

Freedom of Information Act 2000 (Section 50)

Environmental Information Regulations 2004

Decision Notice

Date: 23 March 2010

Public Authority: Department for Communities and Local Government
Address: Elland House
Bressenden Place
London
SW1E 5DU

Summary

The complainant wrote to the Department for Communities and Local Government to request information regarding the planning application concerning the site of the former Vaux brewery in Sunderland. In response the public authority disclosed submissions presented to the Secretary of State in relation to this planning application. However, information was redacted under regulation 12(4)(e) (Internal communications) and regulation 12(5)(b) (Course of justice etc.). The Commissioner has investigated the complaint and has found that the redacted information is exempt on the basis of regulation 12(4)(e) and that the public interest in maintaining the exception outweighs the public interest in disclosure. The Commissioner also found that in its handling of the request the public authority breached regulation 11(4) (Representations and reconsideration), regulation 14(2) and regulation 14(3) (Refusal to disclose information) but requires no steps to be taken.

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. On 6 September 2007 the complainant requested from the public authority information regarding the planning application concerning the site of the former Vaux brewery in Sunderland. The request read as follows:

"in unredacted form, any written submissions or notes of oral submissions made by officials to the Secretary of State for Communities and Local Government ("SS") regarding the report of a planning Inspector on an application by Sunderland arc to redevelop the former Vaux brewery site in Sunderland (Application Reference Number: 02/02480/OUT (DCLG Reference Number: APP/J4525/V/06/1197896); and notes of any meetings between officials or officials and the SS on the same matter."
3. The public authority responded to the request on 12 November 2007 at which point it disclosed a quantity of information falling within the scope of the request in the form of redacted versions of submissions presented to the Secretary of State. Advice from officials was redacted from the submissions under regulation 12(4)(e) (Internal communications). In addition, the names of more junior officials were removed from the submissions released to the complainant. The public authority concluded that the public interest in maintaining the exception in regulation 12(4)(e) outweighed the public interest in disclosure.
4. The public authority also indicated that some of the information redacted under section 12(4)(e) constituted legal advice and that therefore it was necessary to withhold this information so as maintain confidentiality of legal professional privilege.
5. On 21 December 2007 the complainant asked the public authority to carry out an internal review of its handling of the request. In particular the complainant argued that the public authority had failed to take into account a decision of the Information Tribunal where it had ordered disclosure of similar information in another case involving a planning application. The complainant added that it did not object to the decision to redact the names of more junior officials.
6. The public authority presented the findings of its internal review on 28 July 2008. At this stage DCLG upheld its earlier response to the request and dismissed the arguments put forward by the complainant, noting that there was no direct parallel between this case and the case

considered by the Information Tribunal.

The Investigation

Scope of the case

7. On 8 August 2008 the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to redact information from the disclosed submissions by relying on regulation 12(4)(e) of the EIR. It explained that its grounds of complaint were that the public authority had failed to apply the Information Tribunal's decision of 30 December 2007 relating to a planning application at Vauxhall Towers. The complainant argued that the Tribunal had dismissed the arguments which were being relied on by the public authority in this case.

Chronology

8. On 9 November 2009 the Commissioner wrote to the public authority with details of the complaint. The Commissioner asked to be supplied with un-redacted copies of the information falling within the scope of the request, clearly marked to show where an exception applies.
9. The Commissioner also asked the public authority for further details on the background to the planning application and clarification as to what stage the planning application had reached at the time the complainant submitted its request. The Commissioner also asked the public authority for its comments on the complainant's suggestion that in reaching its decision it had failed to take account of the case heard before the Information Tribunal.
10. To the extent that any of the redacted information constituted legal advice, the Commissioner asked the public authority to respond to the following points.
 - The Commissioner asked the public authority to confirm if the content of any withheld legal advice has been made public.
 - The Commissioner asked the public authority to confirm whether any action or decision was taken on the basis of such legal advice.
 - If so, the Commissioner asked if the fact that a decision was taken on the basis of legal advice was made public?

