

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

Decision Notice

Date: 4 February 2010

Public Authority: Cheshire East (formerly Macclesfield Borough Council)
Address: Westfields
Middlewich Road
Sandbach
Cheshire
CW11 1HZ

Summary

The complainant requested copies of two reports he believed had been produced by the Council and Cheshire Constabulary following an investigative visit made to his property connected to a planning application. The Council official involved along with the Chartered Surveyor informed the complainant that no such report had been prepared by the public authority and that the police report was not held by the Council. The Commissioner has investigated these matters and has decided on the balance of probabilities the requested information is not held by the Council. He therefore does not require the public authority to take any remedial steps in this case.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. 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.

Background

3. The complainant has been involved in a long standing dispute with the public authority over the usage of a footpath outside his property. Resulting from this dispute the complainant submitted a planning application to build a wall. The application was not considered valid and subsequently refused by the Council. The complainant lodged a formal planning complaint which was considered by the then Deputy Chief Executive of Macclesfield Borough Council.

The Request

4. On 18 August 2008 the complainant requested the following information from the Council:
 - a copy of the surveyor's report following a visit to his property
 - a copy of Police [*name redacted*] 'on site' investigation report
5. The public authority responded on 08 September 2008 issuing a refusal notice stating:

"...the exemption contained in Regulation 12(4)(a) of the Environmental Information Regulations 2004 applies in that the Council does not hold information in the form of an investigation in connection with your planning application. The purpose of my visit...was to clarify what information you were seeking from the Council and no investigation report was produced following the visit."
6. Over the following months the complainant continued correspondence with a number of public bodies including the Commissioner's Office with the view to compiling a report for the European Court of Human Rights and ultimately contacted the Council again on 26 April 2009 still dissatisfied with its initial response.
7. The Council wrote to the complainant on 09 June 2009 to provide the outcome of the internal review it had carried out. The public authority's records management officer stated:

"I have sought the information you have specified...and am now able to say this report is not held by Cheshire East Council. Nor was it held by the old Macclesfield Borough Council."

The Investigation

Scope of the case

8. Following correspondence and enquiries with the Commissioner's Office the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the Council's claim that it did not hold the information requested.

Chronology

9. On 10 November 2009 the Commissioner contacted the public authority to discuss the case and outline the focus of the investigation.
10. The Commissioner wrote to the public authority on the same day to ask questions, eleven in total, with the view to ascertaining whether or not the public authority held the requested information.
11. The Commissioner sought details of, amongst others, what types of searches were carried out and why these would be likely to retrieve any information falling within the scope of the request; whether the public authority had records of the information's destruction and the Council's formal records management policy.
12. On 10 December 2009 the public authority responded to the Commissioner. The Council gave a brief background to the information request and the two pieces of information that it believed the complainant wished it to carry out searches for.
13. The public authority again stated that it did not hold either report in question. The Council had contacted the solicitor and chartered surveyor, who visited the site, verbally and had received assurances that neither of them had produced a report.
14. The Council explained that staff from both the former Macclesfield Borough Council and Cheshire County Council had been approached and asked to conduct searches of their manual and electronic records. The Council listed the search terms that had been used in attempts to locate the documents.
15. The Council also stated that it had conducted similar searches for a copy of the police report the complainant believed had been prepared by Cheshire Constabulary. The public authority again stated that this information was not held by the Council and as the information in question was a police report it was unlikely that the Council would hold or would ever have held such a document.
16. The Council had informed the complainant of the above regarding the police report and had advised him to contact Cheshire Constabulary.
17. The Commissioner on receipt of the Council's letter dated 10 December 2009 considered the facts contained within the correspondence and found that although he understood the Council's claim, he required further details regarding

- some matters. The Commissioner wrote to the Council again on 15 December 2009 seeking further clarification to aid his investigation.
18. On 05 January 2010 the public authority responded to the Commissioner offering further detailed answers to each of the eleven questions in turn. The Council stressed that there was no question it was withholding information and that the two items of information, the surveyor's report and the police report had never existed.
 19. On 08 January 2010 the Commissioner wrote to the complainant regarding the dispute over whether the Council held or had held in August 2008, the requested information. The Commissioner concluded that on the balance of probabilities he had found that the public authority did not hold the information.
 20. The Commissioner invited the complainant to provide new evidence to support his case if he wished the Commissioner to continue the investigation otherwise the provisional view that the information was not held would prevail.
 21. The complainant contacted the Commissioner on 18 January 2010. He forwarded documents dated from the beginning of January 2010 including correspondence from Cheshire Constabulary, the Independent Police Complaints Commission, the European Court of Human Rights and Chester Crown Court.
 22. The complainant also made a request for the Commissioner's Office to obtain information from the Lord Chancellor regarding land indemnity insurance.
 23. The Commissioner viewed all the new documents and noted the request to obtain information on behalf of the complainant. He wrote to the complainant on 18 January 2010 to provide an update on the case and again clarified that he did not retrieve information or make information requests on behalf of individuals.
 24. The Commissioner confirmed he would be issuing a Decision Notice to resolve the case.

Analysis

Substantive Procedural Matters

Is relevant recorded information held?

25. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency (EA/2006/0072)*. In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether on a balance of probabilities, the information is held.

26. The Commissioner made detailed enquiries of the public authority on 10 November 2009 and 15 December 2009. These enquiries were focussed on establishing whether there were reasons for believing that the information was held and the process that was undertaken by the public authority to locate the requested information.

Reasons for believing information is held/not held

27. The complainant did not offer any proof that the public authority had produced a report following the visit to his property and retained it on file nor that the Council held on its records a copy of the police report he believed had also been produced. His arguments were based on conjecture that the Council must have prepared an investigative report of some kind following the visit to his property.
28. The complainant did write a note, for the attention of the Commissioner, on a letter from Cheshire Constabulary that was forwarded to the case documents on 18 January 2010 stating:

"P.S Inspector [name redacted] says police reports in underground storeroom..."

However the Commissioner has not investigated this matter as the case involves information held by Cheshire East Council (former Macclesfield Borough Council) and no other public authority. The complainant was advised of this in correspondence dated 18 January 2010.

29. The public authority answered the Commissioner's questions fully and argued convincingly that the surveyor's report was never written and the police report was never held by the Council.

Attempts made to locate information

30. Setting aside its claim that no information was held, the Council nevertheless conducted searches of its manual and electronic records and approached staff of the two former public authorities (Cheshire County Council and Macclesfield Borough Council), before Cheshire East Council came into existence, to make enquiries concerning the requested information.
31. In answering the Commissioner's questions the Council detailed its efforts undertaken to locate the information. For example the Council informed the Commissioner of the search terms used in its attempts to locate and retrieve the information.

Balance of probabilities

32. The Commissioner has considered the above information and is content to determine that on the balance of probabilities the public authority holds no recorded information that falls within the scope of the complainant's request.

Public Interest Test

33. Regulation 12(4)(a) (full wording in Legal Annex) of the EIR which states that a public authority may refuse to disclose information if it does not hold that information when an applicant's request is received is subject to the public interest test. However it will not usually be possible for the Commissioner to consider the public interest test in respect of information which is not held, as in this case and therefore he has not commented on it further in this Notice.

The Decision

34. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Environmental Information Regulations.

The Council correctly relied on the exception contained within regulation 12(4)(a) of the EIR.

Steps Required

35. The Commissioner requires no steps to be taken.

Right of Appeal

36. 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 4th day of February 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Regulation 12 - Exceptions to the duty to disclose environmental information

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

Regulation 12(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.

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.