

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

Decision Notice

Dated 24 August 2006

Public Authority: Department for Environment, Food and Rural Affairs

**Address: Nobel House
17 Smith Square
London
SW1P 3JR**

Summary Decision and Action Required

The Commissioner's decision in this matter is that the Department for Environment, Food and Rural Affairs (Defra) has not dealt with the Complainant's request in accordance with Regulation 5 of the Environmental Information Regulations 2004 (EIR) in that it has failed to properly apply the provisions of Regulation 12(4)(e) which allows for a request for information to be refused to the extent that it involves the disclosure of internal communications. The Commissioner disagrees with Defra that much of the requested information is exempt by virtue of Regulation 12(5)(d).

The Commissioner also finds that the public authority has not dealt with the Complainant's request in accordance with section 1 of the Freedom of Information Act ("the Act") in that it has failed to properly apply the exemptions at section 35 and 43 correctly.

The exceptions in Regulation 12 and the exemptions at sections 35 and 43 of the Act are subject to the public interest test. Although the Commissioner agrees that the public interest requires the maintenance of the exceptions/exemptions in respect of some of the information, he does not consider that this is generally the case.

The Commissioner therefore requires Defra to release the requested information with the exception of some residual information.

1. The Environmental Information Regulations 2000 ("the EIR") and the Freedom of Information Act 2000 (the "Act") – Application for a Decision and the Duty of the Commissioner

1.1 The 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 Act are imported into the EIR.

- 1.2 The Commissioner has received an application for a decision whether, in any specified respect, the complainant's request for information made to Defra has been dealt with in accordance with the requirements the EIR and the Act.
- 1.2 Section 50 of the Act provides that where a complainant has made an application for a decision, unless:
- a complainant has failed to exhaust a local complaints procedure, or
 - the application is frivolous or vexatious, or
 - the application has been subject to undue delay, or
 - the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

- 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

- 2.1 The complainant has advised that on 1 March 2005 the following information was requested from Defra in accordance with section 1 of the Act.

"...complete copies of the minutes and agendas of any and all meetings between representatives of Tesco and ministers in DEFRA between January 1 2004 and March 1 2005. For each of these meetings I would also like to request complete copies or all and any documents (such as briefing material, letters, memos, emails, memorandums of conversations) which were prepared for or connected with the meetings, either before or after the event."

- 2.2 The complainant further asked for:

"... a schedule of documents which are relevant to the above request."

This part of the request made clear that the complainant wished to have a list of the relevant documents, together with a brief description and an indication of whether or not the document was being released.

- 2.3 Defra acknowledged receipt of the request on 9 March 2005. On 31 March the authority gave the complainant a refusal notice stating that the "Act/Regulations allow us 20 working days to respond to your request." However, the letter advised that on this occasion, a response within that time scale was not possible and that an extension was required to apply the public interest test. The particular exemptions and exceptions (under the Act and EIR respectively) being considered were stated to be section 43 (commercial interests) and Regulation 12(5)(d) (confidentiality of proceedings).