11. The Commissioner invited the public authority to make any additional representations in support of its handling of the request and asked it to respond to his letter within 20 working days.
12. Despite several reminders, the public authority did not respond to the Commissioner until 25 January 2010. At this point it provided the Commissioner with un-redacted copies of the information falling within the scope of the request. It confirmed that for most of the redacted information it was relying on regulation 12(4)(e). It said that it would come back to the Commissioner with clarification on the extent to which it was relying on regulation 12(5)(b).
13. On 19 February 2010 the public authority contacted the Commissioner again and provided further background information surrounding the planning application. It also provided answers to the Commissioner's questions regarding any legal advice redacted from the requested information. However, it still failed to indicate whether or not it was formally applying regulation 12(5)(b) and so on the 22 February 2010 the Commissioner contacted the public authority to say that if it also wanted to rely on regulation 12(5)(b) it would need to be clear about what information is in the scope of this exception.
14. On 12 March 2010 the public authority responded to the Commissioner. It now explained that the legal advice it received in the course of considering planning applications 'permeates the content of the submissions and the briefings, especially those parts consisting of advice to Ministers'. Therefore it suggested that in effect all the redacted information 'consist of and rely on at least in part legal advice that [the public authority] have received from our legal team'. Nevertheless, the public authority pointed to some specific passages within the submissions which were 'more exclusively based on legal advice'.

Findings of fact

How the planning system works

15. Applications for planning permission are made, in the first instance, to local planning authorities. However, under section 77 of the Town and Country Planning Act 1990 ("the 1990 Act") the Secretary of State may direct local planning authorities to refer certain cases to him/her for decision, instead of being dealt with by the planning authority. This is known as the power to "call-in" an application.

16. The calling in of an application is usually triggered by the local planning authority notifying the Secretary of State of certain types of planning applications, or as a result of representations made by other interested parties. However the Commissioner understands that it is the policy of Government to leave decisions to the local planning authority wherever possible.¹
17. The decision of a local planning authority may be appealed to the Secretary of State. Such appeals are usually heard and determined by a planning inspector although in certain circumstances the Secretary of State may recover an appeal for his/her own decision. All call-ins and virtually all appeals recovered by the Secretary of State are the subject of a local inquiry.
18. Where the Secretary of State is making the final decision the Planning Inspector prepares a report after the inquiry setting out his conclusions and making a recommendation to the Secretary of State. Once the Inspector's report is received it is considered by officials within the public authority. They consider the report and post-inquiry evidence and prepare advice for Ministers on the decision. The Secretary of State may choose to accept or reject any recommendations in the Inspector's report. A decision made by the Secretary of State is set out in a Decision Letter issued to the relevant parties.
19. There is a right of appeal against the Secretary of State's decision to the High Court under section 288 of the 1990 Act.

The Planning Application

20. The complainant's request relates to the applications by Sunderland Arc for a mixed use regeneration scheme on the site of the former Vaux brewery in Sunderland.
21. The application was called-in for the Secretary of State's determination on 2 February 2006. An inquiry was held which ended in July 2006, and an Inspector's report was submitted to the Secretary of State in October 2006. Having considered the Inspector's report the Secretary of State referred back to the parties for further information. The Secretary of State subsequently granted permission on 28 March 2007. A copy of the Secretary of State's decision letter is available at the following link:

¹ The call-in policy is set out in Hansard in Richard Caborn's statement of 16 June 1999, col 138.

<http://www.communities.gov.uk/documents/planning-callins/pdf/620103.pdf>

22. The Secretary of State's decision was judicially challenged by Tesco on 4 May 2007, on a number of grounds. The complainant submitted, on behalf of Tesco, a skeleton argument to the High Court on 13 January 2009 with a hearing due on 3 February 2009. The Commissioner understands that this hearing was adjourned by agreement and that the proceedings were stayed – that is, there is no future planned hearing into this case although it is still possible that proceedings will be revived.

Analysis

23. A full text of the relevant provisions of the regulations referred to in this section is contained within the legal annex.

Exceptions

24. The public authority has indicated that regulation 12(5)(b) may apply to some of the redacted information because legal advice received in the course of the decision making process 'permeates' the submissions given to Ministers. However it is unclear at first glance if this exception would apply to all of the information. Therefore in the circumstances the Commissioner considers that it is more appropriate in the first instance to look at the application of regulation 12(4)(e) as the Commissioner understands that this exception was applied to the redacted information in its entirety.

