

Freedom of Information Act 2000 (Section 50)

Environmental Information Regulations 2004

Decision Notice

8 October 2008

Public Authority: Wesley Housing Association Ltd.
Address: 2 Wesley Court
Carrickfergus
Co. Antrim
BT38 8HS

Summary

The complainant made a request to Wesley Housing Association (“Wesley”) under the Environmental Information Regulations 2004 (“EIR”) for access to all documents held and produced by Wesley in relation to the development of sites at Crumlin Road Methodist Church and 237-247 Tennent Street. Wesley did not provide the information as it stated that Housing Associations were not public authorities for the purposes of the EIR. The Commissioner finds that Wesley is a public authority within the meaning of Regulation 2(2)(c) and 2(2)(d)(i) of the EIR. This Decision Notice requires Wesley to either provide the complainant with the requested information or to issue a formal refusal notice, stating which exceptions (if any) under the EIR it believes to be applicable.

The Commissioner’s Role

1. 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 IV of the Freedom of Information Act 2000 (“the Act”) are imported into the EIR.

The Request

2. The Commissioner has received a complaint which states that on 31 May 2006 the following request for information was made to Wesley :-

"I would request, under the provisions of the Environmental Information Regulations 2004, access to all documents held and produced by Wesley Housing Association in relation to the development of the above sites".
("the requested information").

3. Wesley is a housing association which is registered by the Department of Social Development for Northern Ireland ("DSD") in a public register of housing associations. By registering, a housing association becomes eligible to receive a Housing Association Grant ("HAG") from public funds, however it also places itself within the regulatory regime of DSD.
4. One of the functions of Wesley and other registered housing associations is to provide social housing, i.e. affordable housing for rent for those in housing need. This function can include providing, constructing, improving or managing that social housing accommodation.
5. DSD is a NI government department and provided, up until the implementation of the Housing (Northern Ireland) (Amendment) Order 2006 ("the 2006 Order") HAGs to registered housing associations. These contribute about 70% toward the capital cost of developing general-purpose housing for rent and a higher percentage of the cost of developing accommodation for those in need of specialist accommodation, for instance the elderly and disabled.
6. On 15 June 2006 Wesley corresponded with the complainant to inform him that it had been advised by the DSD that registered housing associations were not public authorities within the meaning of regulation 2(2) of the EIR and that therefore information requests made to Wesley under the EIR were not valid. The complainant requested confirmation of that advice and its basis from DSD, which replied that, whilst it had advised that registered housing associations were not covered by the Freedom of Information Act 2000, it was not at that time in a position to advise whether they were public authorities within the meaning of regulation 2(2) of the EIR.
7. On 21 August 2006 DSD stated to the complainant that it was seeking legal advice on the issue and, dependent of the available legal advice, its views might change on the issue of coverage. DSD undertook to contact the complainant.
8. On 20 October 2006 DSD wrote to the complainant confirming that, on the basis of the legal advice which it had now received, it did not consider that Wesley was a public authority within the meaning of regulation 2(2) of the EIR.

The Investigation

Scope of the case

9. On 31 January 2007 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 Wesley's assertion that at the time of the request it was not a public authority for the purposes of regulation 2(2) of the EIR.

10. The Commissioner contacted Wesley who, following discussions with the Commissioner, offered to provide the requested information on a "without prejudice" basis. It was made clear by Wesley that, whilst it still did not consider itself to be a public authority within the meaning of regulation 2(2) of the EIR, it was prepared to release the requested information to the complainant in order to settle the issue. However, the complainant was not prepared to withdraw his complaint to the Commissioner as he felt that this was a highly significant issue which needed to be resolved as it was likely to recur in the future. The complainant asked the Commissioner to proceed to make a decision on his application under section 50 of the Act.

