Reference: FER0184885

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

Decision Notice

Date: 26 October 2009

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

Summary

The Department for Trade and Industry (DTI) commissioned an external consultancy, Hayes McKenzie, to study noise emissions from certain wind farms. The final version of the report was placed in the public domain. The complainant subsequently requested draft versions of the report as well as correspondence discussing these drafts. The Department for the Business Enterprise and Regulatory Reform (BERR) handled this request as the DTI had ceased to exist by this time. BERR refused to disclose this information citing regulation 12(4)(e) (internal communications) of the EIR, and subsequently also applied 12(4)(d) (draft documents). During the course of the Commissioner's investigation the Department for Energy and Climate Change (DECC), which had inherited responsibility for energy policy, disclosed the correspondence about the drafts. The Commissioner has concluded that the three draft reports themselves do not constitute an internal communication and thus are not exempt by virtue of regulation 12(4)(e). Although the Commissioner has concluded that 12(4)(d) is engaged, he has concluded that that the public interest favours disclosing the information. The Commissioner has therefore ordered the DECC to disclose the draft versions of the report.

The Commissioner's Role

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

Background

2. In January 2004 an article in the national press alleged that Low Frequency Noise (LFN) emissions from wind turbines had given rise to health effects to neighbours of three wind farms in Cumbria, North Wales and Cornwall.

3. Consequently, the Department for Trade and Industry (DTI) commissioned an external consultancy, Hayes McKenzie, to report on claims that infrasound or LFN emitted by wind turbine generators were causing health effects. Hayes McKenzie reported to the DTI in May 2006. The report concluded that there is no evidence of health effects arising from infrasound or LFN generated by wind turbines.

4. The final version of the report which was also disclosed to the public in May 2006 and can be currently viewed on the Department for Business Enterprise Regulatory Reform (BERR) website at: http://www.berr.gov.uk/energy/sources/renewables/explained/wind/onshore-offshore/page31267.html

5. The public authority, the DTI, which commissioned the Hayes McKenzie report ceased to exist in June 2007 with its responsibilities being taken over by the newly created public authority, BERR. In October 2008 responsibility for energy policy, which encompasses the information which is the focus of this request, was passed to the newly created Department of Energy and Climate Change (DECC). Therefore throughout this notice the references to the name of the government department responsible for the report changes to reflect the various machinery of government changes. However, the Commissioner is satisfied that it is appropriate to serve this notice on the DECC as the public authority with current responsibility for handling this request.

The Request

6. On 19 July 2007 the complainant submitted the following request for information to BERR:

> 'The information I request is the original version, as submitted to the DTI by the contractors, of the report entitled "The measurement of low frequency noise at 3 UK wind farms", and any subsequent revisions of this report, which preceded the final published version of that document which has the Contract number W/45/00656/00/00 and URN Number 06/1412. I also include in this request all correspondence and documentation relating to revisions of this report.'

7. On 16 August 2007 BERR responded and explained that given the topic of the information which is the focus of this request, it was more appropriate to deal with this request under the EIR rather than under the Act. BERR also explained that the information it held fell which within the scope of this request could be divided into two categories: firstly, draft versions of the report which was prepared by

Hayes McKenzie and secondly, correspondence between Hayes McKenzie and department officials about the drafts. However, BERR explained that it believed that information falling within the scope of both classes was exempt from disclosure by virtue of the exception contained at regulation 12(4)(e) of the EIR which applies to 'internal communications'. BERR noted that although the report was prepared by an external consultant, it was prepared on BERR's behalf as part of its consideration of policy and thus information falling within the scope of this request was considered to be an 'internal communication'. BERR noted that regulation 12(4)(e) was a qualified exception and that it had concluded that the public interest favoured withholding the information.

8. The complainant asked for an internal review of this decision on 29 August 2007.

9. BERR contacted the complainant on 25 October 2007 and explained that it had undertaken an internal review and concluded that regulation 12(4)(e) had been correctly applied and it remained of the view that the public interest favoured withholding the information falling within the scope of the request.

The Investigation

Scope of the case

10. The complainant contacted the Commissioner on 23 November 2007 in order to complain about BERR's decision to refuse to disclose the information he had requested, namely draft versions of the report and correspondence and documentation relating to these drafts.

11. In January 2009, during the course of the Commissioner's subsequent investigation, the DECC provided the complainant with a three page email chain which detailed discussions between department officials and the external consultants about drafts versions of the report. The DECC explained that this email chain was the second class of withheld information described in paragraph 7 above. Although the DECC redacted the names of the junior officials and the names of third parties on the basis that to disclose them would breach the Data Protection Act 1998 (DPA), the complainant has not complained about the redaction of these names. The DECC's decision to remove these names on the basis of the DPA has not therefore formed part of the Commissioner's investigation.

12. However, upon receipt of this email chain the complainant contacted the Commissioner and argued that the amount of information contained within this chain fell far short of the amount of correspondence that he expected to have been generated by the production of the report. The complainant therefore asked the Commissioner to consider whether the DECC held any further correspondence relating to the revisions of the report.

13. The scope of the Commissioner's investigation has therefore been two fold: firstly, to determine if the DECC holds any more correspondence about draft

versions of the report other than that now disclosed to the complainant and secondly, whether the draft versions of the report, of which there are three separate versions, are exempt from disclosure under the EIR.

