

Information Leaflet 11: Applications raising matters relating to National Security or Security of Premises or Property



June 2006

The purpose of this leaflet is to outline the procedures that will apply to the processing of those planning applications etc. whose consideration by the Department raises matters relating to national security or to the measures taken or to be taken to ensure the security of any premises or property and where public disclosure of information relating to such matters would be contrary to the national interest. It is expected that such cases will be very rare.

Summary

1. Article 21 of the Planning Reform (NI) Order 2006 (the Reform Order) inserts a new Article 112A in the Planning (NI) Order 1991 (the 1991 Order). This Article applies the provisions of the 1991 Order to the Crown, with the exception of enforcement functions covered by Articles 74, 76B, 80 and 82B of the 1991 Order, subject to express provisions detailed in Articles 112B-112E. This means, in effect, that from 10 June 2006 the Crown requires planning permission or consent as required by the 1991 Order and relevant subordinate legislation.
2. Article 22 of the Reform Order also inserts new Articles 123A and 123B in the 1991 Order. These Articles provide the planning framework for dealing with those rare planning applications etc. or exceptional cases of evidence at any public local inquiry or independent examination, where the public disclosure of information would be contrary to the national interest.
3. Article 123B provides, in relation to an application for planning permission or an application for any consent, certificate, approval or determination under the 1991 Order or a development order, that the Secretary of State may certify the application as one to which Article 123B applies, if he is of the opinion that consideration by the Department of the application or of any representations or objections made in respect of it, will raise matters relating to national security or to the measures taken or to be taken to ensure the security of any premises or property and that public disclosure of information relating to such matters would be contrary to the national interest.
4. Where a certificate is issued under Article 123B, the Department is required by Article 123B (2) to hold a public local inquiry (an inquiry) for the purpose of determining the planning application unless it may dispense with an inquiry because either no objections or representations are received in respect of the application to which a certificate relates or objections or representations made are withdrawn.
5. Under Article 123B (3) the Secretary of State may by rules – the Planning (Issue of Certificate) Rules (NI) 2006 - provide for the procedure to be followed in relation to the issue of a certificate and enabling the Department to dispense with an inquiry where no objections or representations are received in relation to an application or where those are withdrawn.

6. The Department is empowered under Article 123 (2) of the 1991 Order to make rules regulating the procedure to be followed in connection with inquiries and independent examinations held by or on behalf of the Department under the Order. The Planning (Inquiry Procedure) Rules (Northern Ireland) 2006 (the Inquiry Procedure rules) detail the procedures for an inquiry required as a consequence of a certificate issued under Article 123B.
7. Article 123A (2) provides that, where the Secretary of State is satisfied in the case of an inquiry or examination that the giving or making available of evidence would be likely to result in the disclosure of information in relation to national security and/or the measures taken or to be taken to ensure the security of any premises or property and public disclosure of that information would be contrary to the national interest, he may direct that evidence described in the direction may only be heard or be open to inspection at the inquiry or examination by specified persons.
8. Where the Secretary of State is considering giving a direction under Article 123A (2), the Advocate General for Northern Ireland may appoint a person, known as an Appointed Representative, to represent the interests of any person who will be prevented from hearing or inspecting any evidence at an inquiry or examination, if the direction is given. He may also appoint a person at any time for the purposes of the inquiry or examination.
9. Article 123A (6) provides that the Lord Chancellor may by rules make provision as to the procedure to be followed by the Secretary of State before he gives a direction and as to the functions of Appointed Representatives - The Planning (National Security Directions and Appointed Representatives) Rules (Northern Ireland) 2006 (the NSD&AR rules).

Detail

The Planning (Issue of Certificate) Rules (Northern Ireland) 2006 (The Certificate Rules)¹

10. The Secretary of State (SoS) may certify that Article 123B of the 1991 Order applies to “an application for planning permission or an application for any consent, certificate, approval or determination under the 1991 Order or a development order” where he is of the opinion that the Department’s consideration of the application or of any associated representations or objections raises matters relating to national security; or the measures taken or to be taken to ensure the security of any premises or property; and the public disclosure of information as to any of those matters would be contrary to the national interest.
11. There are two main scenarios –
 - (a) the first is where the applicant believes a certificate is required from the SoS in relation to his application; and
 - (b) the second is where the objector to an application believes a certificate

¹ The Rules can be found at <http://www.opsi.gov.uk/sr/sr2006/20060226.htm>

is required from the SoS in relation to a third party's application.