- 2.4 Regulation 12(5)(d) was not referred to subsequently in the correspondence between Defra, the complainant and the Commissioner before the representations made by the Department in response to a Preliminary Decision Notice.
- 2.5 On 28 April 2005 the request was refused although the complainant was provided with the dates of meetings/discussions between Defra ministers and representatives of Tesco. The exemptions/exceptions cited were section 43 of the Act and Regulation 12(4)(e) (internal communications.) It was indicated that the commercial interests being protected were those of Tesco and its suppliers. So far as internal communications were concerned, it was indicated that, in the Department's view, disclosure would adversely affect the relationship between the department and the UK food retail industry. No detailed argument of the public interest issues was provided.
- 2.6 On 16 May, the complainant requested a review of the refusal of the first request. Although under no obligation to do so, the complainant advanced a number of public interest arguments in favour of disclosure. He also mentioned the matter of the request for a schedule of documents which had not been addressed in the refusal notice.
- 2.7 Separately the complainant made a similar request to the public authority for information relating to meetings with representatives of ASDA/Walmart. This request was made on 10 March 2005. This was also refused in identical terms on 9 May 2005.. A request for internal review of this second request was made on 3 June 2005.
- 2.8 After several delays, the outcome of the requested internal reviews was provided to the complainant on 17 October 2005. It was confirmed that Defra considered the requested information to be exempt by virtue of section 43 of the Act and Regulation 12(4)(e). Further details of the public interest considerations taken by the authority were given. The reviewer also acknowledged the existence of some additional information not originally identified as falling within the terms of the request. This consisted of briefing material prepared for Ministers before the meeting with representatives of Tesco. It was stated that this information was exempt by virtue of section 35 of the Act and that the public interest favoured maintenance of the exemption.
- 2.9 The reviewer addressed the specific request for the schedule of documents by providing a list of meetings together with brief indications of the matters discussed.

3. Relevant Statutory Provisions of the Act and EIR

- 3.1 **Environmental information** is defined in Regulation 2 as follows:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

3.2 **Regulation 5(1)** provides—

“(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.

3.3 **Regulation 12(1)** provides -

“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.”

3.4 **Regulation 12(4)(e)** referred to in the above paragraph provides -

“...for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that ... the request involves the disclosure of internal communications.

3.6 Regulation 12(5) provides –

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect ...

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these regulations to disclose it; and

(iii) has not consented to the disclosure...”

3.7 Section 1(1) of the Act provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

3.8 Section 10(1) provides that –

“...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt”.]

3.9 Section 39 of the Act provides –

“... Information is exempt information if the public authority holding it –

(a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations.”

3.10 **Section 35** of the Act provides –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.”

3.11 **Section 43** of the Act provides –

“(1) Information is exempt information if it constitutes a trade secret

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

4. **Review of the case**

4.1 The Commissioner has followed the practice adopted by both the complainant and public authority, namely, merging the review of and complaint arising from the separate requests for information relating to meetings between Ministers and representatives of Tesco and ASDA. The issues arising in respect of each are the same.

4.2 The complainant’s concern is with the failure of Defra to respond to his requests for information and with the stated public interest grounds for the maintenance of the exemptions and exceptions (under the Act and EIR respectively).

4.3 In addition, the Commissioner has considered the question of which was the appropriate regime under which the requests should be considered and, following on from that consideration, the question of whether the requests were handled in accordance with the relevant procedural requirements.

4.4 On 20 February 2006, Defra was asked to provide copies of the information which had been withheld from the complainant, and indication, where this was not obvious, as to which information was considered to be caught by the Act and which by the EIR. Defra was also invited to volunteer any additional material arising out of the review, or indeed the original requests, if it was considered that these would assist the Commissioner’s understanding of the issues arising in this case.

4.5 On 1 March 2006, Defra provided the Commissioner with copies of the information which had been withheld. This consisted, in the main, of minutes of bilateral meetings between Defra Ministers and representatives of Tesco and

ASDA, notes taken of the discussions at a dinner held by Ministers for representatives of UK supermarkets including ASDA and Tesco, and briefing material prepared for Ministers before those discussions. No indication was given of which information was considered to be environmental. Nor did Defra provide any additional account of the public interest considerations which it had taken.

4.6 On 4 May 2006, the Commissioner issued a Preliminary Decision Notice to Defra. A Preliminary Decision Notice is a non-statutory notice, inviting final representations from a public authority, designed to explore the possibility of an agreed outcome to a case. Where, as in this case, the Commissioner's preliminary thinking is largely to uphold a complaint, such a Notice is issued only to the public authority.

4.7 Comprehensive representations were made on 5 June 2006. The representations were taken fully into account in reaching a final decision in this case. In addition to a number of points of detail, the representations argued that the requested information was exempt by virtue of regulation 12(5)(d) – “Confidentiality of proceedings” – which had been mentioned to the complainant when acknowledging the receipt of his request for information but not subsequently.