14. In refusing this request BERR cited 12(4)(e) as a basis to refuse to disclose the draft reports in its refusal notice and internal review outcome. However, in submissions to the Commissioner the DECC explained that it was also seeking to rely on regulation 12(4)(d) to refuse to disclose the three drafts of the report. The DECC explained that it had not previously sought to rely on 12(4)(d) as it was confident that 12(4)(e) was engaged and the public interest favoured maintaining the exemption. However, the DECC explained that having reviewed the case in preparing a response to the Commissioner's queries and in particular in light of a recent decision notice, FS5016849 in which the withheld information also constituted draft reports and the Commissioner concluded that regulation 12(4)(e) was not engaged, the DECC explained that it now wished to also rely on 12(4)(d). In these circumstances the Commissioner is prepared to consider the application of 12(4)(d), in addition to 12(4)(e) as the basis to withhold the three draft reports.

Chronology

15. The Commissioner wrote to BERR on 16 October 2008 and asked to be provided with a copy of the information that fell within the scope of the complainant's request. The Commissioner also asked BERR to provide a detailed explanation of why it had concluded that the withheld information was exempt from disclosure on the basis of regulation 12(4)(e). The Commissioner also asked for a copy of the contract between the DTI and Hayes McKenzie.

16. The DECC responded to the Commissioner's letter on 16 December 2008 and provided the three drafts versions of the report and an email chain between the Hayes McKenzie and DTI officials. The DECC noted that it had been over a year since it had initially considered this request and although it was not required to reconsider whether it should continue to withhold the information as at today's date, it had given consideration to this. The DECC went on to explain that although it remained of the view that the three draft reports were still exempt from disclosure, it was prepared to disclose the email chain save for some redactions of personal data.

17. The DECC's letter of 16 December 2008 also included a detailed explanation as to why it considered the draft reports to constitute an 'internal communication' and thus fell within the scope of regulation 12(4)(e). As requested, the DECC provided the Commissioner with a copy of the contract between the DTI and Hayes McKenzie. Finally the DECC's also explained that it also believed the 3 draft versions of the report were also exempt by virtue of the exception contained at regulation 12(4)(d) of the EIR.

18. The Commissioner contacted the DECC on 19 December 2008 and asked it to disclose the email chain to the complaint. The Commissioner also asked the DECC to provide further details to support its position that the drafts of the report were also exempt on the basis of regulation 12(4)(d).

19. On 19 January 2009 the DECC provided the Commissioner with further arguments to support their application of regulation 12(4)(d). The DECC also confirmed to the Commissioner that it had now provided the complainant with a redacted version of the email chain referenced above.

20. The complainant subsequently contacted the Commissioner on 22 January 2009 and argued that as the drafting of the report had taken over a year the amount of information falling within the email chain that he had been provided with fell short of the amount of correspondence he believed would have been created in relation to the revisions of the report.

21. Consequently, the Commissioner contacted the DECC on 18 February 2009 and asked it to clarify whether it held any further correspondence relating to the revisions of the draft reports in light of the concerns raised by the complainant.

22. The Commissioner received a response from the DECC on 27 March 2009 which provided a detailed response to the points raised in his letter of 18 February 2009.

Analysis

Exceptions

Regulation 12(4)(a) – information held by a public authority

23. As noted in the 'Scope of the case' section above the complainant argued that the DECC was likely to hold far more information which fell within the section of his request which sought 'correspondence and documentation relating to revisions of this report' than that contained within the email chain he had been provided with.

24. The complainant's reasoning behind this allegation focuses on the fact that the email chain provided to him only consisted of 8 emails and these dated from the period 13 April 2006 to 3 May 2006. The complainant argued that as the production of the report took over a year it was likely that a much greater volume of correspondence had been generated in relation to drafts of the report and it was likely that this correspondence dated from a wider time period than April to May 2006.

25. The relevant section of the EIR to which this point of complaint relates is 12(4)(a) which provides that a public authority may refuse to disclose information to the extent that:

> 'it does not hold that information when an applicant's request is received'.

26. The Commissioner has investigated this matter and concluded that the DECC does not hold any further 'correspondence and documentation relating to revisions of this report' other than the email chain which has already been located and (subject to certain redactions) provided to the complainant. The

Commissioner's reasoning for this conclusion is set out in detail below and can be divided into two categories, first the DECC's interpretation of the request and secondly, the likelihood of the DECC holding any information falling within its interpretation of the request.

Interpretation of the request

27. The DECC has explained to the Commissioner how it interpreted the part of the complainant's request which sought 'all correspondence and documentation relating to revisions of this report.' The DECC argued that the information which would fall within the scope of this aspect of the request was solely correspondence which discussed revisions to the drafts of the report. That is to say this aspect of the complainant's request – and indeed no other part of the request – did not seek correspondence about other issues related to the report. Therefore the DECC explained that although communications did take place between the DTI and Hayes McKenzie in relation to the extension of the contract it did not believe that such information fell within the scope of this request because it did not contain discussions relating to 'revisions' of the report but merely contractual issues. Similarly, the DECC explained that although it held further records relating to the Hayes McKenzie report these focused on issues such as subsequent internal discussion of the report following its finalisation (e.g. the publication of the report on the DTI's website), Parliamentary Questions, Ministerial correspondence and briefings.

