

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

Date: 23rd October 2008

Public Authority: The Department for Business, Enterprise and Regulatory Reform
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant requested a copy of a draft purchase order relating to the compulsory purchase of his father's land. The public authority wrote to the complainant requesting further information in order to determine if the information was held. Following receipt of this further information from the complainant the public authority wrote to the complainant confirming that the information requested was not held. The Commissioner has investigated and has determined that the requested information if held, would be environmental information and therefore the request should have been dealt with under the Environmental Information Regulations. The Commissioner found that in accordance with regulation 3, the requested information is not held. However, the Commissioner found that BERR breached the requirements of regulation 10(1), 14(1), (2), (3) and (5) and 9(2).

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 (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. This Notice sets out his decision

The Request

2. The Commissioner notes that the time of the request the public authority was the Department for Trade and Industry (DTI) now known as the Department for Business, Enterprise and Regulatory Reform (BERR). As such this decision notice will reference BERR as the public authority.
3. The complainant made a request for information to BERR on 19 May 2006 for the following information:

"I do require copies of the draft order to purchase 'Stone House Farm', Lilbourne... and the 'Lilbourne Charities Land', at Lilbourne....

I have been advised that in addition to the 'Draft Order' there may be copies of board minutes and copies of the correspondence which passes between the GPO and my grandfather, copies of these documents I also request from you."

4. On 2 June 2006 the complainant received a letter from the Department for Communities and Local Government (DCLG) thanking him for his letter of 19 May 2006 and stating that it did not have responsibility for the issues raised in the letter but that his letter had been forwarded to BERR.

The Investigation

Scope of the case

5. On 22 April 2007 the complainant contacted the Commissioner to complain about the lack of a response to his information request.

Chronology

6. The Commissioner wrote to BERR on 2 June 2007 asking BERR if it had responded to the complainant's request and if not, to now do so within 20 working days. The Commissioner also wrote to the complainant informing him that he had written to BERR asking them to respond to his information request.
7. The complainant responded on 3 August 2007 informing the Commissioner that no response had been received.
8. On 13 August 2007 the Commissioner wrote to BERR again asking it to respond to the complainant's information request of 19 May 2006. The Commissioner also wrote to the complainant on the same day informing him of this action.

9. The complainant responded on 29 August 2007 informing the Commissioner that he had still not received a response from BERR to his information request.
10. The Commissioner wrote again on 19 September 2007 to BERR informing it that he had received a complaint and deemed it eligible for consideration under the Act.
11. On 17 October 2007 BERR wrote to the complainant apologising for the lack of response to his information request of 19 May 2006. BERR stated that it required more detailed information in order to conduct a search to see if it holds the information requested for example, where were the draft orders to purchase made; for what and when. BERR also suggested that the complainant contact the National Archives or the British Postal Museum and Archive who might be able to assist in locating the information requested.
12. The Commissioner wrote to BERR on 3 March 2008. The Commissioner asked BERR to explain why the requested information had been transferred to DCLG and why it had failed to reply to the request until October 2007. The Commissioner also asked why BERR had not responded to his earlier letters, to clarify under which legislation the request was being refused and why the letter of 17 October 2007 made no reference to the EIR. Finally the Commissioner asked BERR to consider, due to the length of time elapsed since the request, adopting a more proactive approach in assisting the complainant.
13. BERR responded on 11 April 2008. It explained that it understood that the letter was transferred to DCLG as it believed they were the most appropriate department for dealing with requests on Draft Orders relating to land purchases. It stated that there was nothing within the wording of the request that indicated it would hold the information. BERR also stated that the letter of 17 October 2007 was not a refusal notice but was a letter asking the complainant to clarify his request so that it could identify whether it holds the information requested. BERR stated that it had received no response from the complainant to this letter. BERR also stated that it had not responded to the request until 17 months later as it believed that DCLG were responding.
14. The Commissioner telephoned the complainant on 15 April 2008. The Commissioner explained that BERR required further information in order to locate the information sought as the complainant appeared not to have received a copy of 17 October 2007 letter. The complainant explained that he had also approached British Telecom (BT) and Savills (a company which manages BT's property portfolio) to try and obtain the information. The complainant explained that he had been unsuccessful and asked if the Commissioner could approach BT and Savills on his behalf. The Commissioner explained that as these two firms are not listed as public authorities for the purpose of the Act and do not fall within the definition of a public authority in regulation 2 of the EIR, he has no powers to investigate their responses.
15. The Commissioner wrote to BERR on 16 April 2008. The Commissioner asked BERR to explain why, with the background information provided by the

complainant which clearly referred to the General Post Office (GPO) it had considered DCLG were the appropriate public authority.

16. The Commissioner telephoned the complainant on 20 May 2008 asking him if he had responded to BERR's letter of 17 October 2007. The complainant stated he was unsure but reiterated his desire that the Commissioner obtain the information for him from BT and Savills. The Commissioner again explained that he was unable to do so as they are not covered by the Act.
17. On 25 May 2008 the complainant wrote to BERR providing it with more detailed information in order to assist it in locating the information sought.
18. BERR wrote to the complainant on 16 June 2008 explaining that following a search of its paper and electronic records it had established that the information is not held. BERR also suggested to the complainant other agencies which may be able to assist. BERR also wrote to the Commissioner explaining its position in more detail.