However, scenario 1 could arise both at submission of an application and from an objection to an application already made and being processed in the normal way.

Scenario 1 – Applicant believes a certificate is required in relation to his application

12. An applicant who believes his application may be one requiring a certificate to be issued by the SoS under Article 123B will engage in pre-application discussions with the Department's Planning Service to reach a view on whether the Planning Service's consideration of the application in the normal manner is likely to require the public disclosure of information relating to matters of national security or the measures taken or to be taken to ensure the security of any premises or property and the public disclosure of that information would be contrary to the national interest.
13. Where the applicant is satisfied that the foregoing would NOT be the case, the application will be submitted in the normal way to the appropriate divisional planning office and will be processed in the same manner as other applications.
14. However, where the applicant considers that there would be public disclosure of information that would be contrary to the national interest, he will submit the application (without the 'closed evidence') to the Department (Planning Service Headquarters) and simultaneously request a certificate from the SoS under Article 123B of the 1991 Order.
15. Upon receipt of the application the Department will validate and advertise the application in the normal way to enable it to assess whether there are any objections or representations (necessary to determine whether a public inquiry can be dispensed with where a certificate is given).
16. The validation and advertising of the application by the Department normally 'starts the clock' on an application for the purpose of time periods specified in Article 11 of the Planning (General Development) Order (Northern Ireland) 1993 (the GDO) and elsewhere, after which an applicant can lodge a non-determination appeal (Article 33 of the 1991 Order) with the Planning Appeals Commission who will then determine the application. It is considered extremely unlikely that an applicant seeking a certificate under Article 123B would lodge such an appeal but in any event, the Planning (Application of Subordinate Legislation to the Crown) Order (Northern Ireland) 2006 (at Articles 2 – 6) has amended all relevant provisions relating to such periods to provide that the period does not start until the Department has been notified of the Secretary of State's decision on the request for a certificate. Moreover, where a certificate is issued by the SoS the right of appeal under Article 33 of the 1991 Order no longer applies (Article 123B (4)).
17. The request for a certificate must be submitted to the SoS in writing and must contain –
 - (a) a copy of the application submitted to the Department;

- (b) a written statement setting out the grounds on which it is considered the certificate should be issued;
 - (c) an explanation of the information, the public disclosure of which would, in the view of the applicant, be contrary to the national interest.
18. The SoS will –
- (a) acknowledge receipt of the request;
 - (b) notify the Department of the request and the date by which representations must be received.
19. The Department will provide the SoS by that date (unless it is extended by the SoS) with documentation relevant to the request including the application and any representations made in relation to it.
20. The SoS will inform the Department and the applicant of his decision. In doing so he is not required to give reasons for his decision where that would result in the public disclosure of information that would in his view be contrary to the national interest.
21. Should the Secretary of State refuse to issue a certificate, the applicant will have to consider whether to withdraw his application. Where he decides not to do so, the application will be referred to the relevant divisional planning office for processing to be completed in the normal way.
22. Where the Secretary of State issues a certificate and there are objections and representations in relation to the application the Department will arrange an inquiry for the purpose of determining it.
23. The procedure at an inquiry required as a consequence of a certificate issued under Article 123B is provided for in the Planning (Inquiry Procedure) Rules (Northern Ireland) 2006 (S.R. 2006 No. 213).
24. It is anticipated that in these circumstances the applicant will request the Secretary of State to direct under Article 123A (2) of the 1991 Order that at the inquiry, "evidence of the description indicated in the direction shall only be heard or, as the case may be, be open to inspection at that inquiry or examination by such persons or persons of such descriptions as he may specify in the direction". The procedure to be followed by the Secretary of State before he gives a direction and the functions of 'appointed representatives' are provided in the Planning (National Security Directions and Appointed Representatives) Rules (Northern Ireland) 2006 (S.R. 2006 No. 215).
25. Provision is made in the Certificate Rules that where a document is to be provided in writing it may be done electronically - see relevant definitions and provisions in Rule 1(3)-(5).