Regulation 12(4)(e) – Internal communications

25. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
26. In this case the withheld information constitutes redactions made to 3 submissions and a briefing note made to the Secretary of State by officials within the public authority's planning casework division. The Commissioner is satisfied that this amounts to internal communications and that regulation 12(4)(e) is engaged.

Public Interest Test

27. Under regulation 12(1)(b) a public authority may only refuse to disclose environmental information if an exception applies and, in all

the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. Therefore the Commissioner has carried out a public interest test in respect of the information redacted under regulation 12(4)(e).

Public interest arguments in favour of disclosing the requested information

28. The public authority has acknowledged that the EIR, by virtue of regulation 12(2), apply a presumption in favour of disclosure and that there is a public interest in having a transparent and accountable planning decision making process so that it may be understood why a particular decision has been reached.
29. The Commissioner also notes that the planning application to which this request relates was controversial in that the decision of the Secretary of State overturned the original decision of the Planning Inspector. There was opposition to the application and an alternative proposal had been submitted for the development of the site by Tesco. Disclosure of the redacted information would serve the public interest to the extent that it would further public participation in the planning process.

Public interest arguments in favour of maintaining the exemption

30. The public authority has argued that the planning process depends on the high quality, free and frank advice being provided to ministers. The public authority suggests that if internal communications were routinely made available there would be a deterrent effect on the frankness of the advice leading to the closing off of discussion and the development of options. The public authority suggests that 'this would critically affect the robustness of any advice or recommendation to the detriment of the quality of decision making and therefore the public interest'. It considered that there was a strong public interest in preserving what it referred to as the 'thinking space around ministers' and avoiding inhibiting future discussions between ministers and officials.

Balance of the public interest arguments

31. In essence the public authority's argument is that disclosure would affect the frankness with which officials provide advice to ministers and that this would inhibit discussions and consequently undermine the decision making process. This is the 'chilling effect' argument that has been referred to in several hearings before the Information Tribunal. They have been described as arguments about the 'risk to candour and

boldness in the giving of advice which the threat of future disclosure would cause'.²

32. The Commissioner's approach is to consider chilling effect arguments in the context of the circumstances of the case. In this case, the Commissioner accepts that ministers being able to rely on the free and frank advice of officials is an essential part of the decision making process and that this process would be undermined if officials were to feel inhibited in giving advice. The Commissioner is more likely to give weight to arguments that disclosure would inhibit the frankness of discussions relating to a specific policy to which the information relates and generally he is more sceptical of arguments that suggest a progressively wider 'chilling effect' i.e. arguments that disclosure would effect the frankness of official's advice in future, unrelated cases.
33. The complainant has referred the Commissioner to a case heard before the Information Tribunal where it ordered the public authority to release un-redacted submissions provided to the Secretary of State in connection with a planning application.³ The complainant suggests this is evidence that the public authority's arguments surrounding the impact on the frankness of advice given to ministers should be dismissed.
34. The Commissioner has had regard to this particular appeal but does not consider the decision to be binding in this case. The circumstances differ between the two cases and this affects the weight of the different arguments. In particular, the Commissioner is mindful of the fact that in this case when the complainant submitted its request the application was still the subject of an appeal and indeed a date had been set for a hearing. In this sense the issue was still 'live' when the request was received. Where information relates to a live issue the Commissioner considers that the chilling effect arguments will attract more weight when balancing the public interest as disclosure is more likely to affect the frankness of discussions in relation to this particular issue bearing in mind that the public authority would have been expecting the decision to be appealed at the time the request was received. The Commissioner has also taken into account the free and frank nature of the information itself which was created in the context of a high profile and controversial planning application.
35. The Commissioner is reluctant to accept that disclosure would have a wider deterrent effect on the frankness of advice provided by officials to ministers. This approach is in line with decisions of the Information

² Scotland Office v the Information Commissioner [EA/2007/0070], para. 64.