Findings of Fact

19. The complainant's late grandfather's farm was compulsorily purchased by Her Majesty's Post Master General for the purpose of constructing a new radio transmitting station. The complainant is seeking a copy of the draft order to purchase and any other correspondence held.

Analysis

Procedural matters

20. BERR dealt with the request for information under the Freedom of Information Act and accordingly asked the complainant for further information under section 1(3) (a) in order to identify and locate the information request. Once this information was received by the complainant BERR responded in accordance with the requirements of section 1(1) (a) and informed the complainant the information is not held. The Commissioner has viewed the request for information and has found that the information sought is Environmental Information as defined by the Environmental Information Regulations (EIR).
21. 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 draft purchase order 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 draft purchase order was in relation to the purchase of land for the construction of a Radio Transmitting Station.

Regulation 10 'Transfer of a request'

22. The complainant made his request for information to BERR on 19 May 2006. On 2 June 2006 the complainant received a letter from DCLG stating that his request had been received by it but had been transferred to BERR as the public authority which was likely to hold the information requested.
23. Regulation 10(1) states that where a public authority that receives a request for environmental information does not hold the information but believes that another public authority holds the information, the public authority shall either (a) transfer the request; or (b) supply the applicant with the name and address of that authority, and inform the applicant accordingly with a refusal notice sent under Regulation 14. Regulation 14 states that if a request is being refused under regulations 12(1) the refusal shall be made in writing and (2) be made as soon as possible no later than 20 working days after the date of receipt of the request. Regulation 14(3) states the refusal shall specify the reasons not to disclose the information requested including (a) the exception relied on under Regulation 12(4), 12(5) or 13; and (b) the matter the public authority considered in reaching its decision with request to the public interest. The relevant exception is 12(4) (a).
24. BERR transferred the request to DCLG; however this transfer was done in error as DCLG subsequently transferred the request back to BERR. BERR did not inform the complainant of the transfer and issue a notice under Regulation 14, and have offered no explanation to the complainant or the Commissioner as to why the request was transferred.
25. By failing to inform the applicant that the request was transferred the Commissioner finds that BERR breached the requirements of Regulations 10(1) and 14(1), (2) and (3). The Commissioner also notes that BERR breached 14(5) by failing to inform the applicant of his right to appeal against the decision.

Regulation 9 'Advice and Assistance'

26. Regulation 9(1) states that a public authority shall provide advice and assistance so far as it would be reasonable to expect a public authority to do so to applicants and prospective applicants. Regulation 9(2) states that where a public authority decides that an applicant has formulated a request in too general a manner, it shall (a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of the receipt of the request, to provide more particulars in relation to the request; and (b) assist the applicant in providing those particulars.
27. The request was transferred back from DCLG to BERR on 2 June 2006. Despite letters from the Commissioner to BERR on 2 July 2007, 13 August 2007 and 19 September 2007 BERR did not write to the complainant to request more information in order to determine if the information was held until 17 October 2007.

28. The Commissioner finds that by failing to ask the complainant for further information in order to determine if the information was held until 17 October 2007 BERR breached the requirements of Regulation 9(2). The Commissioner also finds that in providing advice and assistance to the complainant on 17 October 2007 BERR acted in accordance with the provisions in Regulation 9(1) (a). The Commissioner wishes to register his concern at the amount of time it took BERR to provide this advice and assistance.

Regulation 3 'Application'

29. Regulation 3(2) states that environmental information is held by a public authority if the information (a) is in the authority's possession and has been produced or received by the authority; or (b) is held by another person on behalf of the authority.
30. BERR explained that in April 1974 the Ministry of Post and Telecommunications dissolved responsibility for the Post Office Corporation and transferred it to the Secretary of State for Industry. Responsibility for broadcasting policy and radio regulation was allocated to the Home Secretary. The complainant has clarified with BERR that the Compulsory Purchase Order in relation to his request was made for the purpose of constructing a new radio transmitting station in 1950. BERR state that any information relating to radio regulation would have been the remit of the Home Office.
31. BERR went onto explain that although the Radio Regulatory division transferred from the Home Office to BERR (then DTI) in 1983, the records the complainant is seeking would have been 33 years old and in all likelihood these would have been transferred to the Public Records Office (now the National Archives) before the Radio Regulatory Division transferred to the Home Office.
32. BERR stated that the BERR agency which dealt with matters relating to radio regulations was the Radio Communications Agency. Agency records are not kept centrally by the parent department and would have been kept by the Radio Communications Agency and as a result of the Office of Communications Act (2002) these records would have been transferred to Ofcom. At this stage the information sought would have been over 50 years old and the likelihood of the information surviving the transfer is slim. BERR state that any information which did survive the transfer would now be stored at the National Archives.
33. In its letter to the complainant of 17 October 2007 BERR explained to the complainant that this information was likely to be held by the National Archives and suggested he contact them. BERR also explained that in order to provide further assistance it had contacted Ofcom who confirmed after a search of their archives that they do not hold the information. BERR further stated that the Radio Communications Agency archive also does not hold any files on the station, or any related material from 1950. BERR stated that the Radio Communications Agency had suggested one further avenue to explore and informed the complainant that Ofcom had advised that some information may be held by BT Archive.