5. The Commissioner's Decision

5.1 The Act or the EIR?

5.1.1 Section 39 of the Act provides that environmental information is exempt under the Act but must be considered under the EIR. The Commissioner has considered whether Defra was correct to in the approach which it took in this case.

5.1.2 The principal matters discussed between Ministers and representatives of the supermarkets were:

- Issues arising out of Defra's Food Industry Sustainability Strategy (FISS)
- Waste & Recycling
- The Animal By-Products Directive
- Energy use
- General environmental impact of industry
- Targets and incentives for environmental protection
- Sustainability across the food chain, organic & GM crops
- Local sourcing of products
- Regulatory measures in relation to environmental matters and food production
- Relationship of retailers in general and gangmasters

5.1.3 Of this list, only the final item is (arguably) not environmental information. The minute in question records that this issue was raised as an aside to the main body of the meeting and Ministers were concerned in the broader context of “the sustainability of the whole food chain” to secure the support of supermarkets in ensuring that the registration system for gang masters was properly implemented.

5.1.4 The briefings provided to Ministers were principally on the following subjects:

- Energy targets
- Waste targets
- Better regulation
- Organic food sales
- Nutrition & Health
- GM crops policy
- The environment
- Energy
- Waste
- Recycling awareness
- Background on the industry representatives and topical issues affecting their companies

5.1.5 Of this list, the briefing material on better regulation is not directly related to environmental matters. It is also accepted that the background information given on the industry representatives and on the companies should be considered under the Act rather than the EIR.

5.1.6 There is no very clear line of demarcation between environmental and non-environmental information. Where an identical result to a request for information would be given under either regime, the Commissioner's general approach is to discourage an academic debate about whether information is or is not environmental. In this particular case (see 5.2 below) the outcome under the two regimes is by no means identical.

5.1.7 At the same time, as in this case, where a public authority considers a request in relation to both regimes, the Commissioner does consider it important that in refusing a request a public authority makes it as clear as possible what information is refused on what grounds. In taking this approach, the Commissioner is mindful of the general public interest in giving reasons for decisions and of the specific requirement of section 17 of the Act and Regulation 14 to give reasons for the refusal of requests. Failure to distinguish between the two regimes may also restrict the ability of a complainant to make an effective appeal against the refusal of a request.

5.1.8 In this particular case, he considers that Defra should have made it clear which exceptions or exemptions applied to what categories of information. In so far as the information requested is environmental, Defra should have considered the effect of regulation 12(4)(e) and 12(5)(e). In so far the information is non-environmental, it was reasonable to have considered sections 35 and 43 of the Act.

5.2 Procedural matters

5.2.1 As suggested above, the Act and the EIR differ in a number of ways. Among the significant differences are the provisions allowing for an extension for the time for response to requests. Section 10(3) of the Act provides for the normal 20 working day period for response to requests to be extended in cases where this is

necessary in order to consider the application of the public interest test to the exemptions.

5.2.2 The equivalent provision in the EIR, to be found at Regulation 7, allows the 20 working day period to be extended to 40 working days if the public authority:

“reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.”

5.2.3 The information withheld from the complainant but provided to the Commissioner consist of between 80 and 90 sheets of A4. The Commissioner does not accept that these contain a particularly large volume of information. He has been persuaded by the representations made by Defra that although the information itself is not particularly voluminous, it relates upon a number of different business areas within the Department and that the task of considering the exemptions and the application of the public interest test was thus relatively complex.

5.2.4 Insofar as the requested information was non-environmental, and given that the requests was submitted relatively early in the lifetime of the legislation, the Commissioner accepts that it was not unreasonable to have claimed an extension to the normal 20 period allowed for response in order to consider the public interest.