28. On the basis that such communications do not relate to the revisions or drafts of the report but on other substantially different issues relating to the report then the Commissioner is satisfied that the DECC's interpretation of the complainant's request was correct. Therefore given that the scope of the complainant's request is narrower than a request which sought all correspondence on the report then the Commissioner accepts that the amount of information falling within the complainant's request may well be relatively narrow.

Is any further information held which falls within the scope of this interpretation?

29. In cases such as this where there is some dispute as to whether a public authority holds further information than that already located, the Commissioner has been guided in his approach by a number of Information Tribunal decisions which have used the civil standard of the balance of probabilities, i.e. whether on the balance of probabilities the Commissioner is satisfied that no further information is held.[1] In deciding where this balance lies the Commissioner will take into account the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.

30. In order to establish if the DECC held any further information falling within the scope of this request the Commissioner asked the DECC to provide a detailed description of its record management processes in relation to correspondence which would fall within the scope of this request.

[1] See *Linda Bromley v Information Commissioner* (EA/2006/0072)

31. The DECC explained that its processes, and those of both its predecessors, namely BERR and the DTI, for dealing with electronic information and recorded information are also follows:

32. In order to manage storage issues surrounding the volume of day-to-day correspondence within and to the DECC it had a policy on the management of electronic mail which provides for the automatic deletion of emails over 12 months old on a rolling basis. As a result unless emails are transferred onto the DECC's electronic filing system there will be no record of day to day correspondence. It is not the DECC's policy to keep a record of all emails or documents that are created or received. Rather, if a document provides evidence of, or information about, work that individuals within the DECC are responsible for and it has more than passing value then it should be kept as a record on the electronic filing system.

33. The DECC explained that staff were provided with the following advice in relation identifying emails and documents that should be retained:

34. It is the individual's responsibility to store information deemed to be worth keeping on the electronic filing system (Matrix). If an email or document attached to an email relates to the work of BERR; and relates to the area of the individual's responsibility; and was created by them or they are the main or first-named recipient of an external email or it has been forwarded to them for action); and in their judgment it contains valuable information or provides evidence of BERR's activities then the individual in question is responsible for saving it to Matrix.

35. Therefore the Commissioner understands that by the time the complainant submitted his request on 19 July 2007 the DECC would only hold emails dated prior to 19 July 2006 if such emails had been saved by individuals onto the Matrix system. Clearly as the report was presented by Hayes McKenzie to the DTI in May 2006 any correspondence would have to have been saved on to Matrix if it was still to be held at the time the DECC received this request.

36. The Commissioner has established that the DECC has undertaken two separate searches of the Matrix system in order to identify information which fell within the scope of the request. The first of these searches was undertaken at the time the DECC received the complainant's request and the second search was undertaken during the course of the Commissioner's investigation.

37. The DECC explained that the criteria used in these searches were:

- Author – using the relevant policy officials' and legal advisors' names, refined by date of email or by date of registration on the filing system between 1/1/04 and 31/12/06.
- Title word – using the following terms:
  - 'noise + wind farm(s)' – dated between 1/1/04 and 31/12/06.
  - 'Hayes McKenzie ' and 'Hayes MacKenzie ' - no date limit
  - 'low frequency noise' – dated between 1/1/04 and 31/12/06
  - 'LFN' – no date limit

- ‘Hayes’ – dated between 1/1/04 and 31/12/06
- ‘McKenzie’ and ‘MacKenzie’ – dated between 1/1/04 and 31/12/06
- ‘wind’ – dated between 1/1/04 and 31/12/06

- Any word – ‘noise + wind’ dated between 1/1/04 and 31/12/06

38. In the Commissioner’s opinion these search terms are sufficiently varied and broad in scope to have allowed for the identification of any communications which fell within the scope of this request to have been located on the Matrix system.

39. In addition to considering the nature of the searches undertaken by the DECC the Commissioner has taken into account a number of others factors which he considers to be relevant to establishing whether it holds any further correspondence:

40. Firstly, the Commissioner has identified the fact that the contract between Hayes McKenzie and the DTI only required Hayes McKenzie to provide three drafts of the report: the first an ‘interim report’ by 31 January 2005; a ‘draft final report’ by 28 February 2005 and the ‘agreed final report’ by 31 March 2005. Clearly these dates differ significantly from the dates of the emails which were provided to the complainant. The Commissioner therefore sought clarification from the DECC in respect of this point.

41. With regard to this apparent discrepancy the DECC explained that due to events beyond the control of Hayes McKenzie the data collection of noise readings at specific wind farm locations was delayed. As a consequence the contract was extended and the specific milestones set out in the previous paragraph were amended. The Commissioner considers this to be a plausible explanation as to why the emails relating to the revisions of the report do not date from January to March 2005, the milestones set out in the original contract, but April to May 2006, the amended dates by which Hayes McKenzie had to provide the three drafts of the report.

42. Secondly, as noted above the contract required Hayes McKenzie to provide the DTI with three drafts of the report. Having reviewed the email chain in depth the Commissioner has identified three separate emails from Hayes McKenzie to the DTI sending three different versions of the report; two drafts and one ‘final’ version. The Commissioner believes that these facts adds further weight to the view that no further emails were exchanged between the DTI and Hayes McKenzie in relation to revisions of the report.

