

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

Decision Notice

15 March 2007

Public Authority: District of Easington Council
Address: Council Offices
Seaside Lane
Peterlee
County Durham
SR8 3TN

Summary

The complainant made a request to the public authority for a copy of a building survey commissioned by Thornley Community Centre Committee on Thornley Community Centre. The public authority withheld the survey citing section 41(1) of the Act; information provided in confidence. The Commissioner has decided that the public authority correctly withheld the building survey information but a coal mining report that was attached to the survey should be released under the Regulations. The Commissioner partly upholds the public authority's decision and partly upholds the complaint.

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").

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 Act are imported into the Regulations.

This Notice sets out his decision.

The Request

2. The complainant made his information request by e-mail on the 8 August 2005 for:

"...a copy of the report on the structural defects of Thornley Community Centre and what they are claiming is wrong with the building..."
3. The public authority responded stating that it was in the process of carrying out condition surveys of all centres with the public authority's ownership or control, but the report was not complete.
4. In an e-mail dated the 11 August 2005 the complainant clarified that his request was for the condition survey carried out and paid for by the Community Centre Committee (the Committee).
5. The public authority outlined that this condition survey was commissioned by the Committee for the Committee's benefit, not for the benefit of the public authority (the Community Centre's Trustees).
6. The complainant responded on the 12 August 2005 stating his request was a freedom of information request and outlining his arguments in favour of releasing the requested information.
7. On the 6 September 2005 the public authority confirmed that the information was held but that it was exempt under section 41(1), giving details of its appeals process.
8. The complainant appealed to the Information Commissioner's Office. However, as the complainant had not exhausted the public authority's internal appeals process the Commissioner asked the complainant to do so before he could make a decision.
9. The complainant wrote to the Commissioner again on the 9 September 2006 attaching a refusal notice withholding the requested information citing section 41(1) and the outcome of the internal review upholding this decision.

The Investigation

Scope of the case

10. On 9 September 2006 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 following points:
 - The public authority's application of section 41(1)

11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

12. The Commissioner initially received the complaint on 2 November 2005, however as the complainant had not exhausted the public authority's internal appeal process the Commissioner instructed the complainant to exhaust the public authority's internal process before he would accept the complaint.
13. Once the Commissioner received the complainant's resubmitted complaint on the 11 September 2006 a case worker began an investigation. The Commissioner wrote to the complainant on the 26 September 2006 outlining that he will be investigating the public authority's application of section 41(1) and the relationship between the Community Centre and the public authority.
14. Also on the 26 September 2006 the Commissioner wrote to the public authority outlining the complaint and asking the following questions in relation to section 41(1):
 - whether the duty of confidence was explicit or implicit and, if possible, to provide some evidence of this,
 - what were the circumstances in which the information was obtained by the public authority,
 - who provided the information and would they consent to its release
 - whether the information has the necessary 'quality of confidence' i.e. the information must be more than trivial,
 - why release of the information would give rise to an actionable breach of confidence, and
 - who would be able to bring this action, and
 - whether there is an overriding public interest in release of the information sought.
15. And the following questions in relation to the relationship between the Community Centre and the public authority:
 - Does the public authority own the Community Centre building?
 - What is the funding arrangement between the public authority and the Committee?
 - How is the Committee made up, for example, do councillors sit on the Committee?
 - Can the Committee take decisions without the public authority's approval?
 - What is the management structure of the Community Centre?
16. The public authority responded on 25 October 2006:
 - providing a letter from the Committee which explicitly stated that the survey should be confidential and listed people that should have access.

