

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 March 2010

Public Authority: Department of the Environment (Northern Ireland)
Address: 10-18 Adelaide Street
Belfast
BT2 8GB

Summary

The complainant requested information relating to an application for planning permission for a housing development adjacent to an ancient woodland. The Department provided the complainant with access to its planning file, but the complainant was not satisfied that it contained all the information relevant to the request. The complainant requested that the Department conduct an internal review. Despite the Commissioner's intervention the Department failed to conduct an internal review.

Therefore the Commissioner's decision is that the Department has failed to comply with the requirements of regulations 5(1), 11(3) and 11(4) of the EIR. Accordingly, the Commissioner now requires the Department to conduct an internal review which meets the requirements of the EIR.

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.
2. This Notice sets out the Commissioner's decision in respect of the complainant's request.

Background

3. This complaint relates to a planning application for permission to erect housing adjacent to an area of ancient woodland in County Derry. The woodland had been recorded on local maps since at least the 1600s.
4. The complainant in this case acted on behalf of a local group which was concerned about the decision to grant planning permission.

The Request

5. The complainant's request was made to the Department of the Environment (Northern Ireland), (the Department), on 14 May 2007. The complainant referred to his previous correspondence with the Department, and wrote:

"We would point out that some of the main areas of concern for which we have not received the info requested are as follows:

For example, we need to know the detailed information regarding what material considerations were taken into account of when arriving at your decision re this application

Please let us know what information informed your decision to accept the applicant's non compliance with the DAP 20011 and other planning requirements."

6. The Department responded to the complainant on 12 June 2007. The Department referred to regulation 6(1)(b) of the EIR (which relates to the form and format of information), and stated that:

"All information held by the Department in relation to this application, including the professional planning report is contained in the application file. In relation to your questions regarding material considerations and non-compliance with draft Area plan the Division are content that these queries are covered in the Development Control Officer's report. The policies, advice notices etc mentioned in the report are available to view on the Planning Service's website..."

As you are aware this file can be inspected under the Department's Open File policy."

7. On 15 July 2007 the complainant wrote to the Department seeking an internal review of its apparent decision to withhold information, stating:

"We have viewed this file on several occasions and it does not contain the answers to the questions contained in our letters and we have not been given any sound reasons for the PS acceptance of the applicant's non compliance with the requirements of the Area Plan etc."

8. On 19 July 2007 the Department acknowledged this request for an internal review advising that it hoped to provide a substantive response as soon as possible and in any event within 40 working days after receipt of the complaint and not later than 13 September 2007.
9. The complainant did not receive any further correspondence relating to his request for an internal review. There was however an exchange of letters between the complainant's representatives and the Department regarding the Department's decision to proceed with the granting of an application. This sequence of correspondence culminated in a letter from the Department dated 22 October 2007 in which the Department indicated that it had granted planning permission for the development in question.

The Investigation

Scope of the case

10. On 3 November 2007 the complainant contacted the Commissioner to complain that his request for information of 14 May 2007 had not been dealt with appropriately.
11. On considering the correspondence the Commissioner noted that the Department had not yet advised the complainant of the outcome of its internal review. On 29 November 2007 the Commissioner contacted the Department who advised that it had not yet completed a review. However the Department assured the Commissioner that it would now do so, and that the outcome would be provided to the complainant within 14 – 20 days.
12. The complainant contacted the Commissioner again on 7 March 2008 to advise that he had still not received the outcome of the internal review.

Chronology

13. On 14 March 2008 the Commissioner wrote to the Department. The Commissioner reminded the Department that it had advised the complainant on 19 July 2007 that it would conduct an internal review, but despite the Commissioner's intervention it appeared that the Department had failed to do so. The Commissioner asked that the Department provide the complainant with the outcome of its internal review within 10 working days.
14. The Commissioner did not receive a response to his letter, and he contacted the Department again on 8 April 2008. On 1 May 2008 the Department advised the Commissioner that it would provide a full response.
15. Following a change in the Commissioner's staff the case was reallocated in September 2008. The Commissioner noted that he had not received a response to his letter of 14 March 2008, nor had the Department advised the complainant of the outcome of its internal review. The Commissioner contacted the Department, who advised that it had no record of having received the Commissioner's letter of 14 March 2008. The Commissioner wrote to the Department on 5 September 2008 requesting a list of the information held, as well as a copy of all information relevant to the request.
16. On 23 September 2008 the Department provided the Commissioner with copies of some information which was contained within the planning application file. The Department advised the Commissioner that it was unable to produce a list of the information held as the planning application file was "voluminous" and did not contain an index or list. However the Department agreed to provide the Commissioner with a copy of the full planning application file. This was provided to the Commissioner on 14 November 2008.
17. On 9 February 2009 the Commissioner asked the Department to confirm whether any further information relevant to the complainant's request was held by the Department at the time of the request of 14 May 2007. The Commissioner asked whether there existed any correspondence to any party, internal or external, on the issue of this development, other than that which was held on the open planning application file. The Commissioner also asked whether there existed any notes, minutes, memoranda or emails held by any party within the Department or on behalf of the Department relating to the development which were not contained within the planning application file.
18. Regrettably the Commissioner's investigation was then delayed as a result of the volume of complaints received and under consideration.