43. Thirdly, the DECC has argued that the content of the first email within the chain which is from Hayes McKenzie to the DTI strongly implies that this is the first communication between the two parties in relation to a draft of the report. Having studied the contents of this email the Commissioner considers this to be a reasonable conclusion because the email would appear to ‘introduce’ the draft by setting it into some sort of context by providing a summary of its contents. The Commissioner accepts that this supports the suggestion that prior to April 2006 the DTI and Hayes McKenzie did not exchange correspondence in relation to drafts of the report.

44. Fourthly, the DECC noted that the DTI used independent experts, Hayes McKenzie, precisely because it did not have the technical experts 'in house' who could produce the report. Therefore, DECC argued that it was unsurprising that the level of correspondence generated in relation to the revisions of the draft which focused on technical aspects of the report was not vast.

45. Fifthly, the DECC suggested that it may have been the case that further correspondence in relation to revisions of the report had been generated at the time of the project but this had not been saved onto the Matrix system and therefore at the time of the complainant's request was no longer held.

46. Finally, the Commissioner asked the DECC whether it held any internal information relating to internal discussions - i.e. correspondence between DTI employees – upon receipt of the final version of the report. The DECC explained that the only such information it could locate focused on aspects relating to the publication of the report, for example making arrangements to publishing the report on the website. Such a finding, the Commissioner believes links back to the point made by the DECC as noted above; it is not arguing that it only holds these 8 emails in relation to the Hayes McKenzie report, rather that it only holds these emails in relation to correspondence about revisions of the draft reports.

47. On the basis of the detailed and carefully considered searches that the DECC has undertaken and on the basis of the further circumstances set out above, the Commissioner is satisfied that on the balance of probabilities the DECC does not hold any further information falling within the part of the complainant's request which sought 'all correspondence and documentation relating to revisions of this report.' The Commissioner has therefore concluded that the exception contained at regulation 12(4)(a) applies.

48. The Commissioner notes that regulation 12(4)(a) is a qualified exemption and thus subject to the public interest test at regulation 12(1)(b). However, given that regulation 12(4)(a) applies in scenarios where information is simply not held by a public authority, as opposed to situations where information is held but is exempt from disclosure or the principle of confirm or deny applies, the Commissioner does not consider it possible to apply the public interest test in this situation. This is because there is no rational consideration of the public interest that could be carried out as there would be no practical consequence of the Commissioner concluding that the public interest favoured disclosing the information given that the information is not held and thus it could not be disclosed and moreover the EIR does not place any duty on public authorities to create information which has been requested.

Regulation 12(4)(e) – internal communications

49. As noted in the 'Scope' section, the DECC has argued that the three draft reports are exempt from disclosure on the basis of both regulation 12(4)(e) and 12(4)(d). The Commissioner has considered the application of 12(4)(e) first:

50. Regulation 12(4)(e) allows a public authority to withhold information if:

> 'the request involves the disclosure of internal communications'.

51. The exception is class based, therefore if information falls within the scope of regulation 12(4)(e) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to any particular purpose.

52. The Commissioner recognises that neither the EIR, nor the Directive upon which they are derived from, provide a definition of what constitutes an internal communication.[2]

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

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

54. In considering the engagement of 12(4)(e) in this case the Commissioner has borne in mind these comments of the Tribunal. Furthermore, the Commissioner has taken into account the actual findings of the Tribunal in respect of whether 12(4)(e) was engaged in that case. This case involved a request for a copy of a draft report prepared for the Department for Transport and HM Treasury by Sir Rod Eddington, the former Chief Executive of British Airways, on the future of the UK's transport policy. The Tribunal ultimately concluded that regulation 12(4)(e) was engaged.

55. The Commissioner has also considered the findings of a more recent Tribunal decision, *South Gloucestershire Council v Information Commissioner* (EA/2009/0032). The requestor in this case sought copies of independent development appraisals carried about for the Council by external consultants. In this case the Tribunal concluded that the appraisals did not fall within the scope of the regulation 12(4)(e).

56. Whilst the Commissioner has not used the findings of the Tribunal in either case as a direct model to follow in considering the DECC's application of regulation 12(4)(e) – indeed to do so would contradict that Tribunal's comments at paragraph 96 in *DfT* that each case has to be considered on its merits – he has found that the Tribunal's conclusions have provided a useful 'real life' example against which this present case can be analysed.

[2] Council Directive 90/31EEC & 2003/4/EC: http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/european_directive_(eur-lex).pdf

The DECC's position

57. The DECC has provided detailed submissions to support its position that the three draft reports fall in the scope of regulation 12(4)(e). The Commissioner has summarised these submissions below:

58. The DECC explained that as it was the government department which has policy responsibility for wind farms it was its responsibility, and previously that of the DTI, to investigate the claims made in the media regarding the potential health affects of wind farms. The DECC explained that the DTI did not have the technical expertise to undertake the work needed to investigate the reports in the newspaper report and thus it had to commission Hayes McKenzie to carry out the study. Therefore, the report was produced by Hayes McKenzie on behalf of the DTI.

59. The DECC noted that the drafts of the report, although not of course the final version of the report, were produced for internal consumption within the DTI.

