

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

Decision Notice

Date 22 January 2007

Public Authority: Coventry City Council
Address: Council House
Earl Street
Coventry
West Midlands
CV1 5RR

Summary

The complainant requested copies of any emails sent by the policy officer to any of the planning officers at the council in respect of his client's planning application. The council initially responded by stating that it did not hold any information falling within the scope of the request. Upon review the council then stated that the information was exempt under section 36 (effective conduct of public affairs), and section 22 (information intended for future publication) of the Freedom of Information Act 2000, ('the Act'). When the complainant requested a further review of this decision the council responded stating that Regulation 12(4)(e) (internal communications) of the Environmental Information Regulations 2004 ('the Regulations') applied. During the course of the Commissioner's investigation the council wrote to the Commissioner and clarified that it had made a mistake in applying the exemptions and that it did not, in fact, hold any relevant information. After investigating this claim the Commissioner is satisfied that the council does not hold any information which falls within the scope of the request. The initial refusal letter to the complainant stated that no information was held, but it did not include all of the relevant information required by Regulation 14 of the Act. The Commissioner's decision is therefore that the public authority did not comply with its obligations under Regulation 14.

The Commissioner's Role

1. The Environmental Information Regulations ("the Regulations") 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 Regulations shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 11 January 2005 the complainant made a request for information to a policy officer at the council in the following terms:

“Please supply the original emails you have confirmed you supplied to (name of council officer redacted) advising on the retail aspects (and any other aspect) of the proposed development”

The Commissioner understands that the request was for a copy of an email from the policy officer at the council to the planning officer assigned with providing a recommendation on the complainant's application for planning permission.

3. The council did not respond to this request so on 20 January 2005 the complainant remade his request to the policy officer in the following terms:

“I hereby formally request the supply of copies of all emails you have sent to any officer within the council concerning my clients planning application under the provisions of the Freedom of Information Act.”

4. These requests were made directly to the policy officer at the council via email. The policy officer had provided advice to the planning officer as regards the application for planning permission. Shortly after receiving this advice the planning officer had indicated to the complainant that she was minded to recommend to councillors that the application should be refused. It is clear from the correspondence between the complainant and the policy officer that the complainant was seeking copies of emails supplied by the policy officer at the council rather than copies of emails from any other person which may have been held relating to his client's planning application.

The Investigation

Scope of the case

5. On 5 August 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information he had requested should have been disclosed to him.

Chronology

6. The policy officer at the council responded to the complainant's requests of 11 & 20 January 2005 on 21 January 2005. In that email he stated that no emails were held. The complainant emailed the council again on the same day, asking the council to reconsider its response.

7. On 25 February 2005 the council formally responded to the complainant claiming that the information was exempt under section 36(2)(b)(i) and (ii) (prejudice to the effective conduct of public affairs), and section 22(1)(a) (information intended for future publication) of the Act.
8. The complainant requested that the council review its decision in a letter dated 11 March 2005. The complainant did not receive a response to this request and therefore complained to the Commissioner on 21 March 2005.
9. The Commissioner initially highlighted to the complainant that he had not allowed sufficient time for the council to conduct its internal review of its decision. After further correspondence the Commissioner then wrote to the council on 1 July 2005 and on 18 July 2005 requesting that the council respond to the complainant's request. The council responded on 22 July 2005 stating that it had responded to the complainant on 24 March 2005 but that this must not have been received. It therefore resent its response to the complainant.
10. That letter stated that the information was exempt under Regulation 12(5)(e) of the Regulations but the text following this referred to the information being exempt because the emails requested were internal communications. Because of this statement the Commissioner assumes that the Regulation claimed was a mistake and in fact the council intended to refer to Regulation 12(4)(e).
11. The complainant then wrote to the Commissioner again on 5 August 2005, asking for a decision under section 50 of the Act.
12. The Commissioner wrote to the council on 12 June 2006 requesting a copy of the information concerned and any submission the council wished to make in support of its claim to the exemptions. The council responded on 3 July 2006 providing some contextual information together with further arguments in support of its view that the information was exempt from disclosure under Regulation 12(5)(e). It did not specifically supply a copy of any of the requested information.
13. The Commissioner wrote back to the council seeking further clarification of some of the arguments submitted on 5 October 2006. The council responded on 10 November 2006. In that letter it confirmed that it had been mistaken when it applied exemptions to the information as it did not, in fact, hold any information which fell within the scope of the request.
14. The Commissioner therefore investigated the council's procedures for retaining emails. In an email dated 15 November 2006 it asked the council to confirm:
 - whether the council had checked whether any officers retained relevant information on their computers,
 - what the council's policy was on the deletion of emails from computers,
 - whether the council retained copies of emails on back up systems, and,
 - whether the council had ascertained whether any relevant emails were held on any back up systems,

