

**Department for Environment, Food and Rural Affairs**  
Information Rights Team  
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Mr C Lister  
By e-mail: [request-33072-6dfff79b@whatdotheyknow.com](mailto:request-33072-6dfff79b@whatdotheyknow.com)

RFI: 3308  
25 May 2010

Dear Mr Lister

**REQUEST FOR INFORMATION: CORRESPONDENCE BETWEEN DEFRA AND CLG REGARDING THE ENVIRONMENTAL INFORMATION REGULATIONS 2004**

Thank you for your request for information for written communications/responses and email between Defra and CLG Housing Team between 1 January and 19 April 2010, with the additional text the Charges for Property Search Regulations (CPSR), which we received on 26 April 2010. We are dealing with your request under the Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 (EIRs).

The publication of the Information Commissioner's guidance on property searches and his subsequent findings in a number of decision notices plus the decision of the First-tier Tribunal (Information Rights) in the East Riding of Yorkshire v the Information Commissioner case have raised some issues concerning the application of The Local Authorities (England) (Charges for Property Searches) Regulations 2008 and the EIRs which officials are currently considering.

We have conducted a search of the information we hold which is relevant to your request and found a number of documents. One of these is an e-mail where we circulated the decision of the First-tier Tribunal (Information Rights) on the East Riding of Yorkshire Council v the Information Commissioner case to other interested government departments. This is already in the public domain and can be found at:  
[http://www.informationtribunal.gov.uk/DBFiles/Decision/i380/Decision\\_EA.2009.0069\\_15.03.10\\_No\\_Sig.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i380/Decision_EA.2009.0069_15.03.10_No_Sig.pdf)

After careful consideration we have decided to withhold the requested information. To the extent that the information is not environmental, it is being withheld under FOIA. The

exemptions at Section 35 (1) (a) the formulation or development of government policy and Section 42 which relates to legal professional privilege are engaged.

If, in the alternative, the information is deemed to be environmental, Regulation 12 (4) (e) of the EIRs is engaged as the request involves the disclosure of internal communications. Regulation 12 (8) further provides that “for the purposes of (4) (e) internal communications includes communications between government departments”. As the information contains legal advice it has also been withheld under Regulation 12 (5) (b) which covers adverse effect on the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature and Regulation 12 (5) (d) which covers adverse effect on the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

In applying these exemptions/ exceptions we have had to balance the public interest in withholding the information against the public interest in disclosure.

#### Section 35 (1) (a) and Regulation 12 (4) (e)

We recognise there is a general public interest in transparency to increase understanding of how government works. In particular the question of the application of legislation in respect of charging for property searches has been the subject of complaints to the Information Commissioner, and an appeal to the First-tier Tribunal (Information Rights).

On the other hand, there is a strong and countervailing public interest in withholding this information. Given the content of the Decision Notices issued by the Information Commissioner and the findings of the First-tier Tribunal (Information Rights), Government needs to be able to preserve a private space for discussion and consideration of these issues which have an effect on both local authorities and property search companies. Assessment of the implications of these developments needs to be based on the best advice available. Disclosure of this information in relation to a policy matter which is recent and live would be premature and have an adverse effect on the ability of Government to develop policy effectively.

#### Section 42 and Regulations 12 (5) (b) and 12 (5) (d)

Government decisions need to be taken in a fully informed legal context. There is a public interest in public authorities being accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability.

However, confidential communications between lawyers and their clients are protected by Legal Professional Privilege (LPP). Legal advisers need to be able to present government departments with high quality comprehensive legal advice for the effective conduct of their business. This advice needs to be given with a full appreciation of the facts and can include arguments which consider various options. Without comprehensive advice the quality of the government's decision making would be much reduced because it would not be fully informed and this would be contrary to the public interest.

In addition the disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. In this case it has been necessary to consider some complex legal issues requiring the advice and input of our professional legal advisers.

We consider on the light of the above analysis that the disclosure of the information you requested would have a detrimental effect on the Government's ability to develop its policy. Therefore we have concluded that in all the circumstances of the case, the information should be withheld.

If you have any queries about this letter, please contact me. I also attach annexes which relate to copyright (Annexe A) and giving contact details should you be unhappy with the service you have received (Annexe B).

Yours sincerely,

Jenny Carpenter (Mrs)  
Case Officer  
Information Rights Team  
020 7238 4742

## **Annexe A**

### **Copyright**

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## **Annexe B**

### **Complaints**

If you are unhappy with the service you have received in relation to your request you may make a complaint or appeal against our decision within 40 working days of the date of this letter. Please write to Clive Porro, Head of Defra's Information Rights Team at, Area1B Ergon House, Horseferry Road, London SW1P 2AL, (email: [informationrights@defra.gsi.gov.uk](mailto:informationrights@defra.gsi.gov.uk)) who will arrange for an internal review of your case. Details of Defra's complaints procedure can be found at: <http://www.defra.gov.uk/corporate/policy/opengov/complain/info.htm>

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. Please note that generally the Information Commissioner cannot make a decision unless you have first exhausted Defra's own complaints procedure. The Information Commissioner can be contacted at:

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