60. In response to the Commissioner's suggestion in his initial letter of 16 October 2008 that one way in which regulation 12(4)(e) may be engaged would be if the third party was carrying out a statutory function of the public authority, the DECC suggested that this was not the correct test to apply and the fact that the exception was qualified, and thus subject to the public interest test, suggested that the parameters of the exception should not be drawn so narrowly.

61. Nevertheless the DECC provided submissions which focused on how the production of its report was linked to its statutory functions. The DECC explained that although it could not point to a particular provision in statute that required this report to be produced, there were a number of wider statutory duties that the report fed directly into. In summary these are:

62. The DECC is charged with removing barriers to the expansion of wind generation in the UK. This involves working closely with other government departments whose duties and policies affect the delivery of energy infrastructure in the UK. This includes DEFRA which is responsible for noise policy and the setting of noise limits and the regulation of noise impacts from any form of development, including wind farms, under the Control of Pollution Act 1974, Environmental Protection Act 1990 Part III, the Noise and Statutory Nuisance Act 1993 and The Noise Act 1996.

63. The DECC is the consenting authority under section 36 of the Electricity Act 1989 to take decisions on applications for development consent for generating stations, including wind farms, over 50 MegaWatts in scale. To exercise these functions properly the DECC explained that it must have regard to factors such as noise levels and it is important therefore that complaints about the possible health effects of noise levels are investigated where this is considered necessary.

64. For wind farms 50MW or less, it is for Local Planning Authorities to take such decisions under the Town and Country Planning Act 1990. The Department for Communities and Local Government is responsible for planning policy and sets

guidance in the form of Planning Policy Statements to guide Local Planning Authorities' statutory decisions. Planning Policy Statement 22 sets out the Government's policies for renewable energy, which planning authorities should have regard to when preparing local development documents and when taking planning decisions. This states that the 1997 report by Energy Technology Support Unit (ETSU) for the DTI (now DECC) should be used to assess and rate noise from wind energy development ('The assessment and rating of noise from wind farms', ETSU-R-97). Since its publication, the ETSU report has been used to evaluate the potential noise impacts from wind farms in the UK. The DECC explained that it was its responsibility to ensure this is up to date and robust.

The Commissioner's position

65. As suggested above, in considering the arguments advanced by the DECC the Commissioner has taken into account the findings of the Tribunal in the *DfT* decision and the *South Gloucestershire Council*. In brief summary in *DfT* the Tribunal concluded that regulation 12(4)(e) was engaged on the basis that:

- In preparing the report in question Sir Rod was firmly 'embedded' into the civil service – he had his office at the DfT and used business cards showing the logos of both the DfT and HM Treasury;
- Sir Rod had access to the confidential thoughts of the Ministers who commissioned the report and was thus invited into the 'safe space' of policy development within the DfT and HM Treasury;
- Although Sir Rod provided the overall direction of the report and was ultimately responsible for its conclusions, the study was managed and run by senior civil servants; and
- The drafts of the report had limited circulation.[3]

66. Furthermore in the Commissioner's opinion a key reason which supports the Tribunal's finding is the fact that Sir Rod was appointed to produce a key, broad ranging policy document for the DfT – his report was entitled 'Role of Transport in sustaining the UK's Productivity and Competitiveness' which in the Commissioner's opinion can be seen as being directly linked to a core function of the DfT.

67. In *South Gloucestershire Council* the Tribunal concluded that regulation was not engaged on the basis that:

- The consultants in question were not integrated into the Council: they were not seconded to the Council or otherwise imbedded nor did they take decisions or otherwise act on behalf of the Council; and
- Paying attention to both form and to substance, and to the particular circumstances of and nature of the communications, the consultants' reports could not be properly characterised as internal communications of the Council.[4]

[3] See paragraphs 95 to 98 of EA/2008/0052.
[4] See paragraphs 23(h) and 33 of EA/2009/0032.

68. Although the Commissioner accepts the argument of the Tribunal in *DfT* that it is not possible to create a uniform test for deciding if information is an internal communication, the Commissioner remains of the view that whether a third party is carrying out a statutory function of the public authority will often be an important criterion which merits consideration. This is because the performing of a statutory function of a public authority would effectively embed the third party directly into the public authority; the Tribunal findings in the *DfT* case would certainly suggest that this concept of embedding was key to its conclusions.

69. As the summarised arguments set out above, although the report which was produced by Hayes McKenzie was used to support a number of the DECC's statutory functions, it was not a statutory duty of the DECC to actually carry out this study and publish the report.

70. Furthermore, although the report was prepared and used as part of the DECC's policy responsibilities, in the Commissioner's view the report focuses on a relatively narrow area of policy, i.e. the impact of LFN emissions from wind turbines. The narrow focus of this report is in contrast to the overarching and broad remit of the study which was the focus of the *DfT* case, namely the long-term links between transport and the UK's economic productivity, growth and stability, within the context of government's broader commitment to sustainable development.

