Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0043

Environmental Information Regulations 2004 ("EIR").

Heard at Finance and Tax Tribunal,

Bedford Square,

London

Decision Promulgated

Date 01 June 2007

BEFORE

INFORMATION TRIBUNAL DEPUTYCHAIRMAN

Chris Ryan

And

LAY MEMBERS

Dave Sivers

And

Paul Taylor

B E T W E E N

RT HON LORD BAKER OF DORKING CH

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT

Additional Party

Representation:

For the Appellant: **Hugh Tomlinson QC**
For the Respondent: **Timothy Pitt-Payne**
For the Home Office: **Eleanor Grey**

Decision

The Tribunal has decided in favour of the Appellant on this Appeal and that the Department for Communities and Local Government should disclose the information in question within 28 days. The Tribunal

accordingly issues the following substitute decision notice in place of the decision notice dated 13 June 2006

FREEDOM OF INFORMATION ACT 2000 (SECTION 50 and 58(1))
ENVIRONMENTAL INFORMATION REGULATIONS 2004

SUBSTITUTED DECISION NOTICE

Dated 1st June 2007

Name of Public authority: Department for Communities and Local Government (formerly the Office of the Deputy Prime Minister)
Address of Public authority: Elland House, Bressenden Place, London SW1E 5DU

Name of Complainant: The Rt. Hon. Lord Baker of Dorking C.H.

The Decision Notice of the Information Commissioner dated 13 June 2006 shall be substituted as follows:

Nature of Complaint
The public authority failed to disclose information relating to the submissions made to the Deputy Prime Minister following the report of the Planning Inspector in the application to build Vauxhall Tower in London.

Action Required
Within 28 days the Department for Communities and Local Government shall make available to the Complainant, in unredacted form, the written submissions by officials provided to Deputy Prime Minister on 8 December 2004 and 28 February 2005.

Dated this 1 day of June 2007

Deputy Chairman

Reasons for Decision

Background

1. This appeal arises from a decision of the Deputy Prime Minister on 14 July 2005 to grant planning permission for the construction of a 50 storey residential tower near Vauxhall Bridge in London. There had earlier been an inquiry conducted by a planning inspector which had concluded that planning permission for the building should be refused. In May 2006 the Office of the Deputy Prime Minister was replaced by the Department for Communities and Local Government. In this decision we use the word "Department" to refer to each of them as nothing turns on the change to the organisation which had responsibility for responding to the original request and to the Information Commissioner's subsequent investigation.
2. Before he made his decision rejecting the inspector's recommendation the Minister had been provided with advice from his officials in the form of two submissions, one dated 8 December 2004 and the other 28 February 2005. The issue to be determined on this Appeal is whether the advice to the Minister, contained in those submissions, including any opinions of the officials expressed in them, should have been made available to the Appellant in response to a request under Regulation 5(1) of the Environmental Information Regulations 2004 ("EIR"). The Department rejected the request on the basis that the information requested was exempt under EIR regulation 12(4)(e). The Information Commissioner decided, in a Decision Notice dated 13 June 2006, that the submissions as a whole should have been disclosed but that the advice of the officials, and any opinions expressed by them, should be redacted and not disclosed.
3. The Appellant appealed against the Information Commissioner's decision notice and this Tribunal ordered that the Department be joined as an Additional Party to the Appeal. The Department itself accepted the Information Commissioner's decision as to the disclosure of the

rest of the two submissions and they have therefore been made available to the Appellant, with any advice or opinions redacted.

Applicable legal provisions

4. Regulation 5(1) of EIR requires a public authority that holds environmental information to make it available on request. However, the effect of regulation 12 is that the public authority may refuse to disclose information if any one of a number of exceptions to disclosure applies and "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information" (regulation 12(1)(b)).
5. The exemption on which the Department has relied in this case is set out in regulation 12(4)(e) i.e. that "the request involves the disclosure of internal communications".
6. Regulation 12(2) provides that in dealing with a request for information "A public authority shall apply a presumption in favour of disclosure".

