

Environmental Information Regulations 2004

Decision Notice

Date: 28 March 2011

Public Authority: Marine Management Organisation
Address: PO Box 1275
Newcastle upon Tyne
NE99 5BN

Summary

The complainant requested from the public authority information generated by an application to expand the Port of Southampton. The public authority's eventual position was that it had released all the requested information save for personal data it withheld under regulation 13 of the EIR. After investigation the Commissioner found that regulation 13 had been correctly applied but that there was some additional requested information which had not been released. The Commissioner therefore requires that additional information to be provided to the complainant. In its handling of the request, the Commissioner has also found the public authority to have breached regulations 5 and 14 of the EIR.

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.

Background

2. The Marine Management Organisation ("the public authority") is a non-departmental public body which was established under the Marine and Coastal Access Act 2009. It commenced its existence on 1 April 2010 incorporated the work of the Marine and Fisheries Agency (also "the public authority") which ceased to exist. Consequently, although the

request for information was submitted to the Marine and Fisheries Agency, responsibility for it passed to the Marine Management Organisation in April 2010.

3. Associated British Ports Southampton (ABP) applied for licences to the public authority to carry out capital dredging to deepen berths 201 and 202 (at the Port of Southampton) and to construct an improved quay wall, to support the revised berths.

The Request

4. On 14 August 2009 the complainant made a request to the public authority for the following information:

"Copies of all application documents submitted by ABP in relation to their proposed expansion works at the Port of Southampton, including any environmental information together with any correspondence between ABP and the Marine and Fisheries Agency and/or the Department of Transport in relation to those applications and such information."
5. On 3 September 2009 the public authority provided the complainant with a copy of ABP's application documents for its proposed extension works to the Port of Southampton.
6. The public authority next provided a response to the complainant on 25 September 2009 when it asked the complainant to be more specific about what environmental information was sought. The public authority also acknowledged that it held some more of the information requested though it declined to provide it to the complainant. However, the public authority failed to cite the sections or regulations that it was relying on to do so.
7. The complainant responded to the public authority by email on 30 September 2009. It stated, inter alia, that it was seeking any environmental information relating to ABP's applications for the proposed extension works to the Port of Southampton.
8. On 28 October 2009 the complainant wrote again to the public authority. It averred that it had not received a reply to its email dated 30 September 2009 and requested an internal review of the public authority's handling of its request for information.
9. On 21 December 2009 the public authority wrote to the complainant with the details of the substantive result of the internal review it had

carried out. No further information was provided to the complainant. However the review conceded that there had been errors in the way the request for information had been handled. In order to rectify some of these errors the Department for Environment, Food and Rural Affairs ("DEFRA" - which carried out the review) said that the information being withheld was being done so on the grounds provide by regulation 12(5)(d) of the EIR and that the public interest test favoured the maintenance of the exception.

10. On 4 February 2011 the public authority informed the complainant that following discussions with the Commissioner it was releasing the majority of the withheld information. The small remainder it continued to withhold was done so by reference to regulations 12(3) and 13 of the EIR (personal data).

The Investigation

Scope of the case

11. On 17 February 2010 the complainant contacted the Commissioner to complain about the way the request for information had been handled.

Chronology

12. The Commissioner commenced his substantive investigation by writing to the public authority on 17 June 2010. In his letter the Commissioner sought clarification from the public authority regarding its decision to withhold requested information from the complainant.
13. In its response to the Commissioner, dated 22 July 2010, the public authority confirmed and clarified its reliance on regulation 12(5)(d). The public authority further averred that it would also now rely on regulation 12(5)(e) of the EIR to withhold the remaining requested information from the complainant.
14. By way of an exchange of correspondence with the parties the Commissioner, between September and December 2010, investigated further factual and legal matters relating to the circumstances of this case.
15. On 7 January 2011 the Commissioner wrote to the public authority expressing his concerns regarding its reliance on the aforesaid exceptions under the EIR not to communicate information to the complainant.
16. On 24 January 2011 the public authority informed the Commissioner

that it had re-considered matters and that it would now be releasing the withheld information to the complainant.