Scenario 2 – the objector to an application believes a certificate is required from the SoS in relation to a third party's application.

26. The potential objector will become aware of the proposed development when the planning application is advertised or when they are consulted about the

application. Upon receipt of the application, where the Department considers it might have implications for matters relating to national security or the measures taken or to be taken to ensure the security of any premises or property, it will consult the relevant interests.

27. The potential objector will discuss the application with the Department to reach a view on whether the Department's consideration of the application, or more particularly of the objection relating to it, is likely to require the public disclosure of information relating to matters of national security or the measures taken or to be taken to ensure the security of any premises or property and the public disclosure of that information would be contrary to the national interest.
28. Where the objector is satisfied that the foregoing would NOT be the case, the application will continue to be processed in the normal way by the appropriate divisional planning office.
29. However, where the objector considers that there would be public disclosure of information that would be contrary to the national interest, he will request a certificate from the SoS under Article 123B of the 1991 Order.
30. The validation and advertising of the application by the Department normally 'starts the clock' on an application for the purpose of time periods specified in Article 11 of the Planning (General Development) Order (Northern Ireland) 1993 (the GDO) and elsewhere, after which an applicant can lodge a non-determination appeal (Article 33 of the 1991 Order) with the Planning Appeals Commission who will then determine the application. In this case the Department is likely to have already validated and advertised the application thereby inviting objections or representations. Unlike the first scenario, the clock will already be running in relation to the specified time periods. It is essential in this case that the applicant does not proceed to an appeal until the SoS has decided whether to issue a certificate. The Planning (Application of Subordinate Legislation to the Crown) Order (Northern Ireland) 2006 (at Articles 2 – 6) has therefore amended all relevant provisions relating to such periods to provide that the period does not start until the Department has been notified of the Secretary of State's decision on the request for a certificate. Moreover, where a certificate is issued by the SoS the right of appeal under Article 33 of the 1991 Order no longer applies (Article 123B (4)).
31. The request for a certificate must be submitted to the SoS in writing and must contain –
 - (a) a written statement setting out the grounds on which it is considered the certificate should be issued;
 - (b) an explanation of the information, the public disclosure of which would, in the view of the objector, be contrary to the national interest.
32. The SoS will –
 - (a) acknowledge receipt of the request;
 - (b) notify the Department of the request and the date by which representations must be received.
33. The Department will –

- (a) notify the applicant that a request for a certificate has been made and of the manner and time in which representations may be made; and
 - (b) provide the SoS by the date notified (unless it is extended by the SoS) with documentation relevant to the request including the application and any representations made in relation to it.
34. The SoS will inform the Department, the applicant and the objector of his decision. In doing so he is not required to give reasons for his decision where that would result in the public disclosure of information that would in his view be contrary to the national interest.
35. Should the Secretary of State refuse to issue a certificate, the objector will have to consider whether to withdraw his objection. The processing of the application will be completed by the relevant divisional planning office in the normal way.
36. Where the Secretary of State issues a certificate and there are objections and representations in relation to the application the Department will arrange an inquiry for the purpose of determining it. The processing of the application will transfer from the divisional planning office to Planning Service Headquarters.
37. The procedure at an inquiry required as a consequence of a certificate issued under Article 123B is provided in the Planning (Inquiry Procedure) Rules (Northern Ireland) 2006.
38. It is anticipated that in these circumstances the objector will request the Secretary of State to direct under Article 123A (2) of the 1991 Order that at the inquiry, "evidence of the description indicated in the direction shall only be heard or, as the case may be, be open to inspection at that inquiry or examination by such persons or persons of such descriptions as he may specify in the direction". The procedure to be followed by the Secretary of State before he gives a direction and the functions of 'appointed representatives' are provided in the Planning (National Security Directions and Appointed Representatives) Rules (Northern Ireland) 2006.
39. Provision is made in the Certificate Rules that where a document is to be provided in writing it may be done electronically - see relevant definitions and provisions in Rule 1 (3) – (5).