The Commissioner contacted the Department on 4 December 2009 to advise that he had not received a response to his letter of 9 February 2009.

19. The Department responded to the Commissioner on 10 December 2009. The Department confirmed that "The information on the planning application file made available to the applicant details all the information subject to his request".

Findings of Fact

20. Having inspected the planning application file, the Commissioner notes that it comprises over 150 documents relating to the application for development permission. A number of the documents contained in the planning application file are duplicates.
21. The planning application file includes the following broad classes of information:
 - Correspondence between the Planning Service and the developer
 - Correspondence between the Planning Service and various objectors
 - Correspondence between the Planning Service and other stakeholders
 - Internal correspondence within the DoE
 - Maps and photographs
 - The Development Control Officer's Professional Planning Report
22. The Development Control Officer's Professional Planning Report comprises 26 pages and contains the following information:
 - Details of the proposed development
 - Names of consultees and notified neighbours
 - Names of persons who made representations
 - Consultation summary and responses
 - Site history
 - Case officer report
 - List of relevant policies
 - Details of objections
 - Recommendations

Analysis

Regulation 5(1): duty to make information available

23. Regulation 5(1) of the EIR states that, subject to certain exceptions, a public authority that holds environmental information must make it available on request.
24. The Commissioner is mindful of the fact that the EIR provides for access to recorded information, rather than comment or opinion. Therefore the Department was under no obligation to create information to answer questions put by the complainant. However, the Commissioner has carefully examined the detail of the complainant's request. The Commissioner considers that the complainant's request was for access to any recorded information which explained the Department's decision in relation to the planning application.
25. The Commissioner notes that the Department responded to the complainant's request by stating that all relevant information was contained in the planning file, which had already been made available to the complainant. Therefore the Department was of the view that it had complied with regulation 5(1) of the EIR.
26. The Commissioner notes that the Department specifically drew the complainant's attention to the Development Control Officer's Professional Planning Report (see paragraph 22 above). The Department further indicated that the complainant's questions were covered in this report.
27. However, the complainant's view was that the Department had not made all relevant information available, as expressed in his letter to the Department of 15 July 2007:

"Para 4 indicates that all info required is contained in the application file. We have viewed this file on several occasions and it does not contain the answers to the questions contained in our letters and we have not been given any sound reasons for the PS [Planning Service] acceptance of the applicant's non-compliance with the requirements of the Area Plan etc..."

"Our big problem is that we are only being provided with general references to policies etc but the specific aspects of the policies which "were considered" are not being made clear to us".

28. The Commissioner considers that, even if the complainant's initial request was not clear, the complainant clearly stated in his letter of 15

July 2007 his concern that the information contained in the file did not explain the Department's decision.

29. The Commissioner notes that the Department did not provide a substantive response to the complainant's letter of 15 July 2007. The Commissioner is of the view that conducting an internal review would have enabled the Department to provide evidence to both the complainant and the Commissioner that it had in fact considered the complainant's concerns. However, as the Department did not provide any such evidence the Commissioner can not be satisfied that the Department did in fact make all the relevant information available to the complainant in response to his request.
30. However, the Commissioner notes that, when requested by the Commissioner to provide a list of all relevant information held, the Department did not hold any such list of the information held and advised the Commissioner that to create an index of that information would be a considerable task. This suggests to the Commissioner that the Department may not be fully aware of the extent (or lack) of information contained in the file which was relevant to the complainant's request. In any event it appears that the Department assumed that any relevant information would be contained in the planning application file.
31. Accordingly, the Commissioner is concerned at the manner in which such planning documents are managed and made available to the public. The Commissioner considers that the present arrangements for permitting public access to planning application files does not support public confidence that all relevant information has indeed been made available and the requirements of regulation 5 of the EIR fulfilled. Therefore the Commissioner can not be satisfied that the Department has complied with regulation 5(1) of the EIR.

Regulation 6(1)(b): form and format of information

32. The Department referred the complainant to regulation 6(1)(b) in its letter of 12 June 2007. Regulation 6(1)(b) provides that:

"6. (1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –

...