17. By way of a letter dated 4 February 2011 the public authority informed the complainant that following discussions with the Commissioner it would release the withheld information save that certain elements of the documents being disclosing had been redacted. The public authority stated that it now relied only on regulations 12(3) and 13 (personal data) to make the said redactions. It subsequently provided the Commissioner with copies of the information disclosed to the complainant and copies of the information redacted under regulations 12(3) and 13.
18. After the public authority had released further information to the complainant on 4 February 2011, the Commissioner sought the views of the complainant. The complainant informed the Commissioner (in correspondence dated 1 March 2011) that it did not accept that all the requested information had been released. It further averred that regulations 12(3) and 13 of the EIR were not applicable and did not allow for the public authority to redact any of the requested information.
19. The Commissioner put the assertions and contentions of the complainant to the public authority under cover of correspondence dated 2 March 2011. The public authority provided its substantive reply by way of a letter dated 16 March 2011.

Analysis

Substantive Procedural Matters

20. The Commissioner firstly has to decide whether the public authority had located all the requested information it held.
21. The normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information is held, including whether it is inherently unlikely that the information so far located represents the total information held.

22. The Commissioner lays out below the complainant's assertions and the public authority replies thereto:

- a) The application letter from ABP to the public authority dated 15 December 2008 refers to several enclosed plans and sections which have not been disclosed as well as copies of meeting notes with Natural England.

Reply - We have investigated this issue and understood that all of the information had been disclosed in our letter dated 3 September 2009. However, we will now seek to remedy this issue by locating and disclosing this information again.

- b) An email from the Transport and General Workers' Union to the Department for Transport dated 6 January 2009 refers to an attached "briefing note" but this attachment has not been disclosed.

Reply - We were not party to the email dated 6 January 2009 until later in the chain. The "briefing note" referred to was not attached to this email and therefore represents information not held by us.

- c) An email from ABP to the public authority dated 28 January 2009 refers to a meeting agenda which they will provide to the public authority - no agenda for or minutes of the meeting have been disclosed.

Reply - The meeting referred to subsequently took place on 16 February 2009. The minutes to this meeting, titled "ABP – MFA Meeting: MMO Progress, Interim Arrangements and Future Arrangements", were disclosed in our letter dated 4 February 2011

- d) An email dated 27 March 2009 from ABP to the public authority refers to a report "we commissioned to assess the marine environmental impacts raised by Natural England" - no copy of this report has been disclosed.

Reply - We apologise for the accidental omission of this report however we will now seek to remedy this issue by locating and disclosing this information.

- e) We refer also to paragraph 3 of our letter dated 22 October 2010 (copy attached) and our comments in relation to Natural England's scoping response to ABP's scoping report.

Reply - It is important to note that the request was for information up to and including 14 August 2009. At this point in time, the process was underway but not yet complete and it would be unreasonable to suggest that all outstanding points would have

been addressed. We responded to a request for information from the complainant that was raised within the 22 October 2010 letter. However, no internal review was requested. Ultimately in this matter, Natural England responded to the MFA/MMO with no objection to the proposed works once the Appropriate Assessment was concluded. If they had concerns with the Environmental Statement, they would have raised them.

- f) The public authority's decision letter (dated 22 February 2011) refers, at page 6, to a "method statement" which was received by the MFA/MMO from ABP. The disclosed documents do not contain any such statement and this has not been made available to our client.

Reply - at the time of completing the request, the method statement referred to was not identified as falling within the scope of the request. However, the position has been reconsidered and we will now disclose this information.

