ICO
Information Commissioner's Office

Environmental Information Regulations 2004

Decision Notice

Date: 11 February 2010

Public Authority: Welsh Assembly Government
Address: Cathays Park
Cardiff
CF10 3NQ

Summary

On 11 and 29 February 2008 the complainant made requests for information relating to the Cefn Croes Wind farm. The Welsh Assembly Government ('Assembly Government') originally refused the requests by virtue of regulation 12(4)(e) of the EIR but later ceased to rely on that exception and sought to rely on section 12(4)(b). The Commissioner investigated and has determined that the Assembly Government was correct to refuse the requests by virtue of regulation 12(4)(b) of the EIR. However, the Commissioner found a number of procedural breaches in relation to the way the requests were handled.

On 15 July 2009, during the course of the Commissioner's investigation, the complainant refined her request. The Assembly Government also refused the refined request by virtue of regulation 12(4)(b) of the EIR. The Commissioner investigated the handling of the refined request and has determined that the Assembly Government was correct to refuse the refined request by virtue of regulation 12(4)(b) of the EIR. The Commissioner also found a number of procedural breaches in relation to the handling of the refined request.

The Commissioner's Role

1. The Environmental Information Regulations ('the 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.

Background

2. 'Cefn Croes' was built at a cost of approximately £50 million and is the UK's largest onshore wind farm. It is situated in the mountain plateau of Cefn Croes, near Aberystwyth, and is home to 39 turbines, up to 328ft (100m) high. It has the capacity to supply 42,000 homes with electricity, which is 20% of all onshore wind power in Wales[1].

3. 'TAN 8' is the short form for the 'Welsh Assembly Technical Advice Note (TAN) 8 Review of Windfarm Developer Interest 2009'. TAN 8 is a summary of Wind Farm Developments (April 2009), which have been approved or are being considered by the UK Government (for projects over 50 MegaWatts) or by Local Planning Authorities in Wales.[2]

The Request

4. On 11 February 2008 the complainant made the following request to the Assembly Government:

   "…under the provisions of the Freedom of Information Act 2000 and Environmental Information Regulations 2004, I request all documentation, held in either electronic or print form, relating to the legal advice re. disposal of FC Wales managed land for wind developments…

   …This would include the discussions for Cefn Croes (1997 – 2003) and subsequently from 2003 onwards for TAN8 & the tendering process…

   ..Please include all communications between Forestry Commission Wales's lawyers, Forestry Commission GB, DEFRA lawyers, the Welsh Office, the Assembly Government ministers and NAW's [National Assembly for Wales] legal department re. disposal of the National Forest Estate for wind developments…..".

5. On 18 February 2008 the Assembly Government wrote to the complainant with its interpretation of her request and asked her to clarify that it represented an accurate description of the information being sought.

6. On 29 February 2008, the complainant clarified that her initial request related to:

   "…the legal advice given to Forestry Commission Wales, the Assembly Government Forestry Minister and officials in the Planning and Energy Departments in advance of NAW's response to the DTI i.e. Cefn Croes Windfarm application 2001. The information should include that from NAW's internal in-house team. FC lawyers and any independent opinions from outside law firms or DEFRA".

---

[1] http://news.bbc.co.uk/1/hi/wales/mid/4092928.stm
[2] http://wales.gov.uk/topics/planning/planningstats/windfarminterest/?lang=en

In this letter, the complainant also made a second request for:

"…the legal discussions with FC Wales & the Assembly Government relating to further use of FC Land ie the public forest estate for industrial development. The advice should relate to Section 83 GOWA 1998 & its section 41 agreement, and identify the risks of the Assembly's disposals, for purposes other than forestry. The implications of the Regulatory Reform Order – Forestry 2006 on TAN8 implementation should also be made available

On 2 March 2008, the complainant responded to the Assembly Government's letter of 18 February 2009 (note that she had not received this letter at the time of her letter of 29 February 2009) and confirmed that their interpretation of her request was correct, and advised that it should also include:

"…copy of the written instructions from Ministers re. Disposal of FC land for Cefn Croes, or from Ministers to Forestry Commissioners giving them authority to effect the disposal."

This was not a new request for information but clarified the earlier requests.