Issues for consideration on the Appeal

7. As the matter came to us it had already been agreed by the parties that:
    a. The information originally requested by the Appellant was "environmental information" falling within the scope of the EIR;
    b. It was correct to characterise the two submissions as "internal communications", so that the regulation 12(4)(e) exemption was engaged;
    c. The balance of public interest supported the Department's refusal to disclose any part of the submissions before the Minister had made his decision to grant planning permission;
8. Once that decision had been made the balance of the public interest favoured the release of the factual elements of the submissions. It is also common ground that, although the first request for information pre-dated the Minister's decision, it would be appropriate for the Tribunal to

adopt the pragmatic approach of considering any requirement to disclose as at the date when that decision had been made. This was the basis on which disclosure was refused by the Department at the conclusion of an internal review of its original response to the request, and was also the basis of the Information Commissioner's Decision Notice that forms the basis of this appeal. We have agreed to proceed on this basis.

9. The issue we have to decide, therefore, is whether or not the Information Commissioner was right to decide that, even after the Minister's decision had been promulgated, the public interest still supported the withholding of the advice and opinions of the officials making the submissions. We have to decide that issue against the background of a presumption in favour of disclosure (regulation 12(2)) and taking account of all the circumstances of the case before us (regulation 12(1)(b)).

10. The Tribunal's jurisdiction is determined by section 58 of the Freedom of Information Act ("FOIA"), which applies to environmental information cases, by virtue of regulation 18 of EIR, with minor modifications that do not have any impact in the circumstances of this case. The relevant parts of section 58 read:

> "(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*."

We therefore have wide powers to review the Information Commissioner's decision. In exercising those powers in respect of the

public interest balance our approach is that its application is a mixed question of fact and law and not the exercise of a discretion.

11. We have reached our decision on this Appeal without inspecting the unredacted versions of the two submissions. We were, however, provided with an agreed bundle of documents and heard detailed submissions from the legal representatives of the Appellant, the Information Commissioner and the Department during a hearing that took place in London on 8 May 2006, extending into the morning of 9 May. In the course of that hearing we took evidence (principally in the form of cross examination based on previously filed written witness statements) from the following:
    a. On behalf of the Appellant:
        (a) The Appellant himself, a former Government Minister;
        (b) Mr Gordon Chard, until recently the Director of Planning and City Development at Westminster City Council;
        (c) Mr Alastair Robson, Assistant Director – Policy in the Transport and Environment Department of East Sussex County Council;
        (d) Ms Pauline Stockell, an elected member of both Maidstone Borough Council and Kent County Council with extensive experience of Planning Committee work.
    b. On behalf of the Department, Mr Paul Hudson who is currently Chief Planner for the Department but who, prior to his appointment to that post in June 2006 he had held a number of senior posts in the field of planning and economic development at local authority level.

    We will refer later, and in context, to particular elements of the evidence.

Application of the public interest test

12. The Appellant's primary position was that, given the presumption in favour of disclosure set out in EIR regulation 12(2), he did not have to establish any public interest in favour of disclosure. However, he

argued that, if it was necessary for him to do so, there were a number of considerations that favoured disclosure. The Department and the Information Commissioner argued that the main factor in favour of maintaining the exemption was the risk that civil servants would be less frank and impartial in their advice, and less punctilious in recording it, if they knew that it was likely to be exposed to public attention and, possibly, public criticism. They did not claim that any direct harm would result from disclosure of the specific information that is in issue in this case. The anticipated harm, they claimed, was the more general impact on decision making processes within government in the future. It was said that this risk outweighed any of the public interest factors in favour of disclosure.

Factors in favour of maintaining the exemption.

13. In support of the Department's case on the perceived risk of prejudice to the giving of impartial advice, the first witness statement of Mr Hudson explained, in general terms, that the material redacted from the submissions in the form that we viewed them included consideration of the risk of legal challenge, the officials' interpretation on compliance with policy and advice on whether or not to accept the Inspector's recommendations. He stressed the importance of Ministers receiving from their officials private, honest and informed advice which analysed the position and set out all the courses without covering up any uncomfortable facts. He said that if "officials no longer felt able to give frank advice, because of fear of disclosure, decision making would be damaged".
14. Mr Hudson's evidence was supplemented by statements previously made in another Information Tribunal case. This was *The Department for Education and Skills v Information Commissioner and The Evening Standard – (*Case EA/2006/0006). The context of the DfES case was a request for disclosure of information on the formulation of government policy for school funding and a claim to exemption under section 35 of the Freedom of Information Act 2000. The evidence in question in that