5.5 Application of Regulation 12(5)(d)

5.3.1 Regulation 12(5)(2) provides an exception for information whose disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is protected by law.

5.3.2 The representations made by Defra in response to the Preliminary Decision Notice argue that the discussions with the supermarkets took place on a confidential footing, understood both by the Department and the supermarkets which Defra properly consulted when considering its response to the complainant's request.

5.3.3 The Commissioner does not consider that the discussions can properly be considered as “proceedings”. In its own published guidance on the EIR, Defra suggests:

“The proceedings of a public authority will include (but not be limited to) its formal proceedings such as formal board and council meetings.”

5.3.4 While noting that it is somewhat open-ended, the Commissioner broadly agrees with this definition. Among the other activities that the Commissioner would consider to fall within the meaning of “proceedings” would be, say, the formal consideration of a planning application or a disciplinary hearing. He does not, however, believe that the term is so wide in its meaning as to include any business conducted by a public authority or its officials.

- 5.3.5 Moreover, while he accepts that in some cases, the phrase “where such confidentiality is protected by law” may include the protection given by the courts in the event of action taken for breach of confidence, he considers that that the focus of the exception is upon cases where there is specific statutory provision. An example, referred to in Defra’s own guidance, is of the statutory provisions surrounding the conduct of Local Authority meetings and the rules for access by the process and public to Council meetings and papers.
- 5.3.6 Although the Commissioner recognises that there is some force in Defra’s arguments with regard to the expectation of the participants in the meetings, he does not believe that these are relevant since he does not believe that those meetings fall within the meaning of the term “proceedings”.

5.4 Application of Regulation 12(5)(e) (Commercial interests)

- 5.4.1 The Commissioner has issued high level guidance on the exceptions under the EIR. This is his starting point. In his guidance on this part of the EIR, he advises

“...confidentiality may be provided either by explicit statutory restrictions on disclosure or by the common law. The information covered by the exception will include a range of commercially sensitive information such as trade secrets, information supplied by contractors, information supplied as part of a tendering or procurement process and information held by regulators. The Commissioner has published Awareness Guidance 5 on the exemption in the Freedom of Information Act relating to commercial interests. Although the focus of the Regulations is upon information relating to the commercial interests of parties other than the public authorities, this guidance is likely to be of assistance. (The commercial interests of the public authority itself may be covered by the exception relating to intellectual property rights ...”

- 5.4.2 The Commissioner is satisfied that, had the environmental information provided by supermarkets to Ministers been of a commercially sensitive nature, the confidentiality of that information would be likely to have been protected by law. For example, if the public authority were to disclose a trade secret belonging to a supermarket, the Commissioner is satisfied that the supermarket could successfully seek redress through the Courts.
- 5.4.3 However, although the Commissioner is persuaded by the representations received that some (although by no means most) of the environmental information contained in the briefings would have an adverse impact upon the commercial interests of the supermarkets, he is not persuaded that a very significant proportion of this information is subject to a duty of confidence, not least since very little of it was obtained from the supermarkets themselves. On the contrary, the briefing mainly consist of a rehearsal of government policy, indications of the strategies that may be employed by Ministers to advance that policy and some expressions of the opinions of officials about the level of sympathy which the supermarkets may have with government policy. The Commissioner considers that only that information in the briefings which was obtained from the supermarkets themselves and which is not in the public domain

or capable of being derived from information in the public domain is exempt by virtue of Regulation 12(5)(e).