7. On 12 March 2008 the Assembly Government provided a substantive response to the initial request submitted on 11 February 2008 (clarified on 29 February 2008). It stated that, as it considered the information to be subject to legal professional privilege, it was exempt from disclosure by virtue of regulation 12(4)(e) (internal communications). The Assembly Government's view was that it considered the public interest in maintaining the exception to outweigh the public interest in disclosure.

8. On 22 March 2008 the complainant requested an internal review of the Assembly Government's decision in relation to her initial request.

9. On 2 April 2008 the Assembly Government responded to the second request made on 29 February 2008. It advised the complainant that this information was also exempt by virtue of regulation 12(4)(e) and the public interest favoured non-disclosure of the information requested, for the same reasons as set out in its letter of 12 March 2008.

10. On 7 April 2008 the complainant requested an internal review of the refusal of her second request.

11. During the Commissioner's investigation the complainant submitted a refined request on 15 July 2009:

"….the early deliberations between Christine Gwyther/Carwyn Jones and the wind developers and Forest Enterprise Wales & Forestry Commission GB – including correspondence/email/or a minutes of meetings with the then Forestry Commissioners (Gareth Wardell & Anthony Bosanquet). The legal recommendations for disposal of forestry land for industrial purposes should also be included".

In its response of 2 October 2009, the Assembly Government applied the exception available at regulation 12(4)(b) and stated that the request was considered to be manifestly unreasonable as it would place an unreasonable burden on resources and disrupt its day to day work. It again considered that the public interest in maintaining the exception outweighed the public interest in disclosure.

The Investigation

Scope of the case

12. On 9 June 2008 the complainant contacted the Commissioner to complain that the Assembly Government had not completed an internal review of its decision not to disclose the information she requested on 11 and 29 February 2008.

13. On 8 January 2009 the Commissioner wrote to the Assembly Government asking whether it had now completed its internal review of the complainant's requests. The Commissioner also asked for further information in relation to its application of regulation 12(4)(e).

14. On 3 February 2009 the Commissioner wrote to the complainant to clarify that his investigation would focus on whether the Assembly Government was correct to refuse the provide the information requested on 11 and 29 February 2008 by virtue of the exception contained in regulation 12(4)(e).

15. On 3 February the Assembly Government wrote to the complainant with the outcome of its internal review in relation to the complainant's requests dated 11 and 29 February 2008. It stated that, having reviewed the requests, it was now relying on the exception provided by regulation 12(4)(b), as it considered the requests to be manifestly unreasonable. The Commissioner therefore altered the scope of his investigation and considered whether the Assembly Government was correct to refuse the requests on that basis. Throughout the remainder of this Notice, the request dated 11 February 2008 is referred to as "the original request" and the request dated 29 February 2008 as "the second request"

16. As stated in paragraph 11, above, during the Commissioner's investigation the complainant submitted a refined request to the Assembly Government, which was also refused on the basis that it was manifestly unreasonable and that regulation 12(4)(b) provided an exception to disclosure. The Commissioner considered it appropriate to assess the Assembly Government's handling of that refined request in this Notice. This request is referred to in the remainder of this Notice as "the refined request".

Chronology

17. On 8 January 2009 the Commissioner contacted the Assembly Government to request further clarification of its application of the exception provided by 12(4)(e)

of the EIR in relation to the original and second requests. The Commissioner also requested further details concerning the internal review of its decision to withhold the requested information.

18. On 3 February 2009 the Assembly Government provided the Commissioner with a copy of the outcome of its internal review in respect of the original and second requests. The internal review concluded that, as each request was considered to be manifestly unreasonable, the information in relation to both requests was exempt by virtue of regulation 12(4)(b). The Assembly Government considered it would have been possible for it to have aggregated the original and second requests. However, as it considered that the amount of time it would take to deal with each request separately would exceed the appropriate limit, it had not done so. It provided details of its public interest test in relation to regulation 12(4)(b) and concluded that the public interest in maintaining the exception outweighed the public interest in disclosure. It also clarified that it no longer sought to rely on the exception provided by regulation 12(4)(e).

19. On 17 March 2009 the Commissioner contacted the Assembly Government to request further information in relation to its application of regulation 12(4)(b).