case was given by Andrew Lord Turnbull (former Head of the Home Civil Service) and Paul Britton (Director General Domestic Policy Group, Cabinet Office).It was placed before us, with the agreement of the parties, in the form of exhibits to a second witness statement from Mr Hudson, which also exhibited extracts from the transcript of the hearing in the DfES case recording cross examination based on those statements. It was argued before us that the Turnbull and Britton evidence set out the government's areas of concern as to the adverse effects of disclosure, in the case of the formulation of general policy, and that those concerns applied with equal force to advice in respect of a specific administrative decision on a planning issue. The concerns that have potential relevance to this Appeal included the following:

a. A loss of candour in exchanges between Ministers and officials, and dilution of civil servants' willingness to present Ministers with the truth, even when it takes an inconvenient form, or to rigorously test the potential disadvantages of a proposed course of action.
b. The fear that a civil servant might be asked to justify and defend a planning decision which he or she had recommended a Minister to take, which would be unfair as officials are not able to answer back if attacked.
c. Concern that Ministers should not have to defend themselves for having reached a decision that did not follow advice from their own officials.
d. The danger that decisions would not be fully or widely debated, but would only be discussed with a small number of close confidantes in the course of unminuted meetings.
e. The erosion of the tradition of proper record-keeping within the civil service with a consequent damaging effect on the quality of decision making itself.

15. The, differently constituted, Tribunal in the DfES case concluded, in the light of the evidence and competing arguments it had heard, that there were a number of principles that should guide its decision on disclosure. These included the following:

a. The purpose of maintaining the exemption and imposing confidentiality was the protection from compromise or unjust public opprobrium of civil servants, not ministers. It could discern no unfairness in exposing an elected politician, after the event, to challenge for having rejected one possible policy option in favour of another.

b. It was accepted that the disclosure of policy options, whilst policy was in the process of formulation, would be undesirable in that it would deny Ministers and officials the time and space they needed in order to explore all options and reach a concluded view on the policy to apply. It was a judgment to be made in the light of the particular circumstances of each case how soon after a policy had been finalised and announced disclosure should be made of the advice that supported it.

c. If the information requested was not already in the public domain, the publication of other information relating to the same topic for consultation, information or other purpose ought not to be a significant factor in a decision as to disclosure.

d. As to the likely response of civil servants to the possibility of disclosure the decision reads:

"In judging the likely consequences of disclosure on officials` future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote - Trevelyan reforms. These are highly – educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions."

It went on to say:

"Likewise, decisions should not assume the worst of the public. The answer to ill-informed criticism of the perceived views of civil servants is to inform and educate the critic, however hard that task may be, not to deny information, simply through fear that it may reflect adversely and unfairly on a particular official".

16. We have first to consider, therefore, the extent to which the principles enunciated in that case ought properly to be applied to the facts of this Appeal. We remind ourselves, first, that we are not obliged to follow other decisions of this Tribunal. We also note that regulation 12(4)(e) refers simply to "internal communications" without identifying their contents. So, on the face of the provision we are required to apply, there is no indication that the exemption is intended to have particular application to decision makers and their advisers or that it is intended to avoid premature disclosure during the period of time before a decision has been finalised. Moreover, it is, on the facts of this Appeal, only the question of disclosure after the Minister's decision on planning consent had been promulgated that we are required to consider. It was also argued before us that different considerations may apply in cases where the relevant advice was given in support of a specific decision on an administrative issue as opposed to a wide policy review undertaken over a period of time – a view not shared by Miss Grey, representing the Department, who argued that this distinction was less clear than had been suggested.
17. We think that there is a potential difference, from the perspective of a civil servant, between a situation where he or she advises on – and possibly assists the Minister in interpreting - general policy and one where the advice concerns an administrative decision. In the latter case the advice may well have a more immediate impact on the lives of those affected by it and in controversial cases this might even result in more direct, possibly virulent, criticism of his or her contribution to the decision.
18. There are also dangers, in our view, in applying too rigorously principles developed in respect of FOIA section 35 to the quite different language of regulation 12 EIR. However, we believe that the principles set out in the DfES case, and summarised above, do provide broad guidance for us in considering the circumstances of this Appeal. In particular we believe that we received reinforcement for the confidence in the resilience of the civil service reflected in the passage quoted in paragraph 15.d above from some of the evidence which we heard.