- 5.4.4 Information about the businesses of Tesco and ASDA is given in the notes of meetings with Ministers. Of these meetings, one involved representatives of a number of different supermarkets. The Commissioner does not consider it likely that any of the information provided to Ministers at this particular meeting is likely to be commercially confidential since the supermarkets were apparently willing to share the information with their competitors. Although in principle the Commissioner accepts the argument made in Defra's representations that the fact that representatives of several supermarkets were present at some of the meetings does not necessarily demonstrate that the information disclosed at the meetings was not confidential, he does not accept that in this particular case the disclosure would have an adverse affect upon the legitimate economic interests of the supermarkets.
- 5.4.5 By far the larger proportion of the meeting notes comprises an explanation on the part of Ministers and officials of government policy, by factual questions put to the supermarkets about issues facing the industry, and by the responses of the supermarkets. It is not accepted that the disclosure of any of this information, much of which is already in the public domain, would have any adverse affect.
- 5.4.6 The Commissioner's decision is that most of the environmental information requested by the complainant is not exempt by virtue of the exception at 12(5)(e). In common with the other exceptions, Regulation 12(5)(e) is subject to a public interest test. At the same time, the Commissioner acknowledges the importance which the courts attach to the duty of confidence. He also accepts the broad thrust of Defra's argument that discussions between Ministers and stakeholders take place on an understanding that their content will not be widely reported and that disclosure in one case may result in less candid discussions taking place in another. On balance, the Commissioner accepts that, notwithstanding the presumption in the EIR in favour of disclosure, that this general risk outweighs the public interest in disclosure of those pieces of information which were obtained in confidence from the supermarkets themselves and whose disclosure would be likely to damage their commercial interests.

5.5 Application of Regulation 12(5)(f) (Volunteered information)

- 5.5.1 Regulation 15(5)(f) was raised by Defra in its response to the Preliminary Decision Notice, although it had not previously been mentioned.
- 5.5.2 The Commissioner accepts that information supplied by the supermarkets in the course of their meetings with Defra Ministers is information which they could not have been forced to supply and to the disclosure of which they have not consented. He also accepts the argument that the disclosure of this information may have an adverse affect upon the interests of the supermarkets if the general public formed the view that they were not "environmentally friendly."
- 5.5.3 As with the other exceptions, that relating to volunteered information is subject to the public interest test. In its representations, Defra suggests that disclosure of

information supplied on a voluntary basis might result in a decreased willingness on the part of the supermarkets to engage with Defra in future initiatives and that this loss of cooperation would not be in the public interest.

- 5.5.4 The Commissioner does not dismiss this argument lightly. However, he is mindful of the purpose of the EU Directive upon which the EIR are based. Recital 1 records:

“Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.”

The Commissioner accepts that a possible result of disclosure of the requested information is that the public may form an adverse view of the environmental friendliness of the supermarkets. Although this is by no means a certain outcome, the Commissioner considers that this is an acceptable risk, acceptance of which is implied by the Directive. Put simply, the Directive recognises that there is a public interest in increased public awareness of and participation in debate around environmental issues and that one consequence of this is that the environmental practices and policies of companies will come under greater scrutiny.

5.6 Application of Section 43 of the Act

- 5.6.1 Although most of the requested information is environmental, the Commissioner accepts that some is not and that potentially it may be exempted by section 43 of the Act. The non-environmental information identified from a reading of the withheld information is principally background information about the participants in the meetings with ministers and their companies and information concerning the implementation of government policies regarding better regulation and the regulation of gangmasters.

- 5.6.2 The Commissioner does not consider that the disclosure of any of this information would be likely to prejudice the commercial interests of any of the companies involved. He does not consider, in other words, that it is exempt by virtue of s.43.

- 5.6.2 By the same token, the Commissioner is not persuaded that disclosure of any of the non-environmental information provided by the supermarkets in the course of meetings with Ministers would, or would be likely to, prejudice the commercial interests of those companies.

5.7 Application of Regulation 12(4)(e) (Internal Communications)

- 5.7.1 The Commissioner agrees that the briefings provided to Ministers and the notes of the meetings held with representatives of supermarkets may properly be regarded as constituting “internal communications”. Although the notes convey information which has been provided by third parties, the Commissioner accepts that they are internal notes, circulated within the department for use by Ministers and officials. However, the exception is subject to the public interest test. In

considering this, the Commissioner is mindful of the requirement of Regulation 12(2), namely, "A public authority shall apply a presumption in favour of disclosure."