20. On 31 March 2009 it provided the Commissioner with representations in support of its application of 12(4)(b).

21. On 30 June 2009 a member of the Commissioner's staff viewed the files potentially containing the withheld information in situ. During that meeting the Assembly Government agreed to contact the complainant directly and provide details of the information it held in relation to wind farm development, and invite the complainant to refine her request. On 9 July 2009 it confirmed to the Commissioner that it intended to contact the complainant as agreed.

22. On 20 July 2009 the Commissioner wrote to the complainant advising that, based on his inspection of the files, he was minded to conclude that the exception under 12(4)(b) was engaged. The Commissioner explained that he had advised the Assembly Government of the requirement to provide advice and assistance to help her to refine her request so that she could obtain some information that was of interest to her.

23. In response to a letter sent to the complainant asking her to refine her request, on 15 July 2009 the complainant wrote to the Assembly Government, and refined her request to:

   ”….the early deliberations between Christine Gwyther/Carwyn Jones and the wind developers and Forest Enterprise Wales & Forestry Commission GB – including correspondence/email/or a minutes of meetings with the then Forestry Commissioners (Gareth Wardell & Anthony Bosanquet). The legal recommendations for disposal of forestry land for industrial purposes should also be included”.

24. On 23 July 2009 the complainant made further representations to the Commissioner and advised that she did not accept his conclusions in relation to her original request.

25. On 14 September 2009, the Commissioner contacted the Assembly Government to determine the outcome of the complainant's refined request. It advised that it had not responded to the request, as it was awaiting instructions from the Commissioner.

26. On 18 September 2009 the Commissioner contacted the Assembly Government to advise that following the discussions of 30 June 2009 his expectation was for it to consider the refined request as a new request and to provide an appropriate response to the complainant. Because of the delay in providing the complainant with a response to her refined request, the Commissioner requested that the Assembly Government either provide the information or issue a valid refusal notice within 10 working days.

27. On 2 October 2009, the Assembly Government refused the refined request, citing regulation 12(4)(b) as it considered the refined request to be manifestly unreasonable. It provided the Commissioner with a copy of its refusal notice.

28. On 9 November 2009 the Commissioner confirmed to the complainant that, as it had been impossible to resolve this matter informally, he would issue a Decision Notice in relation to the original and refined requests.

Analysis

---

29. Full extracts of the relevant law considered in this case can be found in the Legal Annex to this Notice.

Exceptions

Regulation 12(4)(b) – the request is manifestly unreasonable

30. Regulation 12(4)(b) of the EIR is a broad provision for public authorities to refuse to comply with requests that are manifestly unreasonable. The EIR contain no definition of the phrase "manifestly unreasonable" but the Commissioner considers that the word "manifestly" means that a request should be obviously or clearly unreasonable.

The Assembly Government's position

31. The Assembly Government advised the Commissioner that while it appreciated that there was no equivalent provision to section 12 of the Act under the EIR, it had been guided by the principles of section 12 when considering the original, second and refined requests. It explained that it had considered whether the time for compliance with each request would constitute an unreasonable diversion of resources.

32. In order to reach a conclusion, the Assembly Government considered the amount of time it estimated it would take to respond to each request, and compared this to the cost limit (which equates to 24 hours' work) set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). It noted that the estimated time of compliance with any of the three requests significantly exceeded the appropriate limit under the Fees Regulations. It therefore considered that responding to either request would equate to a significant diversion of resource and advised that it considered all three requests to be manifestly unreasonable.

33. The Assembly Government confirmed that, as it had a print to paper policy, it held relevant information in the form of paper files. It provided the Commissioner with a description of the actions which would be required in order to extract the information requested. It also provided the Commissioner with an estimate of the time it would take to locate, retrieve and extract the information relevant to each request.

34. In its internal review response dated 3 February 2009, the Assembly Government indicated that it had identified 98 files which could potentially hold information relevant to the original or second requests but on further detailed examination the number of files could increase significantly. It explained that it had undertaken a search of a sample of one of these paper files in order to determine a reasonable estimate for searching all of the files relevant to the requests.

35. The Assembly Government stated that one file containing over 200 individual documents took over 2.5 hours to examine to ascertain whether it held information relevant to the request. It accepted that not all the files identified as potentially containing information relevant to the requests contained the same number of documents and used an average figure of 1.5 hours per file in order to estimate the time it would take to search for information relevant to the requests. Its original estimate of the time it would take to search through the files relevant to the original or refined request was 147 hours (98 x 1.5 hours).