First, Mr Chard was asked by a member of the panel whether he had seen any change in the attitude of local authority employees since the FOIA regime was first mooted and training given for its implementation. His answer was that he believed that they had become more rigorous and disciplined in recognition of the fact that what they wrote might become the subject of public scrutiny – they were more aware of the need, in his words, to "get it right". We see no reason to believe that the employees of central government dealing with environmental information will not adopt a similarly responsible and positive approach in the future. The second element of evidence on the point was given by the Department's own witness, Mr Hudson, who said, in the course of his cross examination by Mr Tomlinson for the Appellant, that he thought that although the fear of publicity would lead to a change in the manner in which advice would be proffered, it would not alter the content of the advice. There would, he said, be a greater tendency to give advice orally and not in writing. He explained that this is what had happened when the reports of local authority planning officers were first exposed to public inspection in the early 1990s. However, he added that it had been acknowledged that this represented bad practice and that it was less prevalent these days. He accepted that it was a matter of effective staff management, at both central and local government level, to ensure that complete advice was made available to decision makers and properly recorded. Against that background we believe that, should a requirement to disclose advice to a Minister generate a tendency to adopt bad practice in the way that advice is given or recorded, effective management guidance should deal with the problem in the same way that it appears to have done at local authority level. Finally, we were told by the Appellant during his cross examination, confirmed by Mr Hudson, that even if advice were given to a Minister orally and not set out in a written submission, any material discussion would be minuted by the Minister's private office. We think that this provides further protection against the outcome which the Department fears.

19. We regard the guidance set out in the DfES decision, combined with the evidence summarised above (and the Appellant's own confident assertion that the officials with whom he worked in the past would not have allowed the risk of publicity to undermine the independence of their advice), to be a more reliable basis for our decision on this appeal than the authority of *Conway v Rimmer* ([1968] 1 All E R 874) to which we were referred. We do not think that comments on the likely response of civil servants 40 years ago to the risk of their internal communications being revealed in the rather different context of the disclosure process in civil litigation provides any significant assistance to us on the particular facts of this Appeal..
20. Mr Tomlinson argued that the case against disclosure was further weakened by the fact that all advice given by local planning officers to the members of a local authority planning committee was made available to the public and that it was inconsistent to have a practice under which the equivalent advice given to a Minister, on those cases where he has the final decision on a planning matter, should not also be disclosed. On this issue the parties co-operated in reducing a considerable body of evidence, spread among several witness statements, into a single agreed statement of facts summarising the key elements of the planning process. This confirmed that where a planning application is to determined by the local authority planning committee the case officer will prepare a written report for the committee setting out details of the application, relevant background information, and a summary of the comments received in relation to the application. The report will also set out the officer's recommendation. Before the meeting at which this report is to be considered the meeting agenda and the report itself will be made available for public inspection. The meeting itself takes place in public, usually with the case officer first summarising the issues to be considered. The subsequent debate and voting then also take place in public. The committee must give reasons for its decision and, where the planning officer's recommendation is followed, it is likely to refer to those reasons. However, where the officer's recommendations are not

followed the minutes of the meeting are expected to record the committee's reasons in clear terms.

21. It was suggested, in both argument and in questions put in cross examination to Mr Chard, Mr Robson and Ms Stockell, that it was common for local authority planning officers to hold informal briefing meetings with some or all members of the Planning Committee and that the procedure at local authority level was therefore not as dissimilar from Central Government as might appear to be the case. It was evident from the answers given in cross examination that there frequently is some form of meeting with at least the chair of the Committee and that on occasions the resulting discussion might extend beyond merely reviewing the agenda. However, no clear pattern of behaviour emerged and no evidence was brought to light suggesting that the requirement for full public disclosure of all relevant information and advice was undermined by the use of private briefings to those making decisions on the relevant committee. Mr Robson, in answer to a question put to him in cross examination said that any substantive issues touched on in the course of a pre-meeting briefing would already have been covered in the planning officer's report, which is required to be comprehensive. We would expect that, if it were suspected that the merits of a planning decision had been debated in private, in the way that has been suggested, those members of a planning committee whose party did not have a majority on the committee, and who did not provide the Chair, would have realised what had occurred and would have exposed the practice to publicity and criticism. No evidence was adduced to this effect and, on the basis of the evidence we did hear, we conclude that, if any pre-meetings take place for any purpose other than to familiarise the Chair with the agenda items to be considered, this is not a common or widespread practice, and certainly not one that is regarded as an acceptable norm. In our view, therefore, it does not seriously undermine the general statement, which Mr Tomlinson invited us to accept, that there is a significant inconsistency between the practice of publishing all advice at local authority level and the withholding of

advice when a planning matter falls to be determined by the Secretary of State.