(b) the information is already publicly available and easily accessible to the applicant in another form or format".
33. The Commissioner notes that the request of 14 May 2007 indicated that the complainant had previously asked for information, but was not

content with the information provided. The complainant's letter of 14 May 2007 did not request that the information be provided in a particular form or format, he merely asked for information which he felt he had not yet received.

34. The Commissioner is assisted by the First-tier Tribunal (Information Rights) in the case of Kessler¹, which found that:

"The expression 'form or format' is not a reference to categories of subject matter, but is a reference to whether the information should be supplied by means of paper copies, or electronically, or by viewing of a microfiche and so on."(para 50)

35. Therefore the Commissioner is of the view that, in order to rely on regulation 6, the public authority accepts that it holds the requested information, and is considering how it is communicated to the applicant. However, in this case the Department had already provided the complainant with access to the planning application file, and the complainant disputed that this comprised all of the relevant information. It does not appear to the Commissioner that the Department was offering (or refusing) to provide the complainant with the information in a particular format. Nor did the complaint to the Commissioner refer to the form and format of the information.
36. In light of the above, the Commissioner considers that the Department wrongly cited regulation 6(1)(b). If the Department was of the view that it had provided all the information it held, it ought to have made this clear to the complainant, and ought to have advised that it did not hold any further information relevant to the request. The Department could have issued a refusal notice citing reliance on the exception at regulation 12(4)(a), which applies where requested information is not held.

Internal review – regulation 11

37. Regulation 11(1) of the EIR provides that an applicant may make representations to a public authority, if he considers that the authority has failed to comply with the requirements of the EIR in relation to his request.
38. Regulation 11(3) requires that the authority consider the complainant's representations, along with any supporting evidence provided by the complainant, and to decide whether it has complied with the requirements of the EIR. Finally, regulation 11(4) requires that the authority notify the applicant of its decision in relation to the

¹ *Keston Ramblers Association v Information Commissioner and London Borough of Bromley* (EA/2005/0024)

applicant's representations no later than forty working days after receipt of those representations.

39. The Commissioner considers that the complainant in this case did provide a clear indication to the Department that he was not satisfied with its response (see paragraph 27 above). Specifically the complainant argued that he was not provided with the actual information he requested, he was expected to trawl through the planning application file and various policies published on the Department's website.
40. On 19 July 2007 the Department acknowledged the complainant's request for an internal review, advising that it would respond not later than 13 September 2007. However, despite a number of reminders from the Commissioner, the Department failed to conduct such a review.
41. The Commissioner is concerned that the Department has not provided any explanation as to its failure to conduct an internal review. The Commissioner considers that regulation 11 of the EIR provides a clear statutory right for an applicant to have his or her request reconsidered by the public authority in question. This in turn provides the authority with an opportunity to rectify any procedural or handling issues, as well as an opportunity to explain to the complainant how their request was handled.
42. In this case it is clear to the Commissioner that the complainant's request was submitted because the complainant did not understand how the Department had reached a decision about the planning application. The complainant inspected the planning application file but felt that this did not address his queries. Therefore the Department could have explained to the complainant how planning application files are structured, so that the complainant might understand the extent of the information contained within the file.
43. The Commissioner considers that it would have been reasonable to expect the Department to provide a specific response to the complainant's detailed grounds for dissatisfaction, or at least to explain that it did not hold detailed information (and therefore refuse the request under regulation 12(4)(a), which applies if information is not held).
44. In any event the Department did not conduct an internal review, adequate or otherwise, and therefore the Commissioner must find that the Department failed to comply with regulation 11(3) of the EIR. Consequently, in failing to provide the complainant with notice of its decision in response to the complainant's representations within the

appropriate time period the Department failed to comply with regulation 11(4) of the EIR.

The Decision

45. The Commissioner's decision is that the Department did not deal with the request in accordance with the EIR in the following respects:
- Regulation 5(1), as the Commissioner is not satisfied that the Department made all the relevant information available to the complainant
 - Regulations 11(3) and 11(4) in that the Department failed to consider the representations put forward by the Department.

Steps required

46. The Commissioner requires the Department to undertake an internal review which complies with the requirements of regulation 11(3), that is, which addresses the complainant's representations, so that the complainant can be assured that the Department has undertaken a proper review of its handling of the request.

Failure to comply

47. 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

48. 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 25th day of March 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex: Relevant statutory obligations

Environmental Information Regulations 2004

Regulation 5: duty to make available environmental information on request

Regulation 5(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.

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 6: form and format

Regulation 6(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –

...

(b) the information is already publicly available and easily accessible to the applicant in another form or format”.

Regulation 11: representations and considerations

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(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.

Reference: FS50184503



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 date of receipt of the representations.