- when information obtained by a planning officer is included on a planning file, thereby providing an audit trail of the way a recommendation is arrived at.
15. The council replied on 24 November 2006 and confirmed that it had asked all of the relevant officers if they held any relevant information, and that the officers had confirmed that no information was held. It also confirmed that it does not have a written policy on the retention or destruction of emails.
 16. The council also confirmed that information is only retained on its back up systems for a period of 3 months and that it has affirmed that no relevant information is held on those systems.
 17. However the Commissioner has concerns that the council applied inapplicable exemptions to information it did not hold it. He therefore wrote to the council again on 28 November 2006 asking it to explain how it had applied non applicable exceptions to information it did not hold. The council responded on 11 December 2006 explaining that it had applied the exemptions on the basis of any request for such information. It had not specifically tried to consider the actual information requested in this instance but sought to consider the response to requests of this nature in general. It provided minutes of a meeting held on 21 March 2005 to discuss the request as evidence that this was the case.
 18. On the 16 January 2006 the Commissioner emailed the council and asked if it had checked its back up systems at the time the request was received. The council responded by telephone the same day, stating that at the time of the request no back up system was in place at the council. However on 17 January 2006 it emailed the Commissioner and confirmed that although a back up system was in place, checks had not been carried out on it at that time as it was not realised that this was necessary. It also confirmed that it was not now able to tell what information was held on the back up system at that time.
 19. The Commissioner is now satisfied with the checks the council has carried out to confirm that no information is currently held.

Analysis

Procedural matters

19. The policy officer at the council initially provided a response to the complainant on 21 January 2005 stating that the requested information was not held. He stated that council officers do not retain emails because of the limitations on the storage capacity of the computer systems the council has in place. This email was within the 20 day limit provided for responding to FOI requests and was therefore compliant with the council's obligations under Regulation 14 (2) as regards the time of the response. The email did not however meet all of the requirements for a refusal notice required by Regulation 14(3)(a) in that it did not specifically state that the council was relying upon Regulation 12(4)(a) (information not held). Neither did it meet the obligations of Regulation 14(5) in that it did not provide

information on how to appeal the decision. These are considered further in paragraphs 31 to 36 below.

20. Further responses to the complainant dated 25 February 2005 and 24 March 2005 claimed that the information was exempt from disclosure under the Act and the Regulations. The response dated 25 February stated that the information was exempt because section 36 (effective conduct of public affairs) and section 22 (information intended for future publication) of the Act applied. The response dated 24 March 2005 stated that that information was exempt because Regulation 12(5)(e) applied, (although it is likely that the council was actually referring to Regulation 12(4)(e) (internal communications)).
21. However, as highlighted above, in its letter to the Commissioner dated 10 November 2006 the council stated that it had, in fact, been incorrect to apply the exemptions stated and that no information was actually held which fell within the scope of the request; any emails which had been held had been deleted prior to the request being made. The Commissioner therefore considered the following:

Was the information still 'held' at the time of the request?

22. Based upon the information provided by the council and considered in paragraphs 14 to 18 above the Commissioner accepts that the information is no longer held by the Council. However the Commissioner's decision relates to the time the request for information was received. Although the Commissioner accepts the submission of the council that all of the emails had been deleted by the time of the request there is still a question as to whether the information was held on any back up systems at that time.
23. The council has been unable to confirm whether the information was held on any back up systems at that time. Additionally, given the time which has passed since that point it has confirmed that it would not now be able to ascertain whether this was the case or not.
24. The council has stated that it backs up its data for up to three months using various cycle periods. However emails which are deleted may not, in certain circumstances, be retained on its backup tapes. Examples of such circumstances include emails that are created and deleted on the same day or where emails are deleted in between the cyclic back up periods.
25. Additionally the council is not able to categorically state when the emails were sent by the policy officer, although the Commissioner suggests that this would have been between September 2003 when the planning officers considerations first started, and the 24 November 2004 when the planning officer first stated to the complainant that she was minded to recommend a refusal of the request. As the complainant's formal request was made on 11 January 2005 it is therefore possible that the information may still have been retained on the back up systems of the council at the time of the request. It has confirmed that it did not check to see if this was the case at that time.