36. On 27 May 2009 the Assembly Government explained to the Commissioner that following a more detailed examination of its records it had identified a total of 231 files which could potentially hold information relevant to either the original or second request.

37. In relation to the refined request, the Assembly Government considered that files relating to the period 1999-2007 would contain information relevant to this request. It explained that it had identified that 148 of the 231 files covered the period 1999 to 2007 and a further 35 files which were either closed in 1999 or opened in 2007 which could also potentially contain information relevant to the refined request. The Assembly Government considered that the refined request continued to be manifestly unreasonable as it would still place an unreasonable burden on resources, which would disrupt its everyday work.

38. The Assembly Government's estimate of the time it would take to search through the paper files relevant to the requests was based on the sample review referred

to in paragraph 35 above. Its estimates to comply with each of the requests were as follows:

- Original request – 231 files x 1.5 hours = 346.5 hours
- Second request – 231 files x 1.5 hours = 346.5 hours
- Refined request – 148 to 183 files x 1.5 hours = 222 to 274.5 hours

Commissioner's position

39. The Commissioner expects public authorities to adopt the most efficient search strategy available. Therefore, during his investigation the Commissioner inspected the 231 files held by the Assembly Government. On the basis of this inspection he is satisfied that the estimate of 1.5 hours to search each individual paper file is reasonable and therefore its estimates for complying with the original, second and refined requests individually, as detailed in paragraph 38, are reasonable.

40. The Commissioner notes that the Assembly Government would need to examine 231 paper files in order to comply with either the original or second requests, and to comply with the refined request, it would need to examine between 148 and 183 of these 231 paper files.

41. The Assembly Government's representations in relation to its application of regulation 12(4)(b) to the original, second and refined requests are identical, apart from the fact that fewer files would need to be examined to comply with the refined request. While the Commissioner considers that each of the three requests constitute a new request for the purposes of the EIR, as the information relevant to each request is contained within the same set of paper files, for the practical purpose of this Notice, he has not set out separate arguments in respect of each request.

42. The Commissioner has considered whether the complainant's original, second and refined requests were manifestly unreasonable due to the time and costs associated with compliance. The Commissioner notes that the representations from the Assembly Government were guided by the application of the cost limit under section 12 of the Act. The cost limit for a central government department such as the Assembly Government is currently set out in the Fees Regulations as £600 and equates to 3.5 days' work, at £25 per hour.

43. The Commissioner acknowledges that the amount of time required to respond to a request can make it manifestly unreasonable. However, he considers that regulation 12(4)(b) does not operate as an equivalent to section 12 of the Act. This view was supported by the Information Tribunal in the case of DBERR v ICO and Platform (EA/2008/0096). One of the issues considered by the Tribunal in this case was whether or not there was a correlation between the cost limit for compliance with an information request as set out in section 12 of Act, and the exception to disclosure on the basis of a request being "manifestly unreasonable" as set out at regulation 12(4)(b) of the EIR. In agreement with the Commissioner, the Tribunal concluded that there was no direct correlation between regulation 12(4)(b) of the EIR and section 12 of Act. However, the Tribunal also stated that:

"We see no reason why, on a proper construction of that expression, the resource implications that are involved in meeting a request should not have a bearing on whether a request is "manifestly unreasonable"

44. Section 12 of the Act involves a straightforward calculation of the time taken to comply with a request and does not take into account other factors such as the public authority's ability to meet a request. The Commissioner's view is that the fact that a similar request may be rejected under the provisions of section 12 of the Act does not, in itself, mean that such a request made under the EIR would be manifestly unreasonable by virtue of regulation 12(4)(b).

45. The Commissioner's view is that, in order to demonstrate that regulation 12(4)(b) is engaged, a public authority should be able to show how a request – not just the time required or costs involved in complying with it - is manifestly unreasonable. In practice, regulation 12(4)(b) requires public authorities to consider a request for environmental information more broadly, taking into account the time to respond to the request as one factor to be considered along with others, such as the interference with the normal conduct of the public authority's activities, or whether compliance entails a significant diversion of resources from other functions.

