BY EMAIL

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Dear Mr Walsh,

Information request OF290711: request for an internal review

To the extent set out below, Our Forests hereby request an internal review of Defra's response of 6th October 2011 to our information request made on 29th July 2011. Defra's response is attached to the email to which this letter is also attached, and our information request is included at the end of that e-mail.

In particular, we request an internal review of:

(a) the applicability of the exception in Regulation 12(4)(e) of the Environment Information Regulations 2004; and

(b) the reasoning applied by Defra in carrying out of the public interest weighing test.

A. Applicability of Regulation 12(4)(e)

We request an internal review of whether Defra has correctly applied Regulation 12(4)(e), which allows a public authority to refuse to disclose environmental information to the extent that the request involves the disclosure of internal communications.

The letter of 6th October 2011 states that this exception has been applied to withhold meeting/discussion notes for meetings/telephone calls on five occasions between 29th October 2010 and 8th February 2011 with the Woodland Trust (two), the National Trust, RSPB and the Country Land and Business Association (numbered 2-6 in section 1 of Defra's response letter). The letter states:

> *"A public authority may refuse disclosure of internal communications. The information held engages this exception as it comprises internal documents relating to the halted Future of the Public Forest Estate in England consultation"*

We make the following submissions in this regard:

(1) In reviewing the applicability of this exception, we submit it is first necessary to bear in mind that the Environmental Information Regulations transpose the UK's obligations under Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC, which guarantees the right of access to environmental information held by or for public authorities. As Recital 16 of the Directive makes clear:

> *"(16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive."*

The Directive also provides that the exceptions (including this exception, which derives from Article 4.1(e) of the Directive) *"shall be interpreted in a restrictive way"*.

We draw attention to this issue because Defra has given no indication in its letter that the Regulations transpose a *right* that a Directive guarantees, and that exceptions must be interpreted restrictively. Neither does it acknowledge or demonstrate that it has applied Regulation 12(2), which provides that:

> *"A public authority shall apply a presumption in favour of disclosure."*

In passing – lest Defra might seek to rely upon it, and as it also relevant to our submissions under section B below - we would also add in this context that we are very concerned that the Information Commissioner's guidance in relation to this exception states that it *"should be interpreted broadly"* (*An introduction to the Environmental Information Regulations (EIR) exceptions*, Version 3, 14th September 2009).

We would, however, draw your attention to the Information Tribunal's criticism of this view, expressed in October 2009, and we submit that the Tribunal's view is a more accurate statement of the legal position:

> *'25. In line with the recital, Article 4.2 of the Directive requires that the grounds under which a request for environmental information may be refused "shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure". In September 2009 the Information Commissioner published Guidance titled "An introduction to the Environmental Information Regulations (EIR) exceptions".* ***We regard that guidance as unhelpful in so far as it states that the exception for internal communications "should be interpreted broadly".'*** (South Gloucestershire Council v Information Commissioner, EA/2009/0032, emphasis added)

(2) We further submit that in reviewing the *"internal documents"* you should consider carefully whether each of them can be considered to be *"internal communications"*.

We are aware that where information has been recorded and is intended to be communicated to others, or is to be placed on file where it may be consulted by others, the Information Commissioner has found this information to be a communication.

In our submission, this is not a restrictive approach to the application of this exception, and we would make three points here.

First, if information is basically a record of an event, then without more it is not a communication. Mere placing of a record on a file for it possibly to be read by someone other than the author at an indeterminate point in the future does not render the information a *'communication'*. If it did, this would mean that a record of an event would be a communication even if nobody did in fact read the record, or if in fact it was not actually communicated to anybody. We therefore submit that a pure record of an event cannot constitute a communication.

