

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

Decision Notice

Date: 19 November 2007

Public Authority: Department for Culture Media and Sport
Address: 2-4 Cockspur Lane
London
SW1Y 5DH

Summary

The complainant requested all the paperwork concerning the decision not to list a building. DCMS refused to disclose the information held and relied on sections 36, 40 and 42 of the Act. The complainant disputed the application of section 36. The Commissioner investigated and found that the information requested was environmental information and that the request should have been dealt with under the EIR. The Commissioner found that under the EIR the exception at regulation 12 (4) (e) was engaged in relation to the information withheld under section 36 but that in all circumstances of the case the public interest in maintaining the exception did not outweigh the public interest in disclosure. In failing to deal with the request under the correct legislation the Commissioner finds that DCMS were in breach of regulation 14. By failing to disclose the information and relying on the exemption at 12 (4) (e) DMCS breached the requirements of regulation 5. The Commissioner orders the DCMS to disclose the information withheld under regulation 12 (4) (e) of the Act, subject to redaction of the information which can be withheld under regulation 13 (Personal Data).

The Commissioner's Role

1. The Commissioner has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act (the Act).
2. Because the information requested is environmental, the Commissioner has made a decision as to whether the request was dealt with in accordance with the requirements of Part 2 of the Environmental Information Regulations (EIR). The EIR came into force on 1 January 2005, 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’s representative has advised that on 17 February 2006 the following request for information to the Department for Culture Media and Sport (DCMS) was made:

“It was pointed out to me that there must surely be something on papers between English Heritage’s response to the owner’s representations against listing, and the Secretary of State’s notice of decision not to list, even if it is only an ‘internal memo’. It seems hardly likely that the Secretary of State’s response was drafted without any intervening paperwork.

Under the Freedom of Information Act, I should like to see all the paperwork concerning this case (the decision not to list the Walter Bodmer Building).”

4. DCMS responded on 23 March 2006. DCMS confirmed it held information relevant to the request and provided some of the information to the complaint. DCMS refused to disclose further information under sections 40, 41, 36, and 42 of the Act. DCMS explained that the names of junior DCMS and English Heritage Officials and other individuals had been redacted under section 40 and that some of the information was provided from a third party in confidence and so was exempt under section 41. DCMS also stated that disclosure of some of the information would inhibit the free and frank provision of advice or the free and frank exchange of views and so was exempt under section 36 (2)(b) (i) and (ii). In applying section 42 to some of the information DCMS explained that certain information consists of legal advice provided to official by DCMS lawyers on various issues relating to the decision not to list the Walter Bodmer Building. In applying the public interest test to the exemptions at section 36 and 42 of the Act DCMS concluded that the public interest lay in maintaining the exemption.
5. The complainant’s representative responded on 28 March 2006 to request a review of the decision to withhold some of the information under section 36 of the Act.
6. DCMS completed its internal review and communicated the outcome to the complainant on 22 May 2006. DCMS upheld its original decision to withhold the information that was found to be exempt under section 36 of the Act.

The Investigation

Scope of the case

7. On 1 June 2006 the complainant's representative contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the application of the section 36 exemption to the information requested. He did not ask the Commissioner to investigate the application of the other exemptions applied.

Chronology

8. The Commissioner wrote to the complainant's representative on 1 August 2007 to clarify the scope of the complaint. He responded on 6 August 2007 confirming that the complaint was only concerned with the information withheld under section 36 of the Act.
9. The Commissioner began his investigation by writing to DCMS on 10 August 2007. The Commissioner asked for further explanation regarding the application of the exemption and for a copy of the information being withheld under section 36 of the Act.
10. On 11 September 2007 DCMS responded, providing the Commissioner with a detailed background to the complaint, a copy of the information being withheld under section 36 and more detailed arguments regarding the application of section 36 to the withheld information. DCMS also expanded on the public interest arguments considered both for and against maintaining the exemption.
11. On 2 October 2007 the Commissioner wrote to DCMS explaining that having viewed the information he now believed the information was environmental information as defined by the Environmental Information Regulations (EIR) and asked DCMS to make any further submissions regarding the application of the exception 12 (4) (e) to the information.
12. DCMS responded on 16 October 2007 providing further explanation regarding the listing process to support its assertion that the information requested is not environmental information.

Findings of fact

13. The following documents were withheld under section 36 of the Act:
 - (j) DCMS officials to David Lammy (Minister for Culture) dated 5 December 2005;
 - (ii) second submission from DCMS officials to David Lammy dated 5 December 2005;
 - (iii) an email from David Lammy's private office to officials dated 5 December 2005.

DCMS confirmed that the documents are being withheld under section 36 in their entirety. DCMS also state that section 40 applies to the names of officials and individuals contained within the documents; the application of section 40 has not been disputed by the complainant.