46. In order to determine whether the Assembly Government was correct in this instance to determine either the original, second or refined requests were manifestly unreasonable, the Commissioner has considered the following:

   i. Under EIR, there is no statutory equivalent to the "appropriate limit";
   ii. Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority;
   iii. Presumption in favour of disclosure under regulation 12(2);
   iv. Public interest test under regulation 12(1);

Appropriate limit

47. Whilst there is no cost limit under the EIR, the Commissioner's view is that it is appropriate to consider the Fees Regulations as a starting point when considering whether a request is manifestly unreasonable under regulation 12(4)(b) in relation to the cost of compliance and the time taken to comply with a request. The appropriate cost limit set out in the Fees Regulations for a central government department such as the Assembly Government, is £600, which equates to 24 hours' work at £25 per hour.

48. The Commissioner has referred to the Fees Regulations for guidance as to the activities that the Assembly Government may include in its estimate of the cost of dealing with the requests. Under the Fees Regulations, a public authority may only legitimately refuse requests for information on fees grounds under the Act if it would take more than 24 hours to:

   a) determine whether it holds the information requested
   b) locate the information requested
   c) retrieve the information from a document containing it, and

d) extract the information from a document containing it

49. While these guidelines do not constitute a strict test to be used under the EIR, they are a helpful group of guiding principles for identifying actions which can be considered when determining whether a request is manifestly unreasonable.

50. The Commissioner understands that, in order to answer the original, second or refined requests, the Assembly Government would need to review a substantial amount of information and that the cost of locating, retrieving and extracting the information relevant to each request would significantly exceed the appropriate limit of 24 hours as set out in the Fees Regulations. The Assembly Government estimated it would take 346.5 hours to comply with either the original or the second request, and a minimum of 222 hours to comply with the refined request. At 7 hours a day, this equates to over 49 working days (in excess of 10 working weeks) for each of the original and the second requests, and a minimum of 31 working days (in excess of 13 working weeks) for the refined request.

51. The Commissioner considers that for any of the three requests this represents a significant amount of time, and far in excess of the time allowed for by the appropriate limit. He has therefore gone on to consider the proportionality of the burden on the public authority's workload, taking into account the size of the public authority.

Burden on the public authority

52. The Commissioner acknowledges that under the EIR, public authorities may be required to accept a greater burden in providing environmental information than other information. However, as outlined above, the Commissioner considers that he must have regard to diversion of resources as a factor in determining whether a request is manifestly unreasonable.

53. The Commissioner notes that the role of the executive body of the Assembly Government is to make decisions; develop and implement policy; exercise executive functions and make statutory instruments. He considers that requiring it to undertake anything from 222 hours (in respect of the refined request) to 347 hours (original or second requests) of work to answer a request would constitute an unreasonable diversion of its resources from its core duties. The Commissioner considers that such a significant diversion of resources will inevitably interfere with the normal conduct of the Assembly Government's activities. Devoting such an amount of time to comply with a request could also impact severely on the functions that it fulfils.

54. The Commissioner believes that responding to any of the three requests could prevent the Assembly Government from carrying out is wider obligations fully and effectively to the extent that the needs of the communities it serves might not be met and this would impact negatively on the public at large.

Conclusion

55. The Commissioner considers that the Assembly Government has demonstrated that responding to either one of three requests would require it to divert an unreasonable amount of time from its core functions and that it would significantly divert resources and interfere with its normal activities.

56. On this basis, in this particular case, he finds that the Assembly Government appropriately applied the exception provided by regulation 12(4)(b) to the original, second and refined requests. The Commissioner has therefore gone on to consider the public interest test as required by regulation 12(1)(b).

Public interest test

57. Regulation 12(4)(b) is subject to the public interest test and, as such, the Commissioner has considered whether the public interest in maintaining the exception outweighs the public interest in disclosure.

58. In doing this the Commissioner is mindful of the specific presumption in favour of disclosure under Regulation 12(2) of the EIR, which means that if the factors on both sides are balanced evenly, the public authority should disclose the information.

Public interest in favour of disclosure

Complainant's representations

59. The complainant suggested to the Commissioner that it is in the public interest for the Assembly Government to justify its actions in relation to the disposal of Forestry Commission land. Further, the complainant considers that with 5 million people in fuel poverty there should be greater transparency in government decisions relating to generating energy.

60. The complainant also drew the Commissioner's attention to the UK Low Carbon Transition Plan[3] which considers the need for more home grown energy. The complainant considered that in light of this Plan, there should be more openness and transparency in the consideration of locations of wind farms.