26. It is noted that at that time the Commissioner's guidance on back up systems (Awareness Guidance 8 – Records Management FAQ's published July 2004), stated that information held in back up systems was not "held" for the purposes of the Act. This guidance was amended in light of Tribunal decision EA/2005/0001, Harper v The Information Commissioner, which was published by the Tribunal in November 2005. It is therefore noted that had the council followed the guidance of the Commissioner in publication at that time, it would have understood that it was not necessary to search its back up systems to ascertain if the information was held. We have no evidence to clarify whether the council did or did not consider this guidance at that time.
27. The Commissioner is therefore not in a position to know with absolute certainty whether the information was held on the back up system of the council at the time of the request, and the council is unable to provide evidence to clarify whether this was the case or not.
28. The Commissioner must therefore come to a conclusion based on the circumstantial evidence available. The possibilities are as follows:
- The emails may have been retained on the back up system and deleted after the usual 3 month retention period. This 3 month period may have ended prior to the complainants request being received by the council.
 - Alternatively, given the evidence submitted by the council, it is possible that the information may have been deleted prior to it ever being included on the back up systems.
 - However it is also possible that the emails were included on the back up systems and were held at the time the request was received.
29. The Commissioner has to make a decision as to whether the information was held or not at the time the request was received. The emails had been deleted from the council's main computer systems, and, given the doubts highlighted above, there is no specific evidence to directly suggest that they were ever included on the back up systems or if they were, that they were still held on those systems at the time the request was received. There is no ability for the council or the Commissioner to recheck what was held on the system at the time.
30. Based upon the assertion by the council's policy officer that the information was not held, and the absence of clear evidence to the contrary, the Commissioner's decision must be that the information was not held by the council at the time of the request.

Did the council provide an adequate refusal notice to the requestor?

31. The Commissioner has considered whether an adequate refusal notice was issued for the purposes of Regulation 14. His decision is that the following applies:
- In its initial refusal notice the council failed to specify that exception 12(4)(a) applied.

- It also failed to provide information on the complainant's right to make representations under Regulation 11, (as required by Regulation 14(5)(a),
 - It also failed to provide information on the enforcement and appeal provisions of the Act under Regulation 18 (as required by Regulation 14(5)(b)).
32. The Commissioner therefore considers that the council provided an inadequate refusal notice to the complainant for the purposes of Regulation 14 of the Act.
33. However the Commissioner is aware that the initial request was made directly to the policy officer at the council, and that it was he who responded to the complainant directly rather than the council providing a fully considered response under the Regulations. The policy officer was aware that the information was not held, and simply communicated this fact to the complainant through a semi-formal email. It could therefore be argued that the later, more formal responses provided to the complainant were in fact the council's formal refusal notice to the request. As evidence that this was the intention the council stated in its letter dated 25 February 2005 that "this letter acts as a public interest refusal notice".
34. This response did include the relevant information required under Regulation 14, in that it provided information on the right to appeal and information on the enforcement provisions of the Act. However, in this letter the council claimed exemptions under the FOI Act which were not applicable to the request. Paragraphs 39 to 42 consider this further.
35. Although the council formally claimed that a number of exemptions under the Act, and section 12(4)(e) under the Regulations applied to the information, upon further investigation its final decision was that it did not hold any information which fell within the scope of the request. The Commissioner investigated the procedures of the council in this regard and accepts that the council does not hold this information. He has not therefore considered the council's application of the exemptions (other than the council's failure to specify the exception in Regulation 12(5)(a)) further in this notice.
36. However, should the council seek to argue that the second response to the complainant was the formal response of the council it is the Commissioner's preliminary view that the exemptions cited in the letters of the 25 February 2005 and 24 March 2005 would not be applicable to the request. If this is the case the Commissioner notes that these responses would also have failed to comply with the requirements of the Regulations.

The Decision

37. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it failed to issue an adequate refusal notice as required by Regulation 14.

Steps Required

38. The Commissioner requires no steps to be taken.

Other matters

39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
40. The Commissioner has considered the council's responses to the complainant's requests for internal review. The council applied exemptions to information without recourse to that information, and sought to respond to the request on a general basis that all requests of this type should be refused. However in order to properly consider a request it will, in almost all cases, be necessary for the authority to consider the actual information with a view to its disclosure, in order to ensure itself that exemptions are applicable and in order to properly carry out any prejudice and public interest tests which are required under some of the exemptions. A failure to obtain and consider the actual information requested in this case resulted in an incorrect response being provided to the complainant's request for internal review, which was further confused by the later claim to the exemptions under the Regulations.
41. In addition the council also applied the exemption in section 36 of the Act to the information. Under section 36 of the Act the requested information can be exempted from disclosure where, in the reasonable opinion of the qualified person, disclosure would prejudice the effective conduct of public affairs. The council confirmed to the Commissioner that the qualified person did not consider the request in this instance in an email dated 11 December 2006. The exemption was not therefore applicable.
42. The above highlight problems with the practices of the council when dealing with requests for information under the Act and the Regulations. It is noted however the council has since sought advice in this respect from the Commissioner. As such the Commissioner considers that no further action is necessary at this time.

Right of Appeal

43. Either party has the right to appeal against this Decision Notice to the Information 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

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 22 day of January 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annexe

Relevant statutory obligations and provisions under the Regulations.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

Relevant statutory obligations and provisions under the Act

Information intended for future publication

Section 22(1) provides that –
“Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

Section 22(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”