14. The information disclosed to the complainant consists of copies of the submissions regarding the listing decision from various parties, comments on the submissions and a copy of the decision letter.

Analysis

Background

15. The Secretary of State is required by law to compile a list of buildings of special architectural and historical interest. When a building is listed the only factor which is relevant and which English Heritage, the Secretary of State's statutory advisers on the Historic Environment, and the Secretary of State, can take into account, is whether it possess special architectural or historic interest. The criteria for assessment are laid down in Planning: Policy Guidance Note 15, Planning and the Historic Environment. In considering whether to add a building to the list, Ministers will be provided with a submission that summarises all relevant arguments and offers a recommendation based on the strength of these arguments. If there are opposing views then the submissions must explain why the decision maker has reached the conclusion they have.
16. Once a decision has been made a letter is prepared for the listing applicant and the owner of the building if different, this will explain the reason for the decision. This information is a distillation of the arguments included in the submission.
17. The decision not to list the Walter Bodmer building was taken on 5 December 2005. A copy of the decision letter was provided to the complainants as part of the information provided to them in DCMS's letter of 23 February 2006.

Procedural Matters

18. DCMS dealt with the request for information under the Freedom of Information Act and accordingly applied the exemption at section 36 of the Act. The Commissioner has viewed the information and has found that the information is Environmental Information as defined by the Environmental Information Regulations (EIR).
19. The Commissioner considers that the information falls within the regulation 2 (1) (c), measure (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 measure designed to protect those elements. The listing process and the decision to list or not list a building is an administrative process likely to affect the elements and factors listed in (a) and (b) such as land and landscape. Specifically in this case,

the decision to list the building was linked with the decision to demolish the building and therefore had a direct affect on the landscape of the area around the building.

20. Regulation 14 'Refusal to disclose information' states that if a request for environmental information is refused, this refusal should be made in writing in no later than 20 working days after the date of the request. The refusal must specify any exception being relied upon under regulations 12 (4), 12(5) or 13; the matters considered in reaching a decision with respect to the public interest under regulation 12(1) (b).
21. By failing to deal with the request under the correct legislation and therefore failing to issue a refusal notice which meets the requirements above DCMS have breached the requirements of regulation 14.

Exception 12(4) (e) 'Internal Communications'

22. DCMS have relied on section 36 of the Act to withhold the requested information. During the course of the investigation the Commissioner has determined that the information is environmental and should have been dealt with under the EIR. The Commissioner explained this to DCMS and sought further submissions in relation to any of the exception under regulations 12 (4) and 12 (5) the EIR. DCMS confirmed that if the information is environmental it would seek to rely on regulation 12 (4) (e) 'internal communications'.
23. Regulation 12 states that a public authority may refuse to disclose environmental information if (a) an exception to disclosure under (4) or (5) applies; and (b) in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. 12 (4) (e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
24. The Commissioner accepts that the communications between DCMS officials and the Minister for Culture are internal communications for the purposes of 12(4) (e). The Commissioner is therefore satisfied that disclosure of the requested information would involve the disclosure of internal communications.

Public Interest Test

25. Regulation 12 (1) (b) states that in order to withhold the requested information the public interest in maintaining the exception must outweigh the public interest in disclosure.
26. DCMS stated that it had considered the public interest factors both for and against maintaining the exception but had found that the public interest favoured maintaining the exception. In reaching this decision DCMS considered that there was a public interest in understanding the way in which government operates and how Ministers interact with their advisers and officials. Greater transparency of the decision making process allows for greater accountability of Government to the public which increases trust and understanding and maintains public

confidence. DCMS stated it believed that the public interest in transparency was already met by the information it had disclosed to the complainant.

27. In considering the public interest in maintaining the exemption DCMS stated that there is also public interest in Ministers being able to make fully informed decisions following candid expression of views and advice of officials. Officials must be allowed to formulate advice in a free and frank manner about how listing policy applies in individual cases. DCMS state that the release of these views would be likely to inhibit the willingness of officials and third parties to debate issues fully and provide such advice as necessary in the circumstances; this would damage the quality of the decision making.
28. DCMS explained that this was a high profile case which was particularly contentious due to proposal at the time to demolish the building. Following the decision not to list the building a review was requested and undertaken and the decision was upheld, the building was then demolished. DCMS considers that in high profile cases there is an even greater risk that the release of internal communications between officials and ministers will lead them to be inhibited in the future. This will result in an adverse impact on the quality of the views and advice tendered and the decision making process would be weakened.
29. DCMS also considered the time elapsed since the original information request and concluded that the public interest still favoured maintaining the exemption. DCMS stated that the importance of having thinking space for officials and Ministers is not reduced by the passage of time.
30. The complainant's representative argues that the public interest favours disclosing the information. In support of this assertion he states that the decision to list a building should be based entirely on its architectural merit and that any advice given to Ministers from officials should be irrelevant in reaching a decision as it should be the expert's opinion that counts. Therefore, there is a public interest in seeing the information withheld if it relates to advice given to the Ministers as it would reveal what really happened in reaching the decision not to list the building.
31. In reaching his decision as to where the balance of the public interest lies, the Commissioner has considered the content of the information itself. The withheld information contains of:
 - a submission to the Minister of culture containing summaries of the submissions made to DCMS on the proposed listing of the building and the recommendations of DCMS on the proposed listing;
 - draft decision letters to the relevant parties;
 - a second submission to the Minister of Culture from DCMS; and
 - an email regarding the final decision.
32. The Commissioner recognises that much of the information contained within the withheld information is already in the possession of the complainant, notably the summaries of submissions made to DCMS contained within the first submission to the Minister of Culture dated 5 December 2005.