22. We were invited to accept that there were a number of factors that distinguished the procedure at local authority level from that at Secretary of State level. We accept, as the Information Commissioner argued, and Mr Hudson stated during his cross examination, that the planning decisions habitually taken at local authority level are generally much less complex than those which go through the route of a Planning Inspector's public enquiry and final determination by the Secretary of State. We also accept that the Secretary of State's involvement occurs at a different stage in the overall process than the stage at which a planning committee makes its decision. We do not, however, see why it should follow that the public should be given full disclosure of the advice given to those making the decision at one level and not at the other. The fact that the Secretary of State's decision represents the final stage (subject to appeal to the courts or judicial review) seems to us, if anything, to increase the desirability of full disclosure, rather than to decrease it. Similarly, we consider that full disclosure of the deliberations underlying a decision on a complex matter is arguably more important than in the case of a simple one, where the issues may be more immediately evident.

23. It was argued on behalf of the Information Commissioner that there were two further reasons for saying that it was not fair to draw a parallel between the procedure at local and central government level. A planning decision by a local authority planning committee would, it was said, be quite incomprehensible to the public if the reader did not also have access to the written report and advice of the planning officer and his or her oral summary given in the course of the committee meeting. On the other hand, the Minister's decision, without the civil servants' advice, is still comprehensible because it is set out in a fully reasoned letter (which a planning committee decision is not) and is accompanied by an equally detailed report from the inspector. However, in our view, this argument applies an incorrect test. We remind ourselves that the effect of Regulation 12(4)(e), read in context,

is that all internal communications must be disclosed unless the public interest balance is against disclosure. Nor is there any suggestion elsewhere in EIR that the required disclosure is limited to material which is necessary to make a particular decision comprehensible or which serves any other particular function. And, even if it were limited to information needed to aid comprehension, it is difficult to maintain that a decision is has really been understood if the letter announcing it sets out an apparently comprehensible rationalisation, but in fact avoids mentioning some of the background reasoning, which publication of the advice to the Minister would have revealed.

24. On behalf of the Department Miss Grey criticised any attempt to minimise the significance of the detailed reasons set out in the decision letter or to characterise it (in her view over-cynically) as nothing more than a post hoc rationalisation of the Minister's decision. She argued that the Appellant's apparent faith in the resilience of civil servants should be sufficient to satisfy him that they would ensure that decision letters did not "gloss over" or otherwise fail to record all relevant issues. We certainly agree that we should not make our decision on the basis of unfounded suggestions that the decision letter in this case may have avoided or obscured any of the reasons that led the Minister to reach his decision. And we agree with Miss Grey that we should draw comfort from the fact that the Information Commissioner who, unlike the Tribunal, did inspect an unredacted copy of each of the submissions, expressed no concern in his Decision Notice on this issue. It seems to us, however, that one reason for having a freedom of information regime is to protect Ministers and their advisers from suspicion or innuendo to the effect that the public is not given a complete and accurate explanation of decisions; that the outcome is in some way "spun" (to adopt the term whose very invention illustrates this tendency towards cynicism and mistrust). Disclosure of internal communications is not therefore predicated by a need to bring to light any wrongdoing of this kind. Rather, by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point.

Factors concerning disclosure

25. The Appellant's case is that disclosure of the disputed information would contribute to public understanding of the basis for the Minister's decision and would assist in informing public debate about the merits of that decision. Both the Department and the Information Commissioner recognise that there is some public interest in disclosure on this basis. However, they submit that the value of the contribution is reduced by the fact that the inspector's report, the submissions by third parties to the Minister and the detailed decision letter are already in the public domain and by the fact that there is ample scope for the public to participate in the decision making process (by, for example, making representations to the inspector or the Minister). Mr Tomlinson, for the Appellant counters that it is not sufficient to say that the public has been provided with a substantial body of information and the opportunity to make its voice heard before the decision was taken. The point of transparency in decision making, he says, is that the public comes to know what lies behind the decision, not just what appears in the finely drafted, and possibly defensive, language of the decision letter.
26. The Information Commissioner and the Department also argue that the issue of accountability applies to elected public officials, (in this case the Minister), and not to civil servants. It is the Minister's decision, set out in a fully reasoned format in the decision letter, which should be subjected to public scrutiny. He is able to answer any critics in the course of public debate. His officials do not have that opportunity and are, properly, not accountable to the public in the same way that an elected representative is. We accept that this is a factor to be given appropriate weight in favour of maintaining the exemption.
27. It is said on behalf of the Appellant that the need for disclosure in the present case is increased by the fact that the Minister's decision was a very controversial one (particularly because he did not follow the recommendation of the inspector) and had serious ramifications for the