The Planning (National Security Directions and Appointed Representatives) Rules (Northern Ireland) 2006 (the NSD&AR Rules)

40. The NSD&AR Rules made under Article 123A (6) of the 1991 Order provide for the procedure to be followed by the Secretary of State before he gives a direction and for the functions of 'appointed representatives'. By virtue of Article 123A (1) they might relate to any public local inquiry or independent examination held under the 1991 Order but are particularly relevant where an inquiry is held as required under Article 123B (2) following issue of a certificate under Article 123B (1). These can be found at <http://www.opsi.gov.uk/sr/sr2006/20060215.htm>

41. It is anticipated that where a certificate is issued under Article 123B (1) and there are objections or representations in respect of the application which have not been withdrawn, the applicant or an objector, as the case may be, will request the Secretary of State (SoS) to direct under Article 123A (2) of the 1991 Order that at the inquiry, "evidence of the description indicated in the direction shall only be heard or, as the case may be, be open to inspection at that inquiry or examination by such persons or persons of such descriptions as he may specify in the direction".
42. The SoS may give the direction under Articles 123A (2) and (3) where he is satisfied that giving evidence or making it available for inspection would be likely to result in the disclosure of information as to matters related to national security and the measures taken or to be taken to ensure the security of any premises or property and that public disclosure of that information would be contrary to the national interest.
43. Where the Secretary of State is considering giving or has given a direction the Attorney General for Northern Ireland may appoint a person to represent the interests of any person who will be prevented from hearing or inspecting any evidence at an inquiry or examination if the direction is given.

Functions of Appointed Representative

44. The functions of an appointed representative (Rule 3) are firstly -
 - (a) to take instructions from the person who will be prevented from hearing or inspecting evidence described in a direction (the affected person) before receiving copies of the evidence in relation to which the direction has been requested (potentially closed evidence);
 - (b) to make written representations as to whether a direction should be given; and
 - (c) to deal with preliminary matters, make submissions and cross-examine witnesses where a hearing is held in accordance with Rule 9.
45. The second function of the appointed representative is to represent the interests of the affected person by –
 - (a) taking instructions from the affected person before receiving copies of evidence described in the direction (closed evidence);
 - (b) dealing with preliminary matters in relation to closed evidence in respect of a public local inquiry or independent examination;
 - (c) making submissions or cross-examining witnesses in relation to closed evidence at an inquiry or independent examination; and
 - (d) attending site visits.
46. Finally, the appointed representative is required to ensure that the copies of the closed evidence or potentially closed evidence are returned to the person who supplied it as soon as practicable after whichever is the later of the following dates –
 - (a) the Secretary of State has given notice under rule 13 that he does not intend to give a direction;

- (b) an inquiry or independent examination, to which the closed evidence relates, has ended; or
 - (c) the Secretary of State has notified the appointed representative that no inquiry or independent examination, to which the closed evidence relates, will be held.
47. For the purpose of any of these functions the appointed representative may discuss any matter relating to closed evidence or potentially closed evidence with the person who supplied the evidence to the Secretary of State or with a person specified in the direction.

The Procedure

48. The request for a direction comprises the written representation of the person making the request (Rule 7 (1)). Under Rule 5 (2) the SoS will acknowledge receipt of the request and publicise it by giving notice by local advertisement. If appropriate, notice will be served upon the owner or occupier of the land to which the request for a direction relates. The notice will advise that a request for a direction has been made, that written representations on whether a direction should be given can be made to the SoS at the address specified and provide a date by which such representations should be made. This date will be not less than 2 weeks from the date of the notice.
49. As soon as practicable after notice of the request for the direction has been given, the SoS under Rule 6 (1) will notify the appointed representative of the date by which he is to receive any written representations (a date not less than 6 weeks from the appointed representative being notified). At the same time, the SoS will copy the notice sent to the appointed representative to the other party (that is, the person requesting the direction).
50. When the SoS receives notice from the appointed representative that he has taken instructions from the affected person, he will send to the appointed representative a copy of the request for a direction together with, where the potentially closed evidence includes documentary evidence or a proof of evidence of a person who intends to give oral evidence, a copy of the evidence (Rule 6(2)).
51. As soon as practicable after receipt, the SoS under Rule 7 (2), will send a copy of written representations received from the Appointed Representative, if any, to the other party and will copy to the parties any written representations received in response to the notice that a request for a direction has been made. Any further representations received by the SoS from either party will be sent to the other party as soon as practicable under Rule 7 (3)).
52. The SoS may proceed to a decision on a request for a direction taking into account only those representations that were submitted by the relevant date. The relevant date is the date specified in the notice issued by the SoS under Rule 5 (2) or 6 (1) or a later date specified by him (Rule 10).
53. However, if there is one or more matters which the Secretary of State considers could best be dealt with by holding a hearing he will notify the