71. Having examined the contract entered into between the DTI and Hayes McKenzie the Commissioner does not believe that it can be argued Hayes McKenzie as a third party consultancy, or the individual at Hayes McKenzie who was responsible for taking the lead on this project, could be said to be embedded into the DTI in the way that Sir Rod was. Hayes McKenzie did not have access to high level policy discussions – i.e. they were not invited into the 'safe space' of high level policy discussion, nor were they in a position to direct or manage senior civil servants. Nor were they provided with the practical support provided to Sir Rod, e.g. an office and resource support within a government building. Rather the relationship between the DTI and Hayes McKenzie was effectively a standard commercial one – they were a third party providing a service to a public authority in the same way for example as an external firm of solicitors would. Consequently in the Commissioner's opinion the relationship between Hayes McKenzie and the DTI was effectively one which was at arms-length rather than a close or intimate one.

72. The Commissioner does acknowledge that the drafts of the report only received limited circulation within the DTI which was a factor, albeit not a determinative one, which the Tribunal used in reaching its conclusion that the draft of Sir Rod's report was an internal communication.

73. In conclusion however, in the Commissioner's opinion the three drafts of the report produced by Hayes McKenzie do not constitute an internal communication for the purposes of regulation 12(4)(e). In reaching this conclusion the Commissioner has placed particular weight on the fact that on a practical level Hayes McKenzie were not 'embedded' into the DTI; the report they were commissioned to produce whilst clearly linked to the DTI's policy responsibilities

could not be described as central or core to future policy direction of the department; although the final report supported a number of the department's statutory functions the production of the report was not a statutory function in itself. Ultimately in the Commissioner's view the fact that the DTI did not have sufficient technical expertise to undertake the study is not a factor upon which any weight can be placed; rather it would appear that DTI simply bought in independent professional expertise to assist in its decision making process, just as the *South Gloucestershire Council* did in the case referenced above. If the Commissioner accepted that such a criterion would make any communications between the public authority and the third party 'internal communications' then any time a public authority entered into a commercial relationship with a third party, communications between them could be said to be internal. In the Commissioner's opinion such an approach would be too broad an interpretation of the exception contained at regulation 12(4)(e), particular when one bears in mind the comments of the Directive which says that the exceptions should be interpreted narrowly. Moreover, if such commercial relationships could be considered to be 'internal' this would suggest a free flow of information between the two parties. In this case the flow of information, in the form of correspondence about the draft versions of the report, was in fact restricted and determined by the contract entered into by two legally separate entities.

Regulation 12(4)(d) – material still in the course of completion, unfinished documents or incomplete data

74. Regulation 12(4)(d) allows a public authority to withhold information if:

> 'the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.'

75. The exception is class based, therefore if information falls within the scope of regulation 12(4)(d) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to any particular purpose.

76. The DECC has noted that when the complainant made his request on 19 July 2007 the final version of the report had been published by the DTI. However, it argued that this did not alter the fact that the three draft versions of the report were clearly 'unfinished documents' and thus fell within the scope of regulation 12(4)(d).

77. In considering this case the Commissioner has again taken into account the Tribunal's decision in the *DfT* case referenced above as it also involved the consideration of regulation 12(4)(d). In the decision notice which was the focus of this appeal the Commissioner had argued that 12(4)(d) did not cover a draft version of the report held by the DfT because the final version had been published and thus the drafts no longer related to a unfinished document but in fact related to a completed document.

78. However, the Tribunal was very clear in its conclusions in relation to the scope of regulation 12(4)(d) and at paragraph 82 stated that '…the Draft Report is, by its very name and giving the words their logical meaning, an unfinished document'.

79. On the basis of the Tribunal's conclusions, the Commissioner accepts that draft versions of reports fall within the scope of regulation 12(4)(d) even though the final version of a report may have been published by the time a request is received by a public authority. Consequently the Commissioner is satisfied that the exception contained at regulation 12(4)(d) is engaged with respect to the three draft versions of the report produced by Hayes McKenzie.

Public interest test

80. However, regulation 12(4)(d) is a qualified exception and therefore subject to the public interest test set out at regulation 12(1)(b) of the EIR which states that information can only be withheld if in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest factors in favour of disclosing the information

81. The DECC identified the following factors in favour of disclosing the drafts of the report:

82. There is a general public interest in open and transparent government and there is a specific public interest in the public being informed about issues that relate to their health.

83. Disclosure of the drafts could show how the final report had been arrived at and thus could assist the public's knowledge of that process and therefore could be used to inform public debate on the final product.

84. In his internal review request the complainant argued that it was in the public interest that the drafts be disclosed so that the process by which the drafts were peer reviewed by the DTI could be assessed and why this process may have resulted in changes being made to the final version of the report. The complainant quoted the then Minister for Energy in a House of Commons debate of 5 July 2007 in which he relied on the findings of the Hayes McKenzie report to support his statement that there is 'no evidence of adverse health effects from wind turbines'.[5] The complainant argued that the public were entitled to know on what basis the Minister for Energy could make such a confident assertion.

85. To these arguments the Commissioner would add that disclosure of the drafts could increase public confidence in the final version of the report if disclosure revealed a careful drafting and review process. Equally if the disclosure of the drafts revealed a process by which the drafts were not subjected to adequate scrutiny then it could be argued that it would be in the public interest to disclose the drafts in order to reveal these failures.

86. The Commissioner also accepts that it could be argued that if those who were compiling such research were aware of the fact that it was possible that their draft reports would be disclosed in the future, this may in fact improve the level of

[5] http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070705/debtext/70705-0003.htm

argument or debate contained in the drafts because the authors would know that their initial research may be disclosed at some point and therefore open to public scrutiny.