33. The Commissioner is still not convinced that disclosure of the requested information would inhibit the willingness of officials and third parties to debate issues fully and provide such advice as necessary in the circumstances. Should there be evidence of this, DCMS should take the necessary measures to ensure their staff continue to deliver the quality of advice that they are expected to do.
34. The decision not to list the Walter Bodmer building was controversial at the time and remains a decision over which there is much discussion. Despite the information already disclosed to the public there is clearly some concern as to how and why the decision was made not to list this building. The Commissioner considers that disclosure of this information would help inform the public of the factors put to the Minister for him to reach his decision and contribute to the wider public interest in promoting transparency of the advisory and deliberative process of DCMS in making decisions on listing applications.
35. The Commissioner has also considered the decision reached by the Information Tribunal in EA/2006/0043 *Lord Baker v Information Commissioner and the Department for Communities and Local Government*. This appeal related to the withholding of officials advice and opinions submitted to the Deputy Prime Minister to consider the granting of planning permission.
36. The Tribunal found that ‘full disclosure of deliberations underlying a decision on a complex matter is arguably more important than in the case of a simple one’. It continued to state that ‘the disclosure after the date when the Minister’s decision has been promulgated, of the advice and opinions of civil servants in question will not undermine to any significant extent the proper and effective performance by civil servants of their duties in the future’. In this case the decision not to list the building was made on 5 December 2005 and the request for information was made on 17 February 2006.
37. The Commissioner also notes that in considering whether to list a building the only factors which are relevant and which can be taken into account is whether the building possesses special architectural or historical interest. The complainant has argued that there is a public interest in ensuring that these were the only factors considered by viewing the submissions. The tribunal considered the content of the information in the case above and concluded that:
- “The advice may turn out to have been very bland in the extreme. It may be fully supportive of the decision ultimately taken. Or it may have strongly recommended that the inspector’s recommendation be adopted. We repeat that we believe that the strength of argument in favour of disclosure and against maintaining the exemption is that disclosure will enable the public to form a view on what actually happened and not on what it can otherwise only guess at.”*
38. Clearly, there is a strong public interest in allowing officials within a public authority the ability to communicate amongst themselves. Broadly, the purpose of the exception is to protect the right of officials to think in private. The Commissioner accepts that this can be a persuasive argument when considering

the public interest against disclosure in these cases and considers seriously any reasoned argument about withholding internal communications that reflects these concerns.

The Decision

39. The Commissioner has given very careful consideration to all the competing arguments as set out above and has weighed them against each other. Taking into account that there is a presumption in favour of disclosure at 12 (2), he is not satisfied that, in this instance, the public interest in maintaining the exception outweighs the public interest in disclosing the information
40. The Commissioner's decision in this matter is therefore that the public authority has not dealt with the complainant's request in accordance with the following requirements of Part 2 of the Regulations:
- Regulation 5(1)
 - in that it failed to make available the environmental information requested, to which the complainant was entitled in accordance with the regulations because it incorrectly concluded that public interest in maintaining the exception provided by regulation 12(4)(e) outweighed the public interest in disclosing the information.
 - Regulation 14
 - in that it refused the complainant access to the information but failed to explain the exception being relied upon under the EIR and the public interest matters considered.

Steps Required

41. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose the information withheld under regulation 12 (4) (e) of the Act, subject to redaction of the information withheld under regulation 13 (Personal Data).

Failure to comply

40. 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

41. 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@tribunals.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 19th day of November 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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

–

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and
“working day” has the same meaning as in section 10(6) of the Act.

Regulation 2(2) 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 to the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to 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.

Regulation 2(3) Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.

Regulation 2(4) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(b), namely –

- (a) “data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
- (b) “the data protection principles”;
- (c) “data subject”; and

(d) “personal data”.

Regulation 2(5) Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) 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.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) 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) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 12 (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably

capable of being separated from the other information for the purpose of making available that information.

Regulation 14 - Refusal to disclose information

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(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.

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.