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FOI/EIR	FOI / EIR	Section/Regulation	s2(1)(b), r12(1)(b), s35, s36, r12(4)(e)	Issue	Advice to Decision Makers
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Line to take:

**UPDATE:** As part of the guidance review most of the content of this line to take is now covered in external guidance. The remainder of the line will be incorporated into guidance or caseworker advice notes in due course at which point this line will be withdrawn.

The following considerations may help the weighing of the public interest test:

- (i) arguments that disclosure will lead to poorer record keeping should be disregarded;
- (ii) although the complexity of the issue may make the information more sensitive it may also increase the public interest in disclosure;
- (iii) the fact that there is already information in the public domain explaining the decision in question does not mean there is no public interest in disclosure; and
- (iv) by providing the full information behind a decision removes any suspicion of 'spin'.

Further Information:

Requests for information on the advice provided to decision makers, whether they be other officials, elected members or ministers are often refused under s 35, s36 or the exception under the Regs provided by r 12(4)(e) – internal communications. The validity of the arguments for and against disclosure are usually debated as part of the public interest test and commonly discuss issues around how officials will react to a disclosure of their advice in terms of the candour of any advice they give in the future and the way such advice will be recorded etc.

Lord Baker v the Commissioner and the Dept for Communities and Local Government (EA/2006/0043) concerned a request under EIR for information on a decision on whether or not to grant planning permission on a controversial development. Information on the advice given by civil servants to the Deputy Prime Minister when making his final decision had been withheld under reg 12(4)(e) – internal communications. This case adds to our understanding of how the Tribunal may view some of these arguments.

### Record Keeping

**UPDATE:** This point is now partially covered in the following external guidance:

- [Government policy \(section 35\)](#)
- [Effective conduct of public affairs \(section 36\)](#)
- [Internal communications \(regulation 12\(4\)\(e\)\)](#)

Further detail will be incorporated into other guidance in due course, at which point this line will be withdrawn.

In this case the Tribunal gave little weight to arguments that disclosure will lead to poorer record keeping and seemed to view this as an issue that could properly be addressed by staff management. (This approach is consistent to that taken by the Tribunal in the DfES case EA/2006/0006 see LTT43, also see LTT50 on the disclosure of minutes)

A witness for the Dept explained that although the contents of the advice would not change in response to the possibility of disclosure, there would be a, "greater tendency to give advice orally and not in writing. [The witness] explained that this is what happened when 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."(para 18)

The Tribunal summarised another witness's evidence that "he believed [employees] 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" (para 18).

The complete quotes from the above Tribunal ruling, as well as further quotes from the Tribunal and ICO on impact of FOI on record keeping are available in a [briefing note](#) prepared for a Select Committee on this subject.

**Complexity of issue under consideration.**

**UPDATE:** *This point is now covered in the following external guidance: [The public interest test](#).*

As stated above the case concerned planning consent for a high profile development. The Tribunal stated “The fact that the Secretary of State’s decision represents the final stage ... seems to us, if any thing, 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 a simple one, where the issues may be more immediately evident.” (para 22)

This should not be interpreted as meaning that information on a simpler decision is less likely to be disclosed. Although there may be less compelling public interest in favour of disclosing such information, equally there may be little harm caused by its disclosure and so less public interest in maintaining an exception/exemption. (see LTT42)

#### **Aid to understanding issues**

**UPDATE:** *This point is now covered in the following external guidance:*

- [The public interest test](#)
- [Information in the public domain](#)
- [Government policy \(section 35\)](#)

The Department argued that there was less need to provide the advice provided to ministers because the Secretary of State’s decision was accompanied by a fully reasoned letter, compared to decisions taken at local government level where the rationale for the decisions taken could not be understood without seeing the council officers’ report to the planning committee, which is published. The Tribunal rejected this argument stating that there was no suggestion within;

“... 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 ... has really been understood if the letter announcing it sets out apparently comprehensible rationalisation, but in fact avoids mentioning some of the background reasoning, which publication of the advice to the Minister would have revealed.” (para 23)

#### **Impact of transparency on promoting confidence on public authorities**

**UPDATE:** *This point is now covered in the following external guidance:*

- [The public interest test](#)
- [Information in the public domain](#)
- [Government policy \(section 35\)](#)

The Tribunal continued, “It seems to us ... 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; 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.” (para 24)

It is important to note when using this LTT that the points raised do not represent an exhaustive list of all the factors that need to be considered when balancing the public interest in these cases. It merely identifies the arguments and counter arguments that were presented in the Lord Baker case that have a general application to cases where the information requested relates to advice provided to decision makers.

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Source  
Information Tribunal  
Related Lines to Take  
[LTT42](#), [LTT43](#), [LTT50](#), [LTT229](#)  
Related Documents  
[EA/2006/0043](#)  
Contact

Details  
Baker / DCLG (1 June 2007)

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