

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

Decision Notice

Date: 7 June 2011

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

Complainant: Mr William Rundle
Address: Fish Legal
Eastwood House
6 Rainbow Street
Leominster
Herefordshire HR6 8DQ

Summary

The complainant requested information relating to a pollution incident. The Department of the Environment NI ('the Department') did not respond to the complainant's request until almost 9 months after receiving the original request. The Department then released some information to the complainant. The complainant informed the Commissioner that he believed that the Department held further information falling within the scope of his request. The Commissioner's decision is that the Department, on the balance of probabilities, does not hold any further information within the scope of the complainant's request which has not already been provided to the complainant. The Commissioner also finds that the Department failed to comply with regulation 5 (2) as it did not make the information it subsequently disclosed available within the statutory time for compliance. The Commissioner also finds that the Department has breached regulation 14 by not issuing a refusal notice in accordance with regulation 14 in respect of the information which it does not hold. The Commissioner 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. The Commissioner notes that under the EIR the Northern Ireland Environment Agency ('NIEA') is not a public authority itself, but is actually an executive agency of Department of the Environment ('the Department') which is responsible for the NIEA and therefore, the public authority in this case is actually the Department of the Environment and not the NIEA. However, for the sake of clarity, this decision notice refers in parts to the NIEA as if it were the Department of the Environment.
3. The complainant made the following request to the Department on 26 October 2009:

"I noted at the meeting that some mention was made of the March 2008 pollution which it was believed was caused by Kilco Chemicals although the NIEA did not succeed in its criminal prosecution of this company. Nevertheless, I should be grateful if you would provide to us the full case file including the following:

1: Reports or any other incident details following the pollution;

2: Any assessments of the extent of the fish kill caused by the pollution in March 2008;

3: Transcripts of interviews with Kilco staff;

4: Statements from NIEA staff and/or Kilco relating to the this pollution event;

5: Any chemical analysis of the pollutant at source and in the river.

For avoidance of doubt, this application for information is made pursuant to the Environmental Information Regulations 2004."

4. On 08 December 2009 and 07 January 2010 the complainant contacted the Department seeking a response to his request.
5. On 12 March 2010 the complainant wrote to the Commissioner explaining that he had still not received a response from the Department. On the 16 April 2010 the Commissioner contacted the Department requesting that it responded to this request. The Commissioner reminded the Department of its obligation to respond to requests within 20 working days of receipt.
6. On 11 May 2010 the complainant wrote to the Department to complain that he had not yet received a response or acknowledgement to his request. The complainant referred the Department to the Commissioner's letter of the 16 April reminding the Department of the timescales for responding to requests.
7. On 02 June 2010 the Commissioner wrote to the Department to inform it that he considered the case eligible for formal consideration.

The Investigation

Scope of the case

8. On 12 March 2010 the complainant initially contacted the Commissioner to complain about the way his request for information had been handled. The complainant advised the Commissioner he had not received a response or even an acknowledgement to his request despite sending several letters chasing such a response. The Commissioner initially wrote to the Department asking it to deal with this request under the EIR. When the Department did not do this the Commissioner began an investigation of this case. Through the course of this investigation the Department released some information to the complainant. This decision notice refers to the Department's handling of this request and specifically in regard to the remainder of that information not released to the complainant. The Department states that the complainant has received all information relevant to his request which is held by the Department. The complainant maintains that the Department should hold further information relevant to his request which it has not provided to him. The Commissioner has investigated this.
9. In correspondence dated 18 August 2010 the complainant made another FOI request to the Department. This FOI request does not form a part of this investigation.

10. The complainant confirmed to the Commissioner that he is content that any redacted personnel information/identities of Departmental staff do not form a part of his request. The Commissioner has therefore not addressed the issue of redaction of staff identities in this decision notice.