parties in writing. Any date fixed by the Secretary of State for a hearing must be no later than 6 weeks after the date of the notification of the hearing. A minimum of 2 weeks written notice of the date, time and place fixed for the holding of the hearing should be given to the parties unless a lesser period is agreed. The Secretary of State may vary the date; time and place fixed for a hearing but must give the parties reasonable notice (Rule 8).

54. The procedure at the hearing is determined by the SoS. A hearing will take the form of a discussion led by the SoS and cross-examination will be permitted if he considers this necessary to ensure a thorough examination of the main issues. At the start of a hearing the SoS will identify what he believes the main issues to be considered are and will identify any matters on which he requires further explanation from the parties. This does not preclude any party from referring to issues which they consider relevant to consideration of the request for a direction but which were not identified by the SoS. When a hearing is being held, the Secretary of State may proceed with the hearing in the absence of any party, take into account any written representations or evidence received before the hearing opens or during the hearing provided it has been disclosed to the parties at the hearing and may adjourn the hearing giving notice at the hearing of the date, time and place of the adjourned hearing, in which case no further notice will be required. Any written representation, evidence or other document received after the end of the hearing may be disregarded by the Secretary of State when making his determination (Rule 9).
55. The Secretary of State may at any time vary time restrictions imposed by the rules.
56. The rules provide for the use of electronic communications (see definition in Rule 2 and provisions in Rule 12).
57. The Secretary of State will notify his decision to any person who made representations to him in relation to the direction as soon as practicable after determining whether or not to make the direction. He is not required to give reasons for his decision where doing so would result in the public disclosure of closed evidence.
58. Where a direction is given, the Secretary of State shall send a copy of the direction to the appointed representative and to the person who requested the direction.

The Planning (Inquiry Procedure) Rules (NI) 2006 (the Inquiry Procedure Rules)

59. These rules apply to an inquiry which the Department is required to hold as a consequence of a certificate issued under Article 123B of the 1991 Order. The rules are quite detailed and it is not proposed to recite them at length in this leaflet. They can be found at <http://www.opsi.gov.uk/sr/sr2006/20060213.htm>
60. The Rules set out the responsibilities and requirements placed upon the Department, the inspector appointed by the Department to hold the inquiry and the other interested parties including as appropriate the applicant, persons making representations and appointed representatives (see

paragraphs 44 – 47 above).

61. The main elements of the rules are as follows:

Supply of Preliminary Information by the Department to the applicant, persons it is required to consult and persons who have made representations about the application Rule 4

The procedure where the inspector holds a pre-inquiry meeting including publicity, the responsibilities of the participants and the powers of the inspector Rules 5 & 7

The provision and receipt of statements of case by the participants prior to the inquiry Rule 6

The Inquiry timetable arranged by the inspector Rule 8

The date and notification of the Inquiry by the inspector including publicity Rule 9

Appearances at the Inquiry – those who are entitled to appear and the discretion of the inspector to permit others to appear Rule 10

Provision for representatives of Government departments and other authorities to be made available at the inquiry Rule 11

Provision for proofs of evidence including publication of documents Rule 12

Preparation and publication of a statement of common ground by the Department and the applicant or, where the application is made by or on behalf of the Crown, by the appointed representative and the applicant. Rule 13

The procedure at the Inquiry – procedures not provided for will be determined by the inspector Rule 14

Provision for accompanied or unaccompanied site visits by the inspector before, during or after the inquiry Rule 15

The procedure after the inquiry including the making of the inspector's report, what is to happen where the Department disagrees with any recommendation and provision for re-opening the inquiry should the Department so decide	Rule 16
Notification of the Department's decision on an application to persons who appeared at the inquiry	Rule 17
Provision for the use of electronic communications	Rule 21
Nothing in the rules requires or permits closed evidence to be disclosed to a person other than the inspector, the Department, the appointed representative or a person specified in a direction given under Article 123A.	Rule 22