. Disclosure because of seniority but also because on p58 he is being quoted from what he said on a publicly aired radio programme (Radio 4's today programme 26.03.04) where there cannot have been any expectation that this data would be protected.

Schedule of Personal data that should be disclosed applying the principles set out in the Open Decision

Document and page number	Person redacted	Role	Reason	Disclose / redact
Letter dated 21/12/04 p53 Cf p153 Cf p 168	Iestyn John	Associate Barton Wilmore	Has not objected to disclosure, writing in professional capacity	Disclose
Letter 24.5.05 P62	Philip Binns	Greenwich Conservation group	Should have been disclosed pursuant to the DCMS code. Writing in a public capacity on behalf of others	Disclose
And letter p63	Jack Vaughan	Chair of the Greenwich Industrial History Society	Acting on behalf of an organization no evidence he objected.	Disclose
Letter 4.5.05 P65	Christine Carey	Chris Carey's Collections	She is the chief executive of a company which has publicly expressed its interest in using Borthwick Wharf . Redactions are made but attachments are publically available documents naming her. Additionally her personal data is part of her commercial organization's name, therefore little expectation of privacy re the name.	Disclose
7.12.04 letter P95 and 162	Richard Coleman	Principal of Richard Coleman Consultancy	Writing on behalf of an organization and has not objected. His personal data is part of the commercial organization's name, therefore little expectation of privacy re the name.	Disclose

Document and page number	Person redacted	Role	Reason	Disclose / redact
Letter RHSQ p 98	Jean Stewart	President Royal Historical Society of Queensland	Writing on headed paper on behalf of organization in an official capacity no evidence objected	Disclose
Letter 5.7.04 p105 and 186 And letter 13.7.04 p184	Paul Stone	Member of English Heritage	Declaring his interest, but not writing on behalf of an organization. Private capacity at a private address. However, consented.	Disclose
Letter 18.3.05 P128	Bob McCurry Les West	Director Barton Willmore Barton Willmore	Consent Consent	Disclose Disclose
Letter 4.1.05 P153	Iestyn John	Associate Barton Willmore	Has not objected to disclosure, writing in professional capacity	Disclose
Letter 19.11.04 p 165	R Coleman Les West	Richard Coleman Associates Hays	Principal of commercial organisation writing involved in commercial capacity. Cannot mention his company without using his name consented	Disclose Disclose
Letter 7.10.04	Iestyn John L West	Associate Barton Wilmore Barton Willmore	Has not objected to disclosure, writing in professional capacity consent	Disclose Disclose