The Assembly Government's position

61. The Assembly Government explained to the Commissioner that it had taken into account the public interest in openness and transparency when considering the public interest in favour of disclosure. Further, it advised that although a substantial amount of information was already in the public domain, disclosing further information may add something to the public's knowledge of the matter.

[3] http://www.decc.gov.uk/en/content/cms/publications/lc_trans_plan/lc_trans_plan.aspx

The Commissioner's position

62. The Commissioner's view is that the general purpose of the EIR is to enable the public access to information which affects or is likely to affect the environment. This has the clear benefits of promoting accountability and transparency, as well as enabling individuals to access information which may help them to understand or challenge a decision made, or action taken, by the public authority. This in turn promotes a sense of democracy and public participation.

63. The Commissioner's view is that there is a strong public interest in promoting transparency and accountability of public authorities. He also considers there to be a wider public interest in the development of renewable energy sources and initiatives to increase electricity generation in the UK. The Commissioner is mindful of the various campaign groups that oppose the development of onshore wind farms and is aware that the benefits of such energy sources are not accepted by some individuals and groups. The Commissioner therefore considers that there is a public interest in disclosure of information regarding the development of such sites so that the public may be better informed on this subject.

Public interest in favour of maintaining the exception

The Assembly Government's representations

64. The Assembly Government advised the Commissioner that it had carefully considered the public interest test in relation to this request. It advised that during the 3.5 years since the opening of the Cefn Croes wind farm, the general public at large had not displayed an interest in the matter.

65. It also stated that all of the factors surrounding the decision to develop the Cefn Croes wind farm were considered by the Assembly Government and communicated to the public. It also considered that a substantial amount of information was already in the public domain in relation to Cefn Croes wind farm.

66. Finally, the Assembly Government explained that it was not in the public interest for it to divert a substantial amount of its resources in order to respond to the request.

Balance of public interest

67. The Commissioner notes that there is a background of campaigning against the wind farm at Cefn Croes that began over 10 years ago. He also understands that the complainant previously submitted an application for judicial review and requested that the High Court set aside the Secretary of State's permission for the establishment of Cefn Croes wind farm and called for a public enquiry. The application was unsuccessful.

68. The Commissioner has considered the information which is already in the public domain concerning the development of Cefn Croes. He understands that information has been disclosed into the public domain regarding the information

considered by the Secretary of State when she made her decision to grant the planning application for Cefn Croes[4]. He notes therefore that there is a significant amount of information in the public domain.

69. The Commissioner has considered whether it is in the public interest, in light of the issues involved, to require the Assembly Government to divert a substantial amount of resources away from its core business in order to respond to any of the three requests in this case, particularly given the history of the site and the failed application for judicial review.

70. The Commissioner considers that the total estimated amount of time that it would take the Assembly Government to respond to either the original, second or refined requests does represent an unreasonable amount of work. The Commissioner accepts that responding to any of the requests would clearly require the Assembly Government to divert a disproportionate amount of its resources from its everyday core functions. The Commissioner is of the view that there is a very strong public interest in public authorities being able to carry out their wider obligations fully and effectively, so that the needs to the communities they serve can be fulfilled. The exception provided by regulation 12(4)(b) serves to protect public authorities from being distracted from the various important public functions and duties they are charged with.

71. In view of the above the Commissioner has concluded that the public interest in maintaining the exception under regulation 12(4)(b) outweighs the public interest in disclosing the information in respect of the original, second and refined requests.

Procedural requirements

Regulation 9

72. The Commissioner has considered whether the Assembly Government complied with its obligations under regulation 9 to provide advice and assistance to the complainant.

73. Regulation 9(1) provides that 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.

74. Regulation 9(3) provides that a public authority will have complied with regulation 9(1) where it has conformed to a code of practice issued under regulation 16 in relation to the provision of advice and assistance.

75. The 'Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004' ('The Code of Practice') sets out at paragraphs 8 to 23 what is expected of public authorities as regards the provision of advice and assistance. The Code of Practice states that

[4] Commissioner's decision in FER0087774

appropriate assistance may include providing an outline of the different kinds of information that might meet the terms of the request.