23. The Commissioner notes the assertions of the complainant that the public authority had not located and conveyed to it all the requested information held at the time of the request. As to these assertions the Commissioner accepts as true and correct the replies of the public authority as laid out above. The reason for this decision is that the Commissioner finds the public authority's replies to be reasonable, plausible and there is no evidence that the public authority has previously knowingly withheld information for which it had not accounted.
24. In light of the evidence and arguments provided by the public authority and the complainant the Commissioner is satisfied that, on the balance of probabilities, it ultimately (but belatedly) located the majority of the information requested which it held at the time of the request. However the Commissioner finds that, as indicated by the public authority, the following information is yet to be disclosed to the complainant;
1. The plans, sections and copies of meeting notes with Natural England which have not been yet been disclosed and as referenced in the application letter from ABP to the MFA dated 15 December 2008.
 2. The report referred to in an email dated 27 March 2009 from ABP to the MFA which says it was "commissioned to assess the marine environmental impacts raised by Natural England".

3. The "method statement" referred, at page 6, in the public authority's decision letter dated 22 February 2011¹ .

Exception

25. The Commissioner next considered whether the public authority was correct to withhold part of the requested information from the complainant by relying regulation 13 of the EIR.
26. The Commissioner asked the public authority to clarify its reliance on regulations 12(3) and 13 of the EIR. The public authority replied as follows:

"We consider that all of the withheld information to be personal data as defined by section 1(1) of the Data Protection Act 1998.

We consider that the first data protection principle is the most relevant in this case. We believe that disclosure of the redacted names and contact details would be a breach of the first data protection principle and that the disclosure of this information would be "unfair". At the time of the request for information, we believe that the data subjects would not have had any expectation that their names would be publicised having passed their information to us in good faith.....

More specifically, we argue that in respect of the withheld information (names and contact details) in relation to staff employed by the Marine and Fisheries Agency (MFA), they would not have had overall responsibility for the decision making and that they would report to someone who is ultimately responsible and accountable. Therefore, it would be unfair to disclose their personal data in circumstances where actual responsibility for a particular decision/policy/document is properly held by their superiors. This disclosure could then lead to individuals being held accountable when in fact they were acting merely as an individual drafting and communicating the views of their superiors and/or organisation. With respect of the withheld information (names and contact details) relating to those individuals not employed by the then MFA, those individuals have had no chance to consent to their information being used in this way and given that the individuals have not been able to make representations, disclosure would ultimately be unfair.

1

http://www.marinemanagement.org.uk/works/documents/public_register/abp_southampton/eia_consent_decision.pdf

We believe that the information withheld does not render the disclosed information incomprehensible. In addition, the withheld information is not pertinent to understanding the disclosed information and as it does not affect the wider public interest, there is no necessity to disclose the withheld information."

27. The exception under regulation 13 applies to information that is the personal data of an individual other than the applicant (the complainant) and where disclosure of that information would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ("DPA"). In this case, the Authority considers that disclosure of the withheld information would breach the first and second principles of the DPA.
28. In considering whether the public authority has correctly applied regulation 13(2) of the EIR to the withheld information, the Commissioner has first considered whether the withheld information is 'personal data'. According to section 1(1) of the DPA, personal data is defined as follows:

'personal data' means data which relate to a living individual who can be identified –

 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."
29. In considering whether the withheld information is 'personal data', the Commissioner has also taken into account his own guidance on the issue².
30. The public authority stated that it considers the withheld information to meet the definition for personal data contained within the DPA. The Commissioner notes that the withheld information consists of names and email addresses. In this case, the Commissioner is satisfied that the individuals can be identified by their names and email addresses.

2

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

The Commissioner accepts that this information in the context of this request is therefore personal data as defined by the DPA.