87. Furthermore, the Commissioner is conscious that climate change and the need to seek safe and viable alternatives to fossil fuels are major political issues. Therefore, the Commissioner believes that disclosure of this information could be used to feed into the debate with regard to what role wind farms should have in seeking to reduce the UK's carbon emissions and how that should be balanced with regard to the potential affect that wind farms could have on people's health.

Public interest factors in favour of maintaining the exception

88. The DECC identified the following public interest arguments in favour of withholding the draft reports:

89. Government and third party contractors need a safe space in which to work candidly and freely without being concerned that early drafts of reports will be disclosed and as a consequence those involved would have to spend time clarifying the contents of any of these drafts.

90. It is important that the DECC and contractors can freely analyse and discuss similar drafts in the future. This is a key part of the policy making process and a key element of good policy making. Policies would be worse if this candour and frankness was lost.

91. Disclosure of these drafts could give a misleading impression about the thinking about LFN during the compilation of the report as key points were edited and amended during the drafting process. Disclosure would therefore need to be accompanied by an explanation of the development of the drafting process which could provide some context as to how the final version of the report was reached but this may not be sufficient so as to avoid the risk of confusion.

Balance of public interest factors

92. In considering the balance of the public interest arguments the Commissioner has taken into account the underlying principles involved in balancing the public interest test which were set out by the Tribunal in *DFES v Information Commissioner*, EA/2006/0006. The Commissioner has focused on two of these principles in particular, the first being the timing of the request:

> 'The timing of a request is of paramount importance…Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the…threat of lurid headlines depicting that which has been merely broached as agreed policy.' (Para 75, (iv))

93. And the second principle being the content of the information itself:

> "The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case. (Para 75, (i))

94. Although the *DFES* decision related to the consideration of section 35(1)(a) of the Act, Mr Justice Mitting in his decision in the High Court case Export Credit Guarantee Department v Friends of the Earth [2008] EWHC 638 (Admin) (17 March 2008) considered an EIR request submitted to the ECGD by Friends of the Earth confirmed that these principles should be imported into the consideration of the public interest test in the EIR:

> 'The approach which the authority, the Commissioner and the Tribunal should adopt to those provisions [regulations 12(4) and 12(5)] was set out in two decisions of the Tribunal. First, in Department for Education and Skills v Information Commissioner and the Evening Standard, a decision promulgated on 19th February 2007 and, secondly, in Secretary of State for Work and Pensions v Information Commissioner, a decision promulgated on 5th March 2007.' (para 26)

95. The principle of timing has an important impact on the weight the Commissioner believes should be given to the DECC's argument that disclosure of the drafts would invade the safe space needed by Government and by third parties to discuss drafts of reports. Whilst the Commissioner accepts the merit of such an argument in the development of policy and the production of reports such as the one which is the focus of this request, he believes that the need for such a space significantly diminishes when the development of a particular policy or report has been completed. This is because once the decision making process has been completed there is no little or no need to protect the discussion of 'live' issues. Applying this to the facts of this case by the time the complainant submitted his request in July 2007 the final version of the report had been published some fourteen months previously. Therefore there was no need for a safe space to be provided for Hayes McKenzie and DTI/BERR to discuss drafts of the report free from intrusion.

96. In relation to the DECC's argument summarised at paragraph 90, the Commissioner believes that this is essentially the 'chilling effect' argument which has been considered by previous Tribunals. Basically, chilling effect arguments are directly concerned with the argued loss of frankness and candour in debate and advice which would flow from the disclosure of information which it is said would lead to poorer quality advice and less well formulated policy and decisions. The chilling effect can encompass a number of related scenarios:

- Disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will make future contributions to that policy;

- The idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and
- Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.

97. In relation the first scenario, as the Commissioner has argued in relation to the safe space argument above, as the report was published some time before this request was submitted the first type of chilling effect is an irrelevant consideration. In relation to the wider chilling effect scenarios the Commissioner is conscious of the scepticism various Tribunals have expressed in relation to these effects occurring following disclosure of information under the Act or EIR. Moreover, the Commissioner notes DECC has not provided any specific evidence to support its reliance on the chilling effect beyond a general assertion that disclosure would be likely to affect the frankness and candour of officials in the future. Furthermore, the Commissioner considers that the type of people asked to carry out this type of work in the future, i.e. independent specialist consultants with a professional reputation to consider, are likely to have the ability to carry out their task with requisite thoroughness and robustness regardless of previous disclosures under the Act and/or EIR, i.e. they would not easily deterred from doing what they have been asked to do through fear of disclosure.

98. For these reasons the Commissioner has attributed little weight to the public interest arguments advanced by the DECC which envisage some sort of chilling effect.

