

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

Decision Notice

Date 22 May 2007

Public Authority: Local Government Ombudsman
Address: Beverley House
17 Shipton Road
York
YO30 5FZ

Summary

The complainant made a request to the Local Government Ombudsman for information related to its investigation of a complaint he had previously made against Bolton Metropolitan Borough Council. The public authority refused to disclose the information under section 44 of the Act which provides an exemption from the right to know where disclosure is prohibited under any other enactment. It explained that the relevant statutory prohibition is section 32(2) of the Local Government Act 1974. On reviewing the complaint the Commissioner has found that the majority of the information is exempt from disclosure although the Commissioner has found that some of the information should have been disclosed to the complainant. The Commissioner has also found that some of the information requested by the complainant is environmental information and that therefore the public authority should have also considered the request under the Environmental Information Regulations 2004. However, the Information Commissioner has found that any environmental information held by the public authority would fall within the exception in regulation 12(5)(d) of the Environmental Information Regulations and that the public interest in maintaining this exception outweighs the public interest in disclosing the environmental information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Environmental Information Regulations (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 Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. The complainant had made a complaint to the public authority regarding alleged maladministration by Bolton Metropolitan Borough Council ("Bolton MBC"). On 5 August 2005 the complainant wrote to the public authority to request, under the Act, information regarding its investigation of his complaint. In particular the complainant asked for:
 - a) transcripts of all the telephone conversations between:
 - the investigator and myself
 - the investigator and Bolton MBC
 - the investigator and the deputy head
 - b) copies of correspondence between your office and Bolton MBC
 - c) copies of internal memo's between all your colleagues involved in my complaint
 - d) a copy of the tree maintenance schedule from Bolton MBC
 - e) a list of all those people consulted and copies of associated documentation (including telephone transcripts) gathered by you and your colleagues during your investigation
 - f) an explanation to show how all the information gathered by you and your colleagues influenced your decision
 - g) any other information which will help me understand your decision
4. The public authority responded to the request on 16 August 2005 and refused to disclose the information. It explained that the information is exempt from disclosure under section 44 of the Act which also provides for an exemption from the right to know where disclosure is prohibited under any other law. The public authority said that the relevant statutory prohibition was section 32(2) of the Local Government Act 1974 ("section 32(2) LGA").
5. The public authority also informed the complainant that he was entitled, under the Data Protection Act 1998, to request any personal data it held about him, although it indicated that it was unlikely that it would hold any personal data which the complainant would want to see.
6. After carrying out an internal review the public authority upheld its earlier decision to refuse the request.

The Investigation

Scope of the case

7. On 2 November 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 the public authority's decision to refuse to disclose the information under section 44 of the Act by virtue of section 32(2) LGA.

Chronology

8. The Commissioner wrote to the public authority on 29 August 2006 to request copies of the withheld information.
9. The public authority responded to the Commissioner's request on 7 September 2006.

Findings of fact

10. The information requested by the complainant forms part of a complaints file which includes all of the information held in relation to the complaint against Bolton MBC.
11. The complaint against Bolton MBC centred on problems the complainant was experiencing regarding a local school which adjoins his property.

Analysis

Exemption

12. A full text of the relevant statutes referred to in this section is contained in the legal annex.

FOI Section 44 – Prohibitions on disclosure

13. The Commissioner accepts that section 32(2) LGA acts as a statutory prohibition on disclosure of information obtained in the course of or for the purposes of an investigation and is satisfied that responding to a freedom of information request is not one of the reasons for disclosure provided for in sub-sections a) – c) of section 32(2). The main issue to be considered in this section is whether the information requested by the complainant was obtained in the course of, or for the purposes of the public authority's investigation of Bolton MBC.
14. Having reviewed the information contained within the complaints file the Commissioner has found that most of the information which would fall within the scope of the complainant's request was received by the public authority during

the period in which it was investigating the complaint against Bolton MBC. Where the information was passed to the public authority by Bolton MBC or other third parties the Commissioner is satisfied that the information was obtained in the course of or for the purposes of the investigation and that the exceptions in (a) – (c) do not apply.

15. The file also contains documents which were generated by the public authority and its officers in the course of investigating the complaint against Bolton MBC. This type of information is comprised of copies of telephone transcripts, memo's, correspondence from the public authority to Bolton MBC and other internal documentation. It is the Commissioner's view that where such information draws upon or makes reference to the complaint against Bolton MBC then such information constitutes information obtained in the course of or for the purposes of the investigation and that the exceptions in (a) – (c) do not apply. Whilst these documents may have been generated by the public authority itself, and have therefore not been physically obtained, it is clear that the information contained within the documents will have been obtained in the course of the investigation. This is because the details of the complaint against Bolton MBC and details of the investigation is clearly information which was only received by the public authority for the purposes of investigating that complaint.
16. The complaint file also includes information that was not obtained by the public authority and which does not draw upon or make reference to the details or nature of the complaint against Bolton MBC. It is the Commissioner's view that this information is not covered by the statutory prohibition.
17. It is the Commissioner's opinion that section 32(2) LGA does not act as a blanket exemption to all of the information it holds in its complaint file. Having said this, the Commissioner recognises that information which is not exempt constitutes only a fraction of the information held by the public authority.

