



Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004 (Regulation 18)

Decision Notice

Dated 7 June 2006

Public Authority: Environmental Resources Management Ltd (ERM)
Address: 8 Cavendish Square
London
W1G 0ER

Summary Decision and Action Required

The Commissioner's decision in this matter is that ERM did not deal with the complainant's request in accordance with Parts 2 and 3 of the EIR in that it failed to comply with its obligations under regulation 5(1). Its failure to comply was due to its view that it was not subject to the EIR for the purposes of the information request. The Commissioner's view is that it is. As ERM has now responded to the complainant, the Commissioner does not require any steps to be taken, but if the complainant requests a review, he requires that this be carried out in accordance with the provisions of the EIR.

1 Freedom of Information Act 2000 (the 'Act') and Environmental Information Regulations 2004 (the 'EIR') – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to ERM has been dealt with in accordance with the requirements of Parts 2 and 3 of the EIR.

1.2 The enforcement and appeals provisions of the Act apply for the purposes of the EIR.

1.3 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- the application has been withdrawn or abandoned,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.

- 1.4 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 13 September 2005 the following information was requested from ERM in accordance with regulation 5.
- 2.2 Documents relating to a review carried out by ERM of the potential implications of the 2005 UK Sustainable Development Strategy on the North East Regional Strategy ('RSS').

The full request is quoted in the annex to this notice.

- 2.3 ERM responded to the complainant on 23 September 2005, explaining that it was not a public authority as defined by the Regulations. This followed advice received by the Commissioner in relation to a previous request for information from ERM.
- 2.4 The complainant complained to the Commissioner on 28 September, setting out a number of reasons as to why, for the purposes of this request, ERM is a public authority. These are set out, in summary, in section 5 of this Notice.

3 Relevant Statutory Obligations under the Act and EIR

Paragraph 5(1) provides that –

“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.”

Paragraph 2(2) provides that –

“Subject to paragraph (3), “public authority“ means –

- (a) government departments
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 of the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 of the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or

- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and -
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment”

4 Review of the Case

- 4.1 This case turns almost exclusively upon the question of whether or not ERM is a public authority for the purposes of the EIR. The case officer has therefore relied upon the advice provided by the Commissioner’s Legal Department.
- 4.2 Taking into account said advice and the submissions of the complainant; the decision set out in detail below was reached. The case officer wrote to ERM to advise it of this decision and to request that either the information was provided to the complainant or that ERM respond to the Commissioner if the decision was contested.
- 4.3 On the 26 April, ERM responded to the complainant. The Commissioner has taken no view on whether this response fully addresses the information request made on 13 September 2005.

5 Analysis of the case

5.1 The position of ERM

- 5.1.1 ERM has not advanced any arguments as to why it did not consider itself to be a public authority for the purposes of the EIR. Previously, and in the context of a different request for information, it was advised by the Commissioner that it was not a public authority. The fact that the requested information has now been released to the complainant may suggest that it now accepts, at least for the purposes of this particular request, that it is a public authority.

5.2 Arguments advanced by the complainant

- 5.2.1 The complainant is under no duty to provide arguments as to why ERM is a public authority. However, it is helpful that it has done so. The arguments put to the Commissioner may be summarised as follows:
 - 5.2.2 Directive 1001/42 on the assessment of the effects of certain plans and programmes on the environment (the ‘SEA directive’) requires that ‘environmental reports’ be prepared. The SEA directive is transposed into domestic law by SI 2001/1633 (the ‘SEA Regulations’). These provide that in a number of specified circumstances, “the responsible authority shall carry out, or secure the carrying out of, an environmental assessment...” Where such an assessment is required, “the

responsible authority shall prepare, or secure the preparation of an environmental report...”