31. In determining whether a disclosure is fair under the first data protection principle for the purposes of regulation 13 of the EIR, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with the general principles of accountability and transparency.
32. The Commissioner notes that disclosure under the EIR represents disclosure to the wider world. When considering the reasonable expectations of the data subject, the Commissioner considers whether they would be likely to expect that their personal data would be disclosed to anyone who requested it.
33. The Commissioner notes that the withheld names and email details for the staff of the public authority relate purely to their occupational capacity and there are no 'private' considerations regarding any of these individuals. However, the Commissioner is of the view that such staff would reasonably expect their details to remain 'private' as they would not anticipate any requirement for them to be made 'public' in order for them to fulfil their occupational role. Whilst the Commissioner believes that senior staff should anticipate that such information is likely to be disclosable, he also believes that more junior staff who do not normally deal directly with the public would not presume to have this information released.
34. The Commissioner acknowledges that the licensing process – to which the information relates - should be sufficiently transparent to determine that the correct procedures have been followed, and to allow for challenges. However the Commissioner accepts, noting the contextual setting of the personal data, the assertion of the public authority that the named employees of the public authority were essentially mere conduits in an information and fact gathering exercise and were not ultimately the decision makers here.
35. The withheld information is not the information that the decision is based upon or information that would otherwise be particularly pertinent to the decision. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject in considering how the factors balance. In doing so, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subjects. That the individuals were not in a senior or decision making position and the relative insignificance of the withheld information to the actual decision making of the public authority are important factors

in the Commissioner reaching his decision. As the Commissioner has decided that disclosure would be unfair, there is no need for him to go on consider the other elements of the first data principle (or indeed the second principle).

36. As regards the names and email addresses of individuals who were not employees of the public authority, the Commissioner finds that there is no evidence that they did or would, if asked, give their consent to the public dissemination of their personal data. In the context of this matter their primary function was to liaise with the public authority regarding the applications of ABP. Their role is therefore not public facing and the Commissioner accepts, from this, that they would be unlikely to have envisaged that this would permit the public dissemination of their personal data. The Commissioner is also unable to identify any credible or realistic public need for the public dissemination of this personal data. Consequently, he considers that it is unfair to release these names (and email addresses) in these circumstances and that disclosure also would not be fair.

Procedural Requirements

37. In failing to previously provide the complainant with the information that the Commissioner has directed to be disclosed pursuant to this Decision Notice the public authority breached regulation 5(1) of the EIR.
38. In respect of the information disclosed to the complainant on 4 February 2011 and as regards the information to be disclosed pursuant to this Decision Notice by not providing it to the complainant within 20 working days of the request, the public authority breached regulation 5(2) of the EIR.
39. The public authority cited its reliance on regulation 13 on 4 February 2011. This was not within twenty working days of the request and thus in breach of Regulation 14(2).

The Decision

40. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Regulations:
- The withholding of names and addresses under regulation 13.

- The scope of the information provided to the complainant, save for that directed in this Decision Notice to be conveyed to the complainant
41. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Regulations:
- Failure to cite the correct exception within twenty working days, so contravening regulation 14(2).
 - In respect of the information that was provided to the complainant, by not providing it within 20 working days of the request the public authority breached regulation 5(2) of the EIR.
 - In failing to previously provide the complainant with the information that the Commissioner has directed to be disclosed pursuant to this Decision Notice the public authority breached regulation 5(1) and (2) of the EIR.

Steps Required

42. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:

Provide the complainant with a response in accordance with the EIR in relation to any further information it may hold falling within the scope of the request as indicated or referenced in the following:

1. The plans, sections and copies of meeting notes with Natural England which have not been yet been disclosed and as referenced in the application letter from ABP to the MFA dated 15 December 2008.
 2. The report referred to in an email dated 27 March 2009 from ABP to the MFA which says it was "commissioned to assess the marine environmental impacts raised by Natural England".
 3. The "method statement" referred, at page 6, in the public authority's decision letter dated 22 February 2011.
43. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

44. 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

45. 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

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 28th day of March 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
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Cheshire
SK9 5AF**

Legal Annex

Environmental Information Regulations

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 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
- (a) 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.

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 –
 - 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

1. has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Regulation 12 (6)

For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7)

For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8)

For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9)

To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10)

For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11)

Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

Regulation 13 - Personal data

Regulation 13(1)

To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

Regulation 13(2)

The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - 1. any of the data protection principles; or
 - 2. section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 13(3)

The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Regulation 13(4)

In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Regulation 13(5)

For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (c) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (d) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

Regulation 14 - Refusal to disclose information

Regulation 14(1)

If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

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 –

- (e) any exception relied on under regulations 12(4), 12(5) or 13; and
- (f) 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).