EIR Regulation 12(5)(d)

18. It is the Commissioner's opinion that whilst the majority of the information contained with the public authority's complaint file is not environmental information, some of the information does fall within the definition of environmental information in regulation 2(1)(a) and 2(1)(c) of the Environmental Information Regulations 2004 ("the EIR"). This is because some of the information concerns the state of the elements of the environment such as land and landscape and some of the information concerns a measure, in this case a planning application, affecting or likely to affect the state of the elements of the environment, in this case the land. This information would be exempt from disclosure under the Act by virtue of section 39 which provides an exemption for environmental information. However the public authority would be obliged to also consider the complainant's request as a request for information under the EIR.
19. After reviewing the complaint the Commissioner has found that any environmental information held by the public authority, which falls within the scope of the request, would be covered by an exception under the EIR. It is the

Commissioner's opinion that the relevant exception under the EIR is regulation 12(5)(d) which provides for an exception from the right to know where disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.

20. The Commissioner is satisfied that the statutory prohibition on disclosure in section 32(2) LGA would mean that any environmental information held by the public authority would fall within the scope of this exception.
21. However, under the EIR exceptions to the disclosure of environmental information are subject to the public interest test. In investigating the complaint the Commissioner has considered whether the public interest would best be served by the disclosure or the withholding of any environmental information held by the public authority which would fall within the scope of the request.
22. The complainant has said that he had found it difficult to understand the public authority's reasoning behind its decision regarding his complaint against Bolton MBC. Whilst the Commissioner recognises that there is a public interest in greater openness and transparency; he is satisfied that the environmental information constitutes a minority of the information contained within the complaints file and that little could be learned about the public authority's decision making and investigatory processes through disclosure of this information.
23. The Commissioner recognises that in this instance the complainant is also the individual who made the complaint to the public authority against Bolton MBC. However both the Act and the EIR are said to be 'applicant blind', therefore the identity of the complainant is irrelevant. The Commissioner appreciates the arguments put forward by the complainant that since he made the complaint against Bolton MBC there should be no barrier to him receiving the information he requested. However, in considering the public interest in disclosing or withholding the information the Commissioner has deliberately not taken the identity of the complainant into account.
24. In considering the public interest test the Commissioner wishes to highlight the recent review of the statutory prohibitions on disclosure by the Secretary of State for the Department for Constitutional Affairs. In this review it was decided to maintain section 32(2) LGA as an ongoing prohibition on disclosure and that information related to the public authority's investigations should, in most instances, be exempt from disclosure.
25. The Commissioner considers that the purpose of section 32(2) LGA was to ensure that information pertaining to an investigation carried out by the public authority is kept confidential. Were information obtained in the course of or for the purposes of an investigation released, it could serve to undermine the public authority's ability to conduct further investigations and that this would not be in the public interest. If the various parties involved in the investigation of a complaint thought that information they supply to the public authority in the course of, or for the purposes of, an investigation could be disclosed then they may be less willing to co-operate with any investigation.

26. It is the Commissioner's view that the public interest arguments for withholding the minority of environmental information contained within the complaints file are strong and that the public interest arguments in favour of disclosure would need to be particularly convincing in order to warrant disclosure. The Commissioner's view is that the public interest arguments in favour of disclosure of the environmental information are not sufficiently strong to warrant disclosure in this case. In reaching this view the Commissioner has paid particular regard to the recent review of the statutory prohibitions on disclosure by the Secretary of State for the Department for Constitutional Affairs.
27. The Commissioner recognises that the public authority has discretion to disclose information obtained in the course of or for the purposes of an investigation where it believes that it would be beneficial for the purposes of that investigation. In reaching his decision the Commissioner has not sought to question the public authority's use of its discretion in this regard.

The Decision

28. The Commissioner's decision is as follows:
 - The public authority complied with section 1 the Act to the extent that it correctly applied section 44.
 - The public authority breached section 1 of the Act to the extent that it misapplied section 44 of the Act.
 - By failing to also respond to the request as a request for information under the EIR the public authority breached regulation 14 of the EIR.

Steps Required

29. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose any information it holds, falling within the scope of the request, which does not draw upon or make reference to the details or nature of the complaint against, and investigation of, Bolton MBC.
30. The Commissioner has provided the public authority with a list of documents which should be disclosed to the complainant in order to meet the requirements of this decision notice.
31. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

32. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

33. 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 22nd day of May 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

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.”

Section 44 of the Act provides that:

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Section 32(2) of the LGA 1974 provides that:

Information obtained by a local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this part of the Act shall not be disclosed except-

- a) for the purposes of the investigation and of any report to be made under section 30 or 31 above; or
- b) for the purposes of any proceedings for an offence under the Official secrets Acts 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this part of this Act, by a local Commissioner or by an officer of either Commission or for an offence of perjury alleged to have been committed in the course of an investigation under this part of this Act or for the purposes of an enquiry with a view to the taking of such proceedings, or
- c) for the purposes of any proceedings under section 29(9) above

and the Local Commissioner and the officers of his Commission shall not be called upon to give evidence in any proceedings (other than proceedings within

paragraph (b) or (c) above) of matters coming to his or their knowledge in the course of an investigation under this part of the Act.

Regulation 2(1)(c) of the EIR provides that:

“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 –

- (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.

Regulation 12(1) of the EIR provides that:

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 circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) of the EIR provides that:

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

Regulation 12(5) of the EIR provides that:

For the purposes of paragraph (1)(a), public 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;

Regulation 14 of the EIR provides that:

(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.

(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.

(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).

- (4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

- (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.