76. On receipt of the original and second requests, the Assembly Government wrote to the complainant with its understanding of the information being sought, asking her to confirm whether this represented an accurate description of the information she had requested. The Commissioner was also provided with a copy of a letter which it wrote to the complainant on 20 July 2008 asking her to clarify and narrow the scope of her initial and second requests and identify more specific areas or dates that she was interested in. In its internal review the Assembly Government stated that, although the complainant clarified the information being sought, she did not provide any further narrowing down of the scope of the request.

77. The Commissioner notes that following his intervention the Assembly Government wrote to the complainant on 10 July 2009 providing a brief outline of the files which could potentially hold information relevant to her requests. It asked the complainant whether she would like it to consider a specific subset of the files which had been identified and if so, to provide a clear description of the information which was of greatest interest to her.

78. The Commissioner considers that it would have been unreasonable for the Assembly Government to have given any further details of any information it may hold because, given the broad nature of the request and the fact that the complainant was not able to narrow her request to a particular subject or time period which she was interested in, this would have required the Assembly Government to carry out a search to locate information falling within the scope of the request and the costs of this would have been significant.

79. The Commissioner is satisfied that the public authority made reasonable efforts to help the complainant refine his request and therefore met its duty to provide advice and assistance under regulation 9(1).

Regulation 11(4)

80. The complainant requested an internal review on 22 March 2008 and the outcome of the review was not provided by the Assembly Government until 3 February 2009.The Commissioner notes that it took just under a year to complete the internal review in respect of the original request. The Assembly Government has therefore breached regulation 11(4) in failing to provide the outcome of the internal review within 40 working days.

Regulation 14(2)

81. The complainant made a refined request on 15 July 2009 but the Assembly Government did not respond to this request until 2 October 2009. It therefore took 56 days to issue a refusal to the request. Regulation 14(2) requires a public authority to provide a refusal notice within 20 working days. The Assembly Government therefore breached regulation 14(2) of the EIR in relation to its handling of the refined request.

Regulation 14(5)(c)

82. Regulation 14(5) of the EIR provides that a refusal to a request should:

- Inform the applicant of the provisions of regulation 11 – the internal review.
- Inform the applicant of the enforcement and appeal provisions of the Act applied by regulation 18 – the right to appeal to the Commissioner.

In not providing this information in the refusal notice the Assembly Government has breached regulation 14(5)(c) of the EIR.

The Decision

---

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

   - Applied the exception available at regulation 12(4)(b) to the original and second requests.
   - Applied the exception available at regulation 12(4)(b) to the refined request.

84. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR.

   - The Assembly Government breached regulation 11(4) of the EIR in not providing the complainant with the outcome of the internal review for the original request within 40 working days
   - It breached 14(2) for failing to refuse to disclose the information requested in the refined request within 20 working days
   - It breached 14(5)(c) for failing to provide details of the rights conferred in regulations 11 and 18 of the EIR in its refusal notice for the refined request.

Steps Required

---

85. The Commissioner requires no steps to be taken.

Other matters

---

86. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

87. In explaining that the cost of complying with the information request would be prohibitive, the Assembly Government did not provide the complainant with a breakdown of the approximate cost as part of its refusal. Whilst recognising that it is not a requirement of the EIR or the Code, it is considered good practice to do so and we would therefore recommend that the Assembly Government take steps to include such information in future refusals of this kind.

88. The EIR Code of Practice issued under regulation 16 requires an internal review procedure to be fair, clear and simple. In his Good Practice Guidance No.5, the Commissioner qualifies this further by explaining that he does not expect an internal review to have more than one stage. The Commissioner is concerned that, despite his guidance on the matter, the Assembly Government is operating an internal review procedure with more than one stage. The Commissioner has written to the Assembly Government separately on this matter and is aware that it has provided assurances that this issue will be addressed.

Information Commissioner's Office

Right of Appeal

89. Either party has the right to appeal against this Decision Notice to the Information Tribunal. 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 11th day of February 2010

Signed ………………………………………………..

Anne Jones
Assistant Commissioner

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

Information Commissioner's Office

Legal Annex

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 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 than 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 11(3) The public authority shall on receipt of the representations and free of charge –

(a) consider them and any supporting evidence produced by the applicant; and
(b) decide if it has complied with the requirement.

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;
(b) the request for information is manifestly unreasonable;
(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
(d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
(e) the request involves the disclosure of internal communications.

Regulation 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(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.