Chronology of the case

11. **31 January 2007.** The complainant submitted his complaint to the Commissioner, who wrote to him on 3 March 2007 acknowledging receipt of his complaint and informing him that his case was to be allocated to a case officer. The Commissioner also wrote to Wesley informing it of the complaint.
12. **18 June 2007.** The complaint was allocated to a caseworker after the Commissioner had initially assessed whether Wesley was a public authority within the meaning of Regulation 2(2) of the EIR. The Commissioner wrote to Wesley informing it of his assessment that Wesley was a public authority within the meaning of Regulation 2(2) of the EIR and requesting that Wesley provide a specific argument and any other information which would support its view that registered housing associations are not public authorities within the meaning of Regulation 2(2) of the EIR.
13. **26 June 2007.** Wesley wrote to the Commissioner indicating that it needed to seek further legal advice on the matter. The Commissioner replied on 1 July 2007 asking Wesley to respond by 18 July 2007. Wesley responded on 7 August 2007 stating that it had sought further advice from DSD, who had confirmed its position that registered housing associations were not public authorities within the meaning of Regulation 2(2) of the EIR.
14. **21 August 2007.** The Commissioner wrote to Wesley with further queries arising out of Wesley's letter of 7 August 2007. These related to the functions of registered housing associations and their relationship with the DSD. The Chief Executive of the Northern Ireland Federation of Housing Associations (NIFHA) subsequently contacted the Commissioner in order to discuss resolving the matter informally based on the premise that information would be provided to the complainant on the understanding that this would not set any precedent in relation to registered housing associations' coverage under the EIR. The Commissioner telephoned the complainant on 14 September 2007 to discuss the proposed informal resolution of the matter. The complainant stated that he would discuss the matter with other members of Tudor Renewal Area Residents' Association ("TRARA"). Following these discussions, the complainant wrote to

the Commissioner on 17 September 2007 to confirm that he would not withdraw his complaint.

15. **24 October 2007.** Wesley provided a substantive response to the Commissioner's letter of 21 August 2007 setting out its position and arguments as to why it is not a public authority for the purposes of regulation 2(2) of the EIR. The Commissioner informed the complainant by telephone that this response had been received.
16. Wesley informed the Commissioner in its response that, despite extensive regulation by DSD, registered housing associations remain independent voluntary organisations retaining independent status and management.
17. Wesley responded that DSD exercises no influence regarding the strategic direction, business planning, treasury management, budget setting and control and day-to-day management of a registered housing association. DSD's role relates to scrutiny of these housing associations through an inspection regime to ensure that the public funding has been applied for and used in accordance with the guidelines set by DSD. The Commissioner was advised that this is monitored by DSD through the annual submission to it by each registered housing association of its accounts.

Analysis and Conclusions

18. The Commissioner must decide, in this case, whether Wesley was a public authority within the meaning of regulation 2(2) of the EIR.

Registered Housing Associations

19. A Housing Association¹ is a society, body of trustees or company:
 - established for the purpose of providing; constructing; improving or managing; facilitating and encouraging the construction or improvement of housing accommodation;and which
 - does not trade for profit and their constitution and rules prohibit the issue of capital with interest or dividend exceeding rates prescribed by the Department of Finance and Personnel, with or without differentiation between share and loan capital.

A registered housing association is a housing association which is registered under DSD's public register of housing associations.

¹ Housing (Northern Ireland) Order 1992 Article 3(a) and (b) ("the 1992 Order")

Wesley

20. Wesley is a registered housing association. It is a society dedicated to the provision of a range of sheltered housing and residential care services. Its key role is to develop and manage housing developments and provide support services for the elderly, vulnerable and those with special needs. At the time of the request Wesley had accommodation in 4 locations throughout Northern Ireland.

Is Wesley a public authority within the meaning of Regulation 2(2) of the EIR?

21. Regulation 2(2) of the EIR provides that:-

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

- a. government departments;*
 - b. any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 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;*
 - 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”.*
22. The Commissioner has considered whether or not Wesley falls within any of the categories of “public authority” listed in paragraphs (a) to (d) of regulation 2(2) of the EIR. The Commissioner notes that Wesley is neither a government department nor a public authority for the purposes of section 3(1) of the Freedom of Information Act 2000 (“the Act”). Wesley is neither listed by name nor falls within a category of public authority listed in Schedule 1 of the Act. The Commissioner also notes that Wesley has not been designated as a public authority by Order under sections 4 or 5 of the Act.
23. The Commissioner has considered whether Wesley carries out functions of public administration as per Regulation 2(2)(c) of the EIR. Public administration can be defined in various ways. However, the definition the Commissioner has considered in this case is “the development, implementation and study of government policy. Public administration is linked to pursuing the public good by enhancing civil society and social justice”². The Commissioner notes in particular the factors which would suggest that a function was public in several decisions on determining whether

² Farlex Online Legal Dictionary

housing associations were a public authority for the purposes of the Human Rights Act 1998.^{3 4}