future appearance of London. The Information Commissioner has argued that the controversial nature of the decision is a neutral factor. On the one hand it may increase the public interest in knowing what advice the Minister received and whether he followed it or rejected it but, on the other hand, officials may be entitled to more protection from public criticism in cases which attract vigorous debate and where, possibly, feelings run high.

28. As we have said in paragraph 17 above, we do believe that civil servants may be particularly vulnerable in cases where their advice has contributed to a high profile, controversial administrative decision. We have also made it clear in paragraph 24 above that we do not approach our decision with any suspicion or cynicism as to the Minister's attitude towards his officials' advice or the precision with which the reasons for his decision were recorded in the decision letter. The advice may turn out to have been bland in the extreme. It may be fully supportive of the decision ultimately taken. Or it may have strongly recommended that the inspector's recommendation be adopted. We repeat that we believe that the strength of the argument in favour of disclosure and against maintaining the exemption is that disclosure will enable the public to form a view on what actually happened and not on what it can otherwise only guess at.

Conclusion

29. We have concluded that, on the particular facts of this case, the disclosure, after the date when the Minister's decision had been promulgated, of the advice and opinions of the civil servants in question will not undermine to any significant extent the proper and effective performance by civil servants of their duties in the future. The extracts from the decision in DfES, set out in paragraph 15 above, express confidence in the ability of both civil servants and the public to adopt a sensible attitude in the relatively new environment which the EIR and FOIA have created. We share that confidence. We hope that we are justified in having equal confidence in the media to deal

responsibly with the information that falls into their hands as a result of government now being conducted in a more public manner. Ministers, who are responsible for the decisions, should continue to be held to account for them, and not their officials. We can envisage that a Tribunal considering a similar category of information in the future may take a more restrictive view on disclosure if it has become apparent by then that the media habitually use officials' advice, disclosed under freedom of information principles, as the basis for partial or irresponsible criticism or to justify intrusion into the private lives of the individuals who have contributed to that advice.

30. In light of the presumption in favour of disclosure and those of the factors in favour of disclosure which we have identified in paragraphs 25 to 28 above, we have concluded that, once the Minister's decision had been promulgated, the public interest in maintaining the exemption relied on did not outweigh the public interest in disclosing the disputed information.

31. We should add that it was suggested to us, on behalf of both the Department and the Information Commissioner, that the key date may be, not the date when the Minister announced his decision, but a date 6 weeks later, being the latest date on which a challenge to the decision might have been presented to the court under section 288 of the Town and Country Planning Act 1990. We do not regard the appeal period to have any relevance to this Appeal. The basis of any court challenge would almost certainly be derived from the Minister's detailed reasons, as set out in the formal letter recording his decision, and not the advice given to him before he made it.

32. An additional point on timing arose in the later stages of the hearing. In the course of her closing submissions, Miss Grey, on behalf of the Department, suggested that any disclosure of the disputed information ought to be delayed for an unspecified period after the Minister's decision had been promulgated. We understood that the Department's reason for this suggestion was that the submissions to the Minister included, or may have included, legal advice which, if disclosed, might provide an indication of the Department's general

approach with regard to the risk of legal challenge, which could be of value to others having dealings with it in the future. Miss Grey very fairly pointed out that this represented a change in the Department's position, as previously reflected in the terms of her skeleton argument. However, she did not take up our suggestion that, if an argument along these lines was to be pursued, we would need to view an unredacted version of the two submissions, in order to assess the detailed content of the advice in question, and to hear fresh submissions on the point. Consequently we have no evidence on which to begin making a decision on whether disclosure of the redacted information should have been further delayed beyond the date when the Minister's decision had been promulgated. We have not therefore considered this issue any further.

33. We accordingly direct the Department to disclose to the Appellant, within 28 days of the date of this Decision, an unredacted version of each of the submissions.

Deputy Chairman Date 1st June 2007