Second, a restrictive interpretation would limit the exception to information expressing a personal opinion of an official and not to factual information. Third, if the information

has been communicated to a third party, it cannot be an internal communication. In these two latter respects, we draw your attention to this extract from *The Aarhus Convention: An Implementation Guide* (the 1998 UNECE Aarhus Convention preceded Directive 2003/4 and is the basis for the wording of this exception):

> *'In some countries, the internal communications exception is intended to protect the personal opinions of government staff. It does not usually apply to factual materials even when they are still in preliminary or draft form. Moreover, once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an "internal communication".'* (page 58)

On these bases, if you find on your review that any of the withheld "*internal documents"* are merely a record of a meeting or call, or contain factual information, or has been disclosed outside of Defra, then we submit that the exception should not apply to that extent.

B. The public interest

If, contrary to our submissions, the exception applies, or to the extent that it properly applies, then the information may only be withheld if *"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)). .

In this regard, Defra reasons as follows:

> *"We recognise that there is a public interest in disclosure of information concerning government meetings and discussions about the future of England's public forest estate. However, where incorrect assumptions are made or expectations raised through publication of discussions and views exchanged in earlier communications, government staff resources would need to be diverted to respond to any incorrect media stories and campaigning based on such stories. Given the ongoing heightened interest in forestry policy, there would be a clear risk of being drawn into a public debate on matters which are not government policy. Therefore we have concluded that in most of the circumstances for this case, the information relating to notes of meetings and discussions should be withheld."*

In our submission, this confused and novel type of asserted public interest in maintaining the exception is not credible.

It seems to be founded on two different bases, as expressed in the second and third sentences of the above extract.

The second sentence bears no relationship to the generally acknowledged purpose of this exception, namely that it is intended to allow public bodies to think in private (e.g. *"The Commissioner accepts that the purpose of regulation 12(4)(e) is to protect to private internal thinking space"*: Case Ref: FER0390168, 8th November 2011**,** Public Authority: Uttlesford District Council, Decision Notice, paragraph 31).

It appears, rather, to be based on an assumption as to how the information will be used, on a further assumption that it will not be used correctly, by ourselves or the media, and on a further implied assumption that it is Defra who know what would amount to a correct use. We accept that Defra is perfectly entitled to its view of how disclosed information might be used, however patronising and, indeed, offensive, we might consider such a view. We do not however accept, and cannot believe for a moment, that any of these assumptions constitute legitimate public interest considerations in a democratic society, and submit that they are not valid considerations for the purpose of the public interest test under the Regulations. Neither do we accept that the possibility that officials' time might be taken up dealing with media inquiries is a valid consideration for the purpose of the public interest test.

The third sentence appears to seek to introduce a further but different public interest consideration, namely that there would be a risk of being drawn into a public debate on matters which are not government policy. Again, we find it difficult to conceive how, by any stretch of the imagination, this should be a valid consideration for the public interest test. Whether or not the government wants a public debate on a matter cannot be a credible criterion for restricting citizens' rights to access to information, and it would be worrying if it was. Moreover, Defra acknowledges that there is heightened interest in forestry policy, but in our submission that is a factor that favours the public interest in disclosure rather than in withholding.

Although we do not accept that Defra has put forward any valid public interest consideration, we would also add that even if there were such reasons at one time (which we would also not accept), then they cannot any longer exist. As the above extract from the Information Commissioner's Decision Notice in the complaint involving Uttlesford District Council continues:

> *"[t]he Commissioner accepts that the purpose of regulation 12(4)(e) is to protect to private internal thinking space. However, he considers this public interest*

sways more toward disclosure once decisions or policies are formulated and the need for private thinking space is no longer required."

Finally, and although not part of this request for internal review, we would also be grateful if Defra would clarify the following statement in its letter of 6th October 2011: *"We have interpreted the expression 'taking on' as meaning 'owning' or 'managing' "*. In particular, kindly inform us of the activities that you have interpreted the expression 'taking on' as not meaning, what you mean by 'owning' and 'managing'.

We would be grateful if you would carry out your internal review without further delay, and we look forward to hearing from you as soon as possible.

Yours sincerely,

Helen Anderson
On behalf of **Our Forests**