

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

Decision Notice

Date: 2 February 2010

Public Authority: The Planning Service (an executive agency of the Department of the Environment for Northern Ireland)

Address: Room 6-20 Clarence Court
10-18 Adelaide Street
Belfast
BT2 8GB

Summary

The complainant made a verbal request to inspect information held by the Planning Service on Planning Application file T199/0394. The Planning Service permitted the complainant to view the file but withheld some of the information contained within it on the basis that the exception in Regulation 12(5)(b) applied.

The Commissioner has decided that the Planning Service failed to explain or demonstrate why the exception in Regulation 12(5)(b) applied to the withheld information in this case. It therefore breached Regulations 5(1) and (2) in failing to make that information available to the complainant within twenty working days of the request. He has therefore ordered the Planning Service to make the withheld information available for inspection by the complainant.

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 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. The Commissioner notes that under the EIR the Planning Service is not a public authority itself, but is actually an executive agency of the Department of the

Environment for Northern Ireland (“DOE(NI)”) which is responsible for the Planning Service. Therefore, the public authority in this case is properly the DOE(NI) not the Planning Service. However in this Decision Notice the public authority shall be referred to as ‘the Planning Service.’

3. The Commissioner understands that on 27 April 2006 the complainant made a verbal request to the Planning Service to inspect the planning file for Planning Application (Reference: T/1999/0394).
4. The request was as acknowledged by the Planning Service on 27 April 2006.
5. On 26 May 2006 the Planning Service wrote to the complainant stating that it would permit the complainant to inspect the planning file. The letter also stated that some of the information in the file was being withheld under Regulation 12(5)(b) of the EIR as the release of that information would, in the opinion of the Planning Service, adversely affect the course of justice. The complainant inspected the file on 30 May 2006.
6. The complainant was not satisfied with the limited inspection. On 28 November 2006 the complainant wrote to the Planning Service requesting an internal review of its decision not to allow a full inspection of the file.
7. The Planning Service sent its substantive reply to the complainant on 27 March 2007, confirming that the reviewer believed the original decision to withhold certain information in the file to be correct. The reply also stated that the reviewer considered that the Planning Service was correct in considering the request under the terms of the EIR, as the information in question was environmental in nature. This was not disputed by the complainant.

The Investigation

Scope of the case

8. On 24 April 2007 the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant asked the Commissioner to consider whether the Planning Service had correctly relied upon Regulation 12(5)(b) as a basis for refusing the withheld information. The complainant also suggested that the original request had not received appropriate consideration and pointed to information that it appeared to believe was within the scope of the original request but which had not been provided by the public authority. The Commissioner has considered both of these issues and set out his conclusions below.
9. For the avoidance of any doubt, the Commissioner’s investigation was limited to considering information that the public authority withheld from the complainant which was within the scope of the request.

Chronology

10. On 18 September 2007, that case officer wrote to the Planning Service requesting a copy of the withheld information.
11. On 29 November 2007 the Planning Service responded to the Commissioner enclosing a copy of the withheld information.
12. On 7 December 2007 the complainant wrote to the Commissioner, making further submissions as to why the withheld information should be released.
13. On 11 December 2007, having reviewed the requested information and carefully considered all the arguments submitted by both parties, the Commissioner wrote to the Planning Service requesting that it reconsider its decision to withhold some of the requested information. The Planning Service responded to that letter on 27 February 2008, re-iterating its belief that disclosure of the withheld information would adversely affect the course of justice, as per Regulation 12(5)(b) of the EIR.
14. On 3 June 2008 the complainant wrote to the Commissioner enquiring as to the delay in the Commissioner making a decision in the matter. The Commissioner wrote to both the complainant and the Planning Service on 6 January 2009 asking both to confirm whether their submissions in the matter were complete.
15. On 14 April 2009, not having received a reply from either party, the Commissioner again wrote to the complainant asking whether it wished to continue with its complaint. The complainant replied on 20 April 2009 expressing its dissatisfaction with the delay in bringing the matter to a conclusion and confirmed it did wish to pursue the complaint.
16. On 8 May 2009 the Commissioner wrote to the complainant informing it that his consideration of the complaint was continuing. On 4 September 2009 he e-mailed the Planning Service with some final queries regarding the matter.

Analysis

Environmental Information.

17. The public authority processed the request under the EIR as it was for material that fell under the definition of environmental information in Regulation 2(1)(c). The complainant agreed that the EIR was applicable in this case. The Commissioner is satisfied that the Planning Service was correct to process the request under the EIR because it was made verbally and therefore would not have been a valid request under the Act and because the material requested fell under the definition in Regulation 2(1)(c).