34. In addition to this BERR informed the Commissioner that it has carried out additional research and established that the National Archives has a POST class which covers 122 different aspects of Post Offices. These are records created and used by the Royal Mail and its predecessors. Of this class, a search for the period 1948 – 1950 returned 18 files which were formally BERR's. BERR supplied the Commissioner with a copy of a spreadsheet of the files, none of which contain the information requested. Given this, the Commissioner does not consider that there is any practical benefit in BERR transferring the request to the National Archives.
35. The complainant has asked the Commissioner to contact Savills and BT to 'demand the copy of the draft order to purchase' be supplied. The Commissioner notes that neither BT nor Savills are public authorities for the purpose of the EIR. However, Regulation 3(2)(b) states that environmental information is held by a public authority if the information is held by another person on behalf of the authority.
36. The complainant has advised that he has visited BT Archive who have searched and found that no information was found relating to the purchase of the land in question. He then stated that he had also contacted Land Registry whose information leads back to Savills as legal custodians of BT's property.
37. The Commissioner considers that from the information supplied there is no indication that any information which is held by BT, BT Archive or Savills was or is information held on behalf of the public authority. BERR have explained that any information they may have held would either have been transferred to the National Archives or Ofcom both of whom it has contacted to try and assist the complainant and both of whom have confirmed that no information is held. BERR have not contacted Savills as it is not aware that any information they may hold is on their behalf.
38. In reaching his decision on whether the requested information is held the Commissioner has followed the approach as set out by the Information Tribunal in *Linda Bromley & others v the ICO and the Environment Agency (EA/2006/072)*. The Commissioner has considered the scope, quality, thoroughness and results of the searches carried out by BERR as well as considering, where appropriate, any other reasons offered by BERR to explain why the information is not held. Having considered the evidence supplied by BERR in relation to the considerations set out above the Commissioner is satisfied that on the balance of probabilities the requested information is not held.
39. The Commissioner is therefore satisfied that in accordance with Regulation 3 the information requested is not held by BERR.

The Decision

39. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Regulations:

(i) By informing the complainant that the information is not held in accordance with Regulation 3(2) the public authority complied with the requirements of Regulation 14(1).

40. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Regulations:

(i) By failing to inform the complainant that the information was not held and the request was being transferred to an other department the public authority breached the requirements of Regulation 10(1) and 14(1), (2) and (3).

(ii) By failing to advise the complaint of his right to appeal BERR breached the requirements of Regulation 14(5).

(ii) By failing to provide the complainant with advice and assistance within 20 working days of receipt of the request the public authority breached the requirements of Regulation 9(2).

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

43. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 23rd day of October 2008

Signed

**Steve Wood
Assistant 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 3 - Application

Regulation 3(1) Subject to paragraph (3) and (4), these Regulations apply to public authorities.

Regulation 3(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

- (a) is in the authority’s possession and has been produced or received by the authority; or
- (b) is held by another person on behalf of the authority.

Regulation 3(3) These regulations shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity.

Regulation 3(4) These regulations shall not apply to either House of Parliament to the extent required for the purpose of avoiding an infringement of the privileges of either House.

Regulation 3(5) Each government department is to be treated as a person separate from any other government department for the purposes of Parts 2, 4 and 5 of the Regulations.

Regulation 9 - Advice and assistance

Regulation 9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Regulation 9(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –

- (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
- (b) assist the applicant in providing those particulars.

Regulation 9(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

Regulation 9(4) Where paragraph (2) applies, in respect of the provisions in paragraph (5), the date on which the further particulars are received by the public authority shall be treated as the date after which the period of 20 working days referred to in those provisions shall be calculated.

Regulation 9(5) The provisions referred to in paragraph (4) are –

- (a) regulation 5(2);
- (b) regulation 6(2)(a); and
- (c) regulation 14(2).

Regulation 10 - Transfer of a request

Regulation 10(1) Where a public authority that receives a request for environmental information does not hold the information requested but believes that another public authority or a Scottish public authority holds the information, the public authority shall either –

- (a) transfer the request to the other public authority or Scottish public authority; or
- (b) supply the applicant with the name and address of that authority, and inform the applicant accordingly with the refusal sent under regulation 14(1).

Regulation 10(2) Where a request is transferred to a public authority, for the purpose of provisions referred to in paragraph (3) the request is received by that public authority on the date on which it receives the transferred request.

Regulation 10(3) The provisions referred to in paragraph (2) are –

- (a) regulation 5(2);
- (b) regulation 6(2)(a); and
- (c) regulation 14(2).

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.