24. The Commissioner notes in particular the roles of Wesley to build affordable accommodation for all needs groups where such need has been identified and supported by the Northern Ireland Housing Executive; and the allocation of such accommodation in line with the Common Selection scheme or any other scheme as approved by the Department for Social Development⁵. The Commissioner considers these to be functions of public administration and that Wesley is a public authority for the purposes of regulation 2(2)(c).
25. The Commissioner has also considered firstly whether Wesley is “under the control of a person falling within sub-paragraphs (a) (b) or (c)”. “Control” can be defined in several ways, however the legal definition the Commissioner has considered in this case is “the power to direct, manage, oversee and/or restrict the affairs, business or assets of a person or entity”.⁶
26. The body which oversees registered housing associations such as Wesley in Northern Ireland is DSD. DSD is responsible for the funding, monitoring, regulation and issue of guidance and policy directives to registered housing associations and has a statutory duty to consult with representatives of those associations. The Commissioner considers that DSD falls within sub-paragraph (a) of Regulation 2(2) as it is a government department.
27. Wesley is a registered housing association, meaning that it is registered by DSD. The Commissioner, during the course of his investigation, carefully examined the 1992 Order, which sets out the statutory relationship between DSD and registered housing associations. Article 4(1)(c) of the 1992 Order provides that DSD may:-

“establish and maintain a register of housing associations, exercise supervision and control over registered housing associations, and consider applications for and make payments of grants to registered housing associations”.
28. The Commissioner asked Wesley to consider the effect of this provision. Wesley informed the Commissioner that the Housing (Northern Ireland) Order 2006 (“the 2006 Order”) amended Article 4 of the 1992 Order in April 2007. This enabled the Northern Ireland Housing Executive (NIHE), rather than DSD, to pay grants to registered housing associations. The Commissioner notes that the 2006 Order does not amend the first part of the above Article and therefore DSD continues to have the ability to exercise supervision and control over registered housing associations. The Commissioner notes that the 2006 Order was not in force at the time of the complainant’s request, therefore its provisions are not relevant.
29. Wesley further informed the Commissioner that registered housing associations such as Wesley are subject to DSD regulation and must formally account to the

³ Poplar Housing and Regeneration Community Association Ltd v Donaghue [2002] QB 48, [2001] 4 All EIR 604 (CA)

⁴ R (Heather and others) v Leonard Cheshire Foundation [2002] EWCA Civ 366

⁵ Wesley Housing Association Statutory Equality Scheme

⁶ Farlex Online Legal Dictionary

DSD for their use of housing association grants, give the DSD access to all information relevant to that use, and complete an annual return. Articles 21(1)(a) and (b) of the 1992 Order, provide as follows:-

“a registered housing association shall produce to a person authorised in that behalf by the Department such books, accounts and other documents relating to the association’s business as may be specified by the Department; and

“any officer, employee or member of the committee of the registered housing association shall provide an explanation of any such books, accounts and other documents”.

This provision has not been amended by the 2006 Order.

30. Wesley further stated to the Commissioner that, unlike government and public bodies, it submits annual accounts to the Industrial and Provident Registrar and adheres to standards of best practice governance and risk management strategies which would not apply in a public organisation. Nevertheless, the Commissioner notes that Wesley must complete an annual return to DSD, thereby formally accounting to DSD for the use of public funds.
31. The Commissioner is mindful that DSD has power to intervene if, after investigation, it believes that misconduct or mismanagement has occurred in a registered housing association.
32. The Commissioner notes that registered housing associations remain independent voluntary organisations with their own status and management regarding budgetary matters, business planning, strategic direction and day-to-day management. However, the Commissioner is not satisfied that this in itself means that registered housing associations are not “under the control” of the DSD.
33. The Commissioner takes the definition of control to be as stated earlier in this Decision Notice, i.e. “the power to direct, manage, oversee and/or restrict the affairs, business or assets of a person or entity”. Wesley has informed the Commissioner that it and other registered housing associations are subject to extensive regulation by DSD. This is evidenced by the fact that they must account annually to DSD for their use of public funds as per Article 21(a) and (b) of the 1992 Order. It is further evidenced by DSD’s considerable powers of intervention in a situation of alleged misconduct or mismanagement in a registered housing association. The Commissioner is mindful of the fact that the DSD, in Article 4(1)(c) of the 1992 Order, has been granted the statutory power to exercise “supervision and control” over registered housing associations.
34. The Commissioner considers that Wesley is “under the control” of the DSD within the meaning of control, as DSD retains power to oversee its affairs by extensively regulating it and perusing its annual accounts. The Commissioner is satisfied that Wesley is under the control of a person falling within Regulation 2(2) sub-paragraph (a) as DSD is a government department.