Scope of the request

18. As part of the submissions dated 24 April 2007 the complainant referred the Commissioner to earlier decisions that he had made regarding planning information that were deemed to be relevant to this case. In doing so it was suggested that the Planning Service had not given the request proper consideration and that a significant amount of material had been withheld. To illustrate the point the complainant advised the Commissioner that the Planning Service had not disclosed a copy of the Planning Enforcement Notice or the reply to the Notice.
19. The Commissioner has considered the complainant's assertions the request was not properly considered and that a significant amount of information was withheld by the Planning Service. The request was made verbally and therefore no written record is available to confirm precisely what was requested. In these circumstances the Commissioner has had to consider the key documents that he has been provided with by both the complainant and the public authority in order to reach a view about the scope of the request and whether it has been properly considered.
20. The initial responses from the public authority dated 27 April 2006 and 26 May 2006 simply refer to viewing 'Planning Application (Reference: T/1999/0394)'. The complainant's request for an internal review of the decision to withhold certain information under Regulation 12(5)(b) dated 28 November 2006 refers to 'a letter from the Planning Service dated 24 May 2006, replying to a request for sign of the planning file relating to our client's property'. The outcome of the internal review dated 27 March 2007 also refers to the complainant's request in which he sought "access to planning application file T1999/0394".
21. Having considered the content of the correspondence above and noted that the complainant did not raise an issue about the scope of the request with the public authority once the file had been inspected, the Commissioner has concluded that the request covered all information held on the Planning Application file T199/0394. The Commissioner understands that the Planning Enforcement Notice that the complainant referred to when arguing that the request had not been properly considered was not held on the aforementioned file and therefore it was outside the scope of the request. The Commissioner is satisfied that the public authority has provided him with the totality of the information that is within the scope of the request and to which Regulation 12(5)(b) was applied. He has therefore gone on to consider whether the Planning Service was correct to refuse the complainant access to that material on the basis that the exception in 12(5)(b) applied.

Exception

Regulation 12(5)(b) – course of justice

22. Regulation 12(5)(b) provides an exception from the duty upon a public authority under Regulation 5(1) to make information upon request, to the extent that its disclosure would adversely affect 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.

23. When determining whether an exception in Regulation 12(5) has been appropriately applied by a public authority the Commissioner will consider the following:
- Whether the adverse effect that the public authority has claimed would result if the withheld information was made available is to one of the interests inherent in the exception.
 - If so, whether the public authority has demonstrated that the adverse effect in question would arise, and if necessary,
 - Whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.
24. The Planning Service has asserted that the course of justice is sufficiently wide as to include the enforcement and due administration of the law relating to planning. It has suggested that this would also encompass any prejudice to its enforcement investigations. The complainant has disputed this and appears to have suggested that the exception only refers to investigations of a criminal or disciplinary nature. Whilst the complainant has noted that the exception also covers the wider concept of the course of justice it has asserted that the Planning Service has failed to demonstrate how disclosure of the withheld information would adversely affect it.
25. The Commissioner considers that the phrase 'the course of justice' is a relatively broad one and that the exception could potentially apply to information related to the enforcement of planning laws via legal proceedings. His approach in this regard has been informed by the comments of the Information Tribunal in the case of *Rudd v ICO & The Vederers of the New Forest* (EA/2008/0020), in which it stated that,
- “...the Regulations refer to ‘the course of justice’ and not ‘a course of justice’. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’...”
26. The Commissioner has given careful consideration to all of the arguments the Planning Services has put forward in relation to the engagement of the exception in Regulation 12(5)(b) in its correspondence with the complainant and in its submissions during the course of the investigation. In the Commissioner's view although the exception in Regulation 12(5)(b) could potentially apply to the withheld information, the Planning Service has failed to explain or demonstrate how the disclosure of the withheld information in this case would adversely affect the course of justice.
27. The Planning Service explained that enforcement of planning conditions involves the gathering of evidence and that the premature release of such evidence would undermine its enforcement case. It also stated that in the event the matter in question was taken to court then the withheld information would be exposed via the appropriate disclosure procedures. In the Commissioner's view it is unclear

whether the Planning Service was suggesting that disclosure would adversely affect its ability to investigate potential breaches of planning legislation or any proceedings in the event that the matter went to court or indeed both.

28. Whilst the Commissioner accepts the Planning Service's argument that the withheld information would constitute evidence it remains unclear how its disclosure at the time of the request would have actually adversely affected the course of justice. In particular he does not consider that the Planning Service has demonstrated how or why the premature disclosure of evidence would result in an adverse effect on the course of justice or any court proceedings in this case.
29. The other arguments put forward by both the Planning Service and the complainant relate to whether an adverse effect was more probable than not, (i.e. whether it would have arisen if the withheld information had been released) and to the public interest test. However, as the Commissioner does not consider that the Planning Service has in fact identified the specific nature of the adverse effect it claims would have resulted if the material had been disclosed, he has not needed, nor been able, to assess these issues.

Procedural requirements

Regulation 5 – duty to make environmental information available

30. Regulation 5(1) of the EIR states 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.”

31. Regulation 5(2) of the EIR states that:

“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.”

32. As the Commissioner has decided that the Planning Service has not demonstrated that the exception in Regulation 12(5)(b) applied in this case, it breached its duty under Regulation 5(1) in failing to make it available to the complainant.

33. The Planning Service also breached Regulation 5(2) in failing to make the withheld information available to the complainant within twenty working days of the request. The full text of regulation 5 can be found in the Legal Annex at the end of this Decision Notice.

The Decision

34. The Commissioner's decision is that the Planning Service has failed to demonstrate that the withheld information is excepted by virtue of Regulation 12(5)(b). Therefore, in failing to make the withheld information available within twenty working days of the request the Planning Service breached Regulations 5(1) and (2) of the EIR.

Steps Required

35. The Commissioner requires the Planning Service to take the following steps to ensure compliance with the EIR:

Make the information that was withheld under Regulation 12(5)(b) available for inspection by the complainant.

The Planning Service must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

36. 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

37. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 2nd day of February 2010

Signed

**Jo Pedder
Senior Policy Manager**

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

Legal Annex

Regulation 5 -Duty to make available environmental information on request

(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.

(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.

(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.

(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.

(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 a standardised procedure used.

(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

(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.

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

(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.

(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.
- (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.