- 5.2.3 The “responsible authority” in this case is the regional assembly for the North East of England (‘RANE’), this being the authority responsible for preparing the RSS. In line with the Regulations quoted above, secured ERM to carry out the environmental assessment and prepare the environmental report.
- 5.2.4 Because ERM carried out the assessment and prepared the report, regulation 2(2)(d)(ii) of the EIR applies to it. Furthermore, ERM is under the control of RANE, a body to which regulation 2(2)(c) applies. This control is both contractual and statutory.
- 5.2.5 One of the main changes to the current directive from the original environmental information directive is the expanded definition of ‘public authority’. The reason for this is so that public access to public information is not affected by the delegation of responsibilities from public authorities to others. Had the SEA assessment been carried out by RANE itself, information relating to it would have been subject to the provisions of the EIR. The EIR should therefore similarly apply in the actual case.
- 5.2.6 If ERM are not subject to the EIR for the purposes of this request, the public cannot access background information relevant to the preparation of an environmental report. This creates a disparity between citizens in different member states.
- 5.2.7 Guidance issued by Defra lists examples of bodies covered by EIR. The list includes environmental consultants.
- 5.2.8 It is not the case that ERM are only acting on behalf of RANE and are not themselves carrying out a public function. Because the SEA legislation provides RANE with a choice of whether to carry out the assessment or secure another body to do so, the fact that RANE chose to secure another body means that that person, ERM, assumed public functions relating to the environment whilst carrying out the assessment.

6 The Commissioner’s decision

- 6.1 The Commissioner’s view is that ERM are, for the purposes of the information request set out in this notice, subject to the EIR.
- 6.2 The Commissioner’s general approach is to adopt a broad interpretation of the definition of “public authority” in the EIR to bring it in line with the directive. This avoids the problem of public sector bodies contracting out public services in order that legal obligations, such as the obligation to disclose environmental information, may be avoided. It is therefore wholly possible that there may be cases where external service providers to public authorities are subject to the provisions of the EIR. It is also possible that organisations may be public authorities in respect of some of the information they hold and not others.

- 6.3 RANE is a public authority because it, “carries out functions of public administration.”
- 6.4 The SEA Regulations require public authorities to carry out or secure the carrying out of environmental assessments. By contracting out the carrying out of the environmental assessment the public authority is fulfilling own statutory obligation.
- 6.5 Through this contract, RANE has delegated a public function to ERM, and ERM, for the purposes of this case are therefore subject to the provisions of the EIR because in carrying out an environmental assessment it is under the control of a public body and is exercising functions of a public nature relating to the environment. (In effect this is one of the arguments advanced by the complainant, summarized in paragraph 5.2.4 above)
- 6.6 The Commissioner’s decision, therefore, is that ERM has failed to comply with Regulation 5(1) – in that it failed to make available to the complainant environmental information held by it, until prompted to do so by the Commissioner.

7. Action Required

- 7.1 As ERM has responded to the information request, the Commissioner does not require it to take any remedial steps at this time. However, should the complainant request a review of the response, he requires it to deal with this appropriately and according to the provisions of the EIR.

8. Right of Appeal

- 8.1 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
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 28 days of the date on which this Decision Notice is served.

Dated the 7th day of June 2006

Signed

Phil Boyd
Assistant Commissioner

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

ANNEX

Full text of request for information from Environmental Resources Management Ltd made by the complainant on 13 September 2005

- “1. In a letter from RANE dated 22nd August 2005 [...] it stated that ERM carried out a review of the potential implications of the 2005 UK Sustainable Development Strategy on the North East RSS. Please would you provide us with all documents held by ERM relating to that review including, but not limited to:
- 1.1. Any documents(s) setting out the terms of reference or scope of the review;
 - 1.2. Any document setting out the result of that review;
 - 1.3. Any correspondence (including electronic correspondence) between the authors of the report and ERM in relation to that review;
 - 1.4. Any document setting out the conclusions of ‘Task 1.1 – Identify relevant plans and programmes, and their relation to RSS...
2. In the same letter it is stated that ERM ‘reviewed the objectives and predicted outputs of the [EU Sixth Environmental] Action Plan and did not view them as being salient to the RSS. Please would you provide us with all documents evidencing that review. Such documents should include as a minimum any correspondence between ERM and the authors of the review, and notes (or minutes) of any meeting (internal or external), in relation to that issue.
3. We enclose a copy of a reply to RANE of today. You will see that at Part III of that letter we raise concerns in relation to the treatment of issues relating to airport expansion. Please would you explain why the three references referred to were removed from the final SA Report and provide us with copies of all documents which evidence the decision making process leading to that removal.
4. In the same letter you will see that we raise concerns relating to the treatment of ‘alternatives’ or ‘options’. In the August 2004 appraisal of the pre-final draft RSS it is stated (para. 3.2.2) that *“following extensive discussions and considerations of a wide range of issues at the scoping stage, it was agreed that this SEA+ will only assess alternatives relating to housing provision.”* Please provide us with full details

Reference: FER0090259

of those 'discussions' including the dates and participants (organisations and positions will suffice) as well as any written records of such 'discussions' and their outcomes"