Arguments advanced by Defra

5.7.2 Most of the public interest arguments advanced by Defra in its final refusal of the complainant's request concern the alleged negative impact which disclosure would have on the process of policy formulation. In particular, it argued:

- Disclosure would be likely to inhibit open and candid discussion with stakeholders in the future;
- Disclosure of the notes of meetings would inhibit the officials making notes of those meetings.

Arguments advanced by the complainant

5.7.3 Although complainants are under no obligation to present arguments as to why the public interest may favour disclosure of information, it is helpful that in this instance the complainant has done so. In brief, the two main arguments made by the complainant are as follows:

- There is a public interest in a democracy in the release of information about the formation of and influences on policy;
- There is a particular interest in the disclosure of information about the meetings between Defra Ministers and UK supermarkets because of the influence that the latter wield in public life.

The Commissioner's published guidance

5.7.4 The Commissioner has published guidance on both the public interest test and the EIR exceptions. Although this is not binding and must be applied carefully to the circumstances of individual cases, it does represent the Commissioner's starting point.

5.7.5 The Commissioner's basic approach to the public interest test to be applied under both the Act and the EIR is explained in Awareness Guidance No 3. Among the factors favouring disclosure are the following:

- furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority.
- promoting accountability and transparency by public authorities for decisions taken by them. By placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.

In the Commissioner's view each of these factors is relevant to this particular case.

- 5.7.6 The Commissioner has also published introductory advice on the application of the exceptions in the EIR. In this advice, the Commissioner recognises that one of the purposes of the exception relating to internal communications is "to provide some protection for the "private thinking space" for senior officials or elected members..." The advice explains that although the exception appears to have a very wide scope, in practice this is likely to be narrowed by the application of the public interest test.
- 5.7.7 The advice goes on to explain, "When refusing a request for information on the ground that it relates to internal communications, public authorities must be satisfied that disclosure would firstly cause some harm, for instance by misleading the public or making the formulation of policy difficult or impossible and, secondly, that there is not a stronger public interest in increasing public input into the formulation of policy."

The Commissioner's assessment of the application of the public interest test

- 5.7.8 So far as the arguments advanced by Defra are concerned, the Commissioner agrees that, were a note of open and candid discussion between ministers and stakeholders to be disclosed, this might have a "chilling effect" on future discussions whether with these particular stakeholders or stakeholders in general. However, in this particular case, while the Commissioner does not doubt that participants in the meetings expressed their honest opinions about a range of matters, he does not believe that they would have been inhibited from doing so had it been thought that those opinions might be made public. In a number of cases, the views expressed are clearly those of the industry as a whole or of its representative body. It would be difficult to imagine any of the participants being reluctant to express the same opinions if asked, for instance, by a journalist.
- 5.7.9 By the same token, the Commissioner is not persuaded that an official charged with taking a note of a meeting will be inhibited from taking an accurate note by the thought that that note might be made public at some time in the future.
- 5.7.10 At the same time, the Commissioner accepts that, within the information requested, there are occasional statements made to and by Ministers whose disclosure might have an adverse affect on relationships between Defra and the industry. The Commissioner accepts, therefore that Defra would be entitled to remove from the requested information before release any indication of the assessment of officials, Defra as a Department, or Minister as to the willingness of supermarkets to engage with the strategies being developed by the Department or any discussion of specific regulatory issues that may have arisen with individual supermarkets and which was not, at the time of the request in the public domain.
- 5.7.11 The advice given to Ministers before the meetings is arguably more sensitive in that this may reveal emerging policy lines, frank opinions of the participants at the forthcoming meetings and so forth. However, the Commissioner is not satisfied

that in this particular case the briefings provided to Ministers are necessarily of this nature. To a large extent they consist of statements of existing government and departmental policy regarding a range of environmental matters. The Commissioner is particularly mindful of the fact that the purpose of the briefings was to lay before Ministers the key points to be put in the course of their meetings. In other words, there was a clear intention that the salient points of the briefings would be communicated to the representatives of the supermarkets. This being the case, the Commissioner finds it difficult to accept that these elements of the briefings should not now be disclosed.