- It explained that the survey was provided to the public authority for information and has not been used in any decision making process as it has commissioned its own condition surveys as part of a wider look at provision of community buildings.
 - It stated that it approached the Committee to ask if the survey could be released however this was refused.
 - It explained that the issue is sensitive to local politics and would give rise to an action of breach of confidence
17. The response also outlined the relationship between the public authority and the Community Centre stating that it was owned by the Coal Industry Social Welfare Organisation, who have put the building into trust with the public authority and that there was no funding arrangement between the centre and the public authority. The public authority provided a copy of the Community Centre's constitution and explained that there are no district councillors on the Centre's Committee; that the Committee are responsible for the internal arrangements and the activities that take place in the Centre but the building remains the responsibility of the public authority.

Findings of fact

18. In addition to the building survey requested, there is a coal mining report that the public authority provided to the Commissioner as part of the information that has been requested and withheld.
19. The Commissioner has established that the condition survey was commissioned by the Committee for the benefit of the Committee and it has refused to consent to the survey's release.
20. The survey itself is a privately commissioned expert report which an expert has used his skill and judgement to produce, whereas the coal mining report attached to it is a document that any member of the public could have obtained, albeit for a fee.

Analysis

Exemption under section 41 of the Act

21. The public authority withheld the condition survey citing section 41(1) information provided in confidence. To invoke this exemption the information must firstly have been provided by a third party and secondly disclosure of the information could give rise to an actionable breach of confidence.
22. The Commissioner is satisfied that the information was supplied by a third party; in this case the Committee. The Commissioner agrees that the Committee is a separate entity as the Committee is responsible for the running and management of the Community Centre. The Commissioner also agrees that in providing the

condition survey to the public authority the Committee created an obligation of confidence through explicitly stating that the survey should be held in confidence.

23. For disclosure to give rise to an actionable breach of confidence the information must have the necessary quality of confidence. The Commissioner is satisfied that although the content might at first appear to be trivial information about the condition of a building the condition survey is a privately commissioned expert report for a specific purpose. If the report was written by a member of the public and consisted of a physical description of the property, describing only what any other person could observe then clearly there would be nothing confidential.
24. However, in this case, the report is prepared by an expert on instruction from a private organisation and goes beyond a mere description that anyone can give. The report includes comment and recommendations that are based upon the skill and judgement of the expert. That expert has exercised his skill and judgement to address the instructions of this particular client and for the benefit of this client only. Therefore, his recommendations and comments are confidential to this client.
25. The Commissioner is satisfied that the exemption would apply to this information as the Committee is a third party, the condition survey was provided in confidence and the information has the necessary quality of confidence to give rise to an action for breach of confidence by the Committee.
26. Whilst the exemption conferred by section 41 is absolute, the public interest must be a consideration when analysing the obligation of confidence. For the duty of confidence to be overturned there must be a stronger countervailing public interest that favours disclosure of the information. This principle was examined by the Information Tribunal in case EA/2006/0014, paragraph 35 and the Commissioner has taken this into account in reaching his decision.
27. In the circumstances of this case, there does not appear to be any overwhelming public interest in releasing the information. It is information obtained from a private source and has not been used by the public authority in any decision making process. The Commissioner has found no evidence to suggest that there is a strong public interest in disclosing the information and therefore overturning the duty of confidence and concluded that the information is incidentally held by the public authority.

The Regulations

28. The Commissioner is of the opinion that the coal mining report attached to the building survey requested should be classed as environmental information and that this part of the request should therefore have been responded to under the Regulations. It is noted that such a report can be obtained by any member of the public upon payment of a fee. As there is no exception within the Regulations that relates to information that is reasonably accessible to the applicant, there does not appear to be any exception under the Regulations that would apply to this information.

The Decision

29. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:

- The application of section 41 to the building survey.

However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Regulations:

- The coal mining report has not been disclosed yet no exception applies. This means that the public authority has breached regulation 5(1).

Steps Required

30. The Commissioner requires the public authority to take the following steps to ensure compliance with the Regulations:

- Disclose the coal mining report.

31. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

32. 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 15th day of March 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex:

Freedom of Information Act 2000

Section 41(1) provides that –
“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Environmental Information Regulations 2004

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.