Does Wesley have public responsibilities, exercise functions of a public nature, or provide public services, relating to the environment?

35. Wesley provides affordable housing and support services to the public. The Commissioner considers that Wesley has public responsibilities in that it undertakes to provide housing and support services to the public.
36. The Commissioner considers that Wesley's public responsibilities, i.e. the provision, construction, improvement or management of social housing, relate to the environment, as relate can be defined as "having a connection to". The construction of new social housing, and changes and improvements made to existing housing structures can have significant effects on energy use; energy is a factor listed in 2(1)(b) of the Regulations and reducing energy use in housing can have a positive effect in reducing carbon dioxide emissions and therefore the state of the air and atmosphere.
37. The Commissioner notes that HAG funding is conditional, and that certain conditions reflect strong environmental considerations. The environmental standards, as set out in DSD's Design Requirements for Housing Associations, Part 3, detail under the Energy, Sustainability and Services heading specific environmental requirements for all social housing schemes that receive HAG or utilise Disposal Proceeds Funds. In particular all housing association 'newbuild' schemes must meet a specified EcoHomes rating level. Wesley has to ensure the EcoHomes criteria are met as part of its core work in constructing buildings for accommodation. Wesley therefore has specific public responsibilities relating to the environment, linked to its wider public responsibilities.
38. The Commissioner is also therefore satisfied that Wesley is a "public authority" by virtue of falling under Regulation 2(2)(d)(i) as it is under the control of a government department and has public responsibilities relating to the environment.

Is the requested information caught by the EIR?

39. Regulation 2(1) of the EIR defines "environmental information" as follows:
" "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 life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”
40. The Commissioner is satisfied that information relating to housing developments being built in any area is environmental information within the definition in regulation 2(1)(c). Social housing policies and plans to construct a housing development are measures likely to affect elements of the environment. These include the land and landscape and construction of a housing development which necessarily brings with it noise and potentially release of emissions and chemicals into its surrounding environment, therefore affecting the air, water and soil.
41. The Commissioner has not had sight of the requested information but is satisfied from the complainant’s request that it covers information that falls within the definition and is therefore covered by the EIR. Wesley should identify which information falls within the definition and consider which might not.

Procedural matters

42. Regulation 5(1) of the EIR provides that:-

“Subject to paragraph (3) and in accordance with paragraphs (2) (4) (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request”.

43. Regulation 6(2) of the EIR provides that:-

“If the information is not made available in the form or format requested, the public authority shall-

- (a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;*
- (b) provide the explanation in writing if the applicant so requests; and*
- (c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18”.*

44. The Commissioner has considered whether Wesley was a public authority within the meaning of Regulation 2(2) of the EIR. The Commissioner concluded that it is and that the requested information is environmental information within the meaning of Regulations 2(1)(c) of the EIR. The Commissioner is therefore satisfied that Wesley, by not providing the complainant with either the requested information or an explanation as to the reason for its decision not to provide same, is in breach of regulations 5(1) and 6(2) of the EIR.

The Decision

45. The Commissioner's decision is that Wesley is a public authority for the purposes of regulation 2(2)(c) and 2(2)(d)(i) of the EIR and that it did not deal with the complainant's request in accordance with the EIR.

Steps Required

46. The Commissioner requires Wesley to take the following action to ensure compliance with the Act:-
- Provide the complainant with the requested information that falls within the definition of environmental information in the Regulations or a formal refusal notice in accordance with the provisions of the EIR.

Wesley must take the action required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

47. Failure to comply with the action 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

48. 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 8th day of October 2008

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex: Relevant statutory obligations

The Environmental Information Regulations 2004

PART 1

Interpretation

1. Regulation 2(1) provides that:

In these Regulations -

"the Act" means the Freedom of Information Act 2000[3];

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

"appropriate records 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[4] 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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

2. Regulation 2(2) provides that:

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

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 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.

3. Regulation 5(1) provides that:

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

4. Regulation 6(2) provides that:

“If the information is not made available in the form or format requested, the public authority shall-

- (a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;*
- (b) provide the explanation in writing if the applicant so requests; and*
- (c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18”.*