5.7.12 At the same time, the Commissioner accepts the point made in the representations to the Preliminary Decision Notice that the briefings also cover emerging policy. As lay reader, it has not necessarily been obvious to the Commissioner which elements of policy described in the briefings are established and which emerging. In principle, however the Commissioner agrees that, insofar as the briefings concern policies that are under development and where premature disclosure would have an adverse impact the information they contain may be withheld.

5.7.13 In summary, the Commissioner is not satisfied in general that the public interest in maintaining the exception relating to internal communications outweighs that in disclosure. In requiring Defra to communicate the withheld information from the complainant, the Commissioner does, however, accept that it may be reasonable to exclude information which:

- describes emerging (rather than settled) government and departmental policy;
- is an expression of a confidential opinion or view of Ministers or officials about either the supermarkets as businesses or the representatives of Tesco and ASDA;
- would disclose the regulatory strategies pursued by Defra, its Ministers and officials, where these are not already in the public domain;
- is an expression of a confidential opinion of the representatives of Tesco and ASDA concerning a government policy or another member of the industry.

5.8 Application of section 35 of the Act

5.8.1 Section 35 exempts information held by a government department if this information relates to:

- the formulation or development of government policy
- Ministerial communications
- The provision of advice by any of the Law Officers or may request for the provision of such advice
- The operation of any Ministerial private office

The exemption is subject to the public interest test.

5.8.2 The briefings given to Ministers include descriptions of emerging and existing government policy. As indicated in 5.7.12 (above) it is not entirely obvious which policies are settled and which are under development. The Commissioner also

accepts that policy is kept under review and that some information may relate to both a settled policy and a policy being developed. Insofar as the policy described in the briefings is settled, the Commissioner does not accept that the public interest requires the maintenance of the exemption.

- 5.8.3 Although the Commissioner accepts that the exemption may be applied to communications between ministers and third parties, he is not persuaded that the notes of meetings held between Ministers and the supermarkets are themselves held for the purpose of the formulation of government policy. While he accepts that parts of the briefing notes which consist of non-environmental information and to policy under development may be withheld in reliance on section 35, he does not consider that the public interest requires the maintenance of the exemption in relation to policies which were settled at the time of the complainant's request.

6. Action Required

- 6.1 In the light of the above, the Commissioner requires that Defra within 30 days of receipt of this notice, provides the complainant with copies of the information which has been withheld.
- 6.2 In doing so, the Commissioner allows that information may be redacted insofar as, at the time of the complainant's request, it:
- describes emerging (rather than settled) government and departmental policy;
 - is an expression of a confidential opinion or view of Ministers or officials about the representatives of Tesco and ASDA;
 - is an expression of a confidential opinion of the representatives of Tesco and ASDA concerning a government policy or another member of the industry;
 - consists of information not otherwise in the public domain relating to the commercial positions of the supermarkets or their record of compliance with relevant environmental policies and regulation
 - would disclose the regulatory strategies pursued by Defra, its Ministers and officials, where these are not already in the public domain.
- 6.3 In the event that Defra decides that it is justified in withholding the information described in 6.2, it will give the complainant a further refusal letter setting out reasons for refusal in such detail as does not compromise the purpose of claiming any exemptions or exceptions. Defra must also provide a copy of this response to the Commissioner to enable him to judge whether it has properly applied the exceptions/exemptions and public interest test as described in this Notice.

7. Right of Appeal

- 7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre [SPELLING?]
PO Box 6987
Leicester
LE1 6ZX

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

7.2 Any Notice of Appeal should be served on the Tribunal within 35 days of the date on which this Decision Notice is served.

Dated the 24th day of August 2006

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**