99. Finally, with regard to the DECC's suggestion that disclosure may give a misleading impression about how the report was created or the drafts reports could be misinterpreted by the public, the Commissioner has not placed great weight on this argument. Although the Commissioner acknowledges that his guidance on regulation 12(4)(d) notes that 'when faced with a request for information which is as yet incomplete, public authorities must consider whether disclosure of the information would be misleading because incomplete or whether disclosure would make it difficult or impossible to complete work'.[6] However, in this case as the Commissioner has noted above, the final copy of the report had been published by the time this request was received and therefore disclosure of the drafts would not interfere with the completion of the final report. Moreover, as the DECC has acknowledged in disclosing the draft reports it has the option of setting them in some wider context and thus going some way to alleviate any potential confusion. In making this point the Commissioner agrees with the findings of the Tribunal in *HM Treasury v Information Commissioner*, (EA/2007/0054) which considered how the public would use information disclosed under the Act:

[6] An Introduction to the EIR Exceptions

> 'We were wholly unpersuaded by Mr Neales's further point, that the public might wrongly assume that a measure was adopted or rejected by reason of the rationale used by the Civil Servant as a working assumption for the provision of advice, whereas the Minister's actual reason for adopting or rejecting it might be different, and that would lead to difficulties. Any Minister in that position would be able to explain the status of the official's assumption and what his own thinking was'. (Para 64)

100. With regard to attributing weight to the public interest factors in favour of disclosure the Commissioner recognises that they are ones which are regularly relied upon in support of public interest in favour of disclosure, i.e. they focus on openness, transparency, accountability and contribution to public debate. However, this does not diminish their importance as they are central to the operation of both the Act and EIR and thus are likely to be employed every time the public interest test is discussed. Nevertheless, the weight attributed to each factor will depend upon a number of circumstances, again the key ones being the content of the information and the timing of the request.

101. In terms of disclosure of the drafts influencing the debate around the final product, see paragraph 83, as the final report had been published by the time of the request the Commissioner does not think that this can be given any weight in terms of influencing the policy outcome. Weight can be given to the fact that the drafts could be used to feed into similar policy debates in future. .

102. Rather the arguments in favour of disclosure which attract more weight are those which focus on issues of transparency, accountability and contribution to a wider public debate. The Commissioner agrees with the DECC's point that information relating to the health of the public, which this information clearly does, should attract particular public interest in disclosure, particularly if the information could be used to inform the debate on the potential health affects of wind farms. Moreover, the Commissioner accepts the complainant's argument that there is value in understanding how the final report was arrived it is a valid one. Nevertheless, having considered the content of the three drafts, although the Commissioner can identify some differences within them, and indeed the DECC has identified what it considers to be a number of key revisions between versions, the Commissioner notes that they are technical documents. Therefore it is questionable how much disclosure of the three drafts would actually provide the public with a clear narrative of how, and perhaps more importantly why, revisions were made at certain stages.

103. Despite these reservations as to how much weight should be attributed to the factors in favour of disclosure the Commissioner believes that on balance the factors in favour of maintaining the exception attract even less weight. This is therefore a case where although there is not an overwhelming case for disclosing the information, the case for withholding is even weaker. As there is presumption in favour of disclosing information in the EIR, the balance of the public interest must favour disclosing the information.

Procedural Breaches

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

> 'The refusal shall specify the reasons not to disclose the information requested, including –
>
> (a) any exception relied on under the regulations 12(4), 12(5) and 13…'

105. Although the DECC provided the complainant with a refusal notice citing regulation 12(4)(e) as a basis upon which to refuse to disclose the requested information it did not cite regulation 12(4)(d) which it later relied upon to refuse the three draft reports. This constitutes a breach of 14(3).

106. Regulation 5(1) requires that a public authority will make environmental information available upon request. Regulation 5(2) states that requested information should be made available no later than 20 working days after the receipt of the request. As the Commissioner has concluded that the three draft reports do not fall within the scope of the exception contained at regulation 12(4)(e) and has concluded that although they fall within the scope of the exception contained at regulation 12(4)(d) the public interest favours disclosing the information, the Commissioner therefore finds that the DECC breached regulations 5(1) and 5(2).

The Decision

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107. 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 Commissioner has concluded that the DECC does not hold any further information falling within the part of the complainant's request seeking 'all correspondence and documentation relating to revisions of this report' other than that previously disclosed to him.

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

- The DECC breached regulation 14(3) by failing to cite regulation 12(4)(e) in its refusal notice.
- The three draft reports do not fall within the scope of the exception contained at 12(4)(e).
- The three draft reports do fall within the scope of the exception contained at 12(4)(d) but in all the circumstances of the case the public interest in maintaining the exception does not outweigh the public interest in disclosing the three draft reports.

- By failing to disclose the three draft reports the DECC breached 5(1) and 5(2) of the EIR.

Steps Required

109. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Disclose to the complainant the three draft versions of the report. The Commissioner is conscious of the DECC's decision to redact personal data from the correspondence which has been disclosed to the complainant during the course of the investigation. The Commissioner is satisfied that there is no personal data contained in the drafts of the report. The only exception to this is the electronic version of one of the drafts provided to the Commissioner which includes track changes. If one hovers over the track changes themselves the author of the changes is revealed. Consequently if the DECC does not wish reveal the author of these changes it should provide the complainant with a paper copy of this particular draft rather than an electronic version.

110. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

111. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

112. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
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 served.

Dated the 26th day of October 2009

Signed ……..

Steve Wood
Assistant Commissioner

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

Legal Annex

Environmental Information Regulations 2004

Duty to make available environmental information on request

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.

Exceptions to the duty to disclose environmental information

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.

(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;

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

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

Refusal to disclose information

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.

(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.

(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;