³ RT Hon Lord Baker of Dorking CH v The Information Commissioner and the Department for Communities and Local Government [EA/2006/0043]

Tribunal which have given little weight to arguments by public authorities that disclosure would lead to a relatively wide-ranging 'chilling-effect' on future un-related issues. The Tribunal has said that civil servants should not easily be deterred from doing their jobs and that:

In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil services since the Northcote – Trevelyan reforms.”⁴

36. Having said this, the Commissioner is satisfied that in this case disclosure would affect the frankness of advice and inhibit discussions between officials and ministers with respect to this particular planning application.
37. As regards the arguments in favour of disclosure, the Commissioner has given due weight to the presumption in favour of disclosure and recognises that there is a legitimate public interest in the planning process being transparent and accountable. However, in this case the Commissioner considers that the public interest in greater transparency is somewhat reduced because at all stages of the process the reasons why the application has progressed in the way it has have been made publicly available, via the planning inquiry, the report of the planning inspector and the Secretary of State's decision letter. In particular the decision letter thoroughly explains why the Secretary of State approved the application. Of course accountability is reduced if an applicant is unable to make a fully informed appeal but the Commissioner does not believe this is a relevant consideration in light of the information that has already been released. However the Commissioner does acknowledge that there will always be a public interest in disclosing redacted information in order to reveal the 'full picture' about an issue.
38. The Commissioner would also stress that in his view it is the Secretary of State's decision and knowing what factors it was based on that is relevant when it comes to considering the public interest. It is the Secretary of State that is accountable for the decisions rather than his or her officials. As regards any potential appeal it is the Secretary of State's decision rather than any internal considerations that carry legal weight.

⁴ Department for Education and Skills v The Information Commissioner and The Evening Standard [EA/2006/0006], para.75.

39. The Commissioner is of the view that purely in terms of the content of the information, the public interest test is finely balanced. However, the fact that the issue was still live at the time of the request is a key factor and when this is taken into account he considers that the public interest shifts in favour of withholding the information. Therefore the Commissioner has decided that in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure.

Other exceptions

40. The Commissioner is satisfied that the exception in regulation 12(4)(e) applies to all of the redacted information and that the public interest in maintaining the exception outweighs the public interest in disclosure. Consequently the Commissioner has not gone on to consider whether regulation 12(5)(b) applies.

Procedural Requirements

Regulation 5(2) – Duty to make available environmental information on request

41. Regulation 5(2) provides that information shall be made available as soon as possible and no later than 20 working days after the date of the request. In this case the complainant submitted its request to the public authority on 6 September 2007. However the public authority did not respond until 12 November 2007 when it released the redacted submissions. By failing to make this information available within 20 working days the public authority breached regulation 5(2).

Regulation 14 – Refusal to disclose information

42. Regulation 14(2) provides that if a request for environmental information is refused 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) provides that the public authority shall specify the reasons not to disclose the information requested, including:

‘any exception relied on under regulations 12(4), 12(5) or 13; and the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b).’

43. When the public authority responded to the request on 12 November 2007 it also explained that it was withholding the redacted information

under the exception in regulation 12(4)(e). Later, during the course of the Commissioner's investigation it indicated that regulation 12(5)(b) may also apply. By failing to issue its refusal within 20 working days of receiving the request the public authority breached regulation 14(2). By failing to inform the complainant that it was seeking to rely on regulation 12(5)(b) the public authority also breached regulation 14(3).

Regulation 11 – Representations and reconsideration

44. Regulation 11 provides that where an applicant makes representations to a public authority where it appears that the public authority has failed to comply with a requirement of the EIR:

‘A public authority shall notify the applicant of its decision...as soon as possible and no later than 40 working days after the date of the receipt of the representations.’

45. In this case the complainant wrote to the public authority on 21 December 2007 to ask that it carry out an internal review of his request for information. In particular the complainant said that he disagreed with the public authority's application of the exception in regulation 12(4)(e). However, the public authority only presented the findings of its internal review on 28 July 2008. This constitutes a breach of regulation 11(4).

The Decision

46. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the EIR:
- The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld the redacted information under regulation 12(4)(e).
47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- The public authority breached regulation 5(2) by failing to make available the disclosable information within 20 working days of receiving the request.

- The public authority breached regulation 11(4) by failing to complete an internal review within 40 working days.
- The public authority breached regulation 14(2) by failing to issue a refusal within 20 working days of receiving the request.
- The public authority breached regulation 14(3) by failing to inform the complainant of its reliance on the exception at regulation 12(5)(b).

Steps Required

48. The Commissioner requires no steps to be taken.

Right of Appeal

49. 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 23rd day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

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 11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

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
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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 12(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 these Regulations to disclose it; and
 - iii. has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

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).