Chronology

11. On 09 July 2010 the Department clarified to the complainant that it was in fact going to release *'all of the items of information requested'* apart from the personal data redactions highlighted in their letter of the 07 July 2010, and apologised for not making this clear in its previous correspondence.
12. On 28 July 2010 the Department released some information to the complainant. The complainant contacted the Commissioner informing him that the released information did not contain all of the requested information but only that information requested in part 4 of the complainant's request, with no mention being made of parts 1,2, 3 and 5.
13. The Commissioner wrote to the Department on the 11 October 2010 seeking further information about the handling of this request. Having not received a reply to his correspondence or his reminders the Commissioner informed the Department that he would be issuing a decision notice in this case.
14. On 26 November 2010 the Department released further information to the complainant. The Department stated to the Commissioner that it had now had released all of the documents within the scope of the complainant's request. It confirmed that the only information not previously provided to the complainant (other than the personal data redactions as outlined in paragraph 11) in response to his request for information was copies of the photographs relating to the unsuccessful prosecution. Copies of these photographs have now been provided to the complainant. It clarified that these documents were not being withheld but it was simply the case that it had difficulty in obtaining these from the relevant business area.
15. As a result of the Department's response the Commissioner contacted the complainant again on 10 January 2011 to ascertain whether in light of this further disclosure he was still of the view that some information had not been made available. The complainant replied stating that he considered that he had not received all of the information in this case. He stated that the Department had not provided him with a definitive list of all that was held in this case, he stated specifically *'from reviewing what I have received all but item 4 remain unaddressed and satisfactorily dealt with'*.

16. Following a change in the Commissioner's staff, on 10 March 2011 the Commissioner wrote to the Department asking it to confirm whether or not it held any further information in relation to the complainant's request which it had not already provided. In that letter, the Commissioner put several questions to the Department and asked for its detailed responses to these in the event that it did not hold any further relevant information. Those questions were designed to elicit from the Department how it had ascertained that it held no further information relevant to the complainant's request.
17. On 25 March 2011 the Department responded to the Commissioner stating that it did not hold any further information relevant to the complainant's request. However, that letter failed to provide detailed responses to the Commissioner's questions. As a result of this, the Commissioner again wrote to the Department on 13 April 2011 repeating those questions and adding some further questions on the issue of how the Department had ascertained that it did not hold any further relevant information. The Department provided its detailed responses to those questions on 21 April 2011.

Analysis

Substantive Procedural Requirements

Is the remaining requested information held by the Department?

Regulation 5

18. Regulation 5(1) of the EIR states that:-

"...a public authority that holds environmental information should make it available on request".
19. The Commissioner has considered whether the Department has complied with regulation 5(1) of the EIR.
20. In considering whether or not the information is held by the Department, the Commissioner is mindful of the Tribunal's decision in the case of *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that "there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records". The Tribunal clarified that it was applying the application of the balance of probabilities test required a number of factors to be considered, i.e:-

- the quality of the public authority's initial analysis of the request
- the scope of the search that it decided to make on the basis of that analysis and the thoroughness of the search which was then conducted.
- the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light.

It was therefore clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner will apply in this case.

21. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office (EA/2007/0110)*, in which case the complainant expected that the information would be held as it was extremely important, however the Tribunal concluded that it was not held. Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that information is held.
22. In coming to a decision in this case the Commissioner has considered the supporting evidence which was provided to him by the complainant in support of his submission that the requested information is held. The complainant has suggested that, since the matter which is the subject of his request was the subject of Court proceedings, the Department should reasonably hold further relevant information such as attendance notes of what transpired during the course of the Court proceedings.
23. During the course of the Commissioner's investigation, on 10 March and 13 April 2011, the following questions were put to the Department to determine what information is held relevant to the scope of the complainant's request:
 - Does the Department hold any recorded information relevant to the scope of the complainant's request?
 - What steps were taken to determine what recorded information is held relevant to the scope of the request? The Department must provide a detailed account of the searches that it has conducted to determine this.
 - If the information were held would it be held as manual or electronic records?
 - Was any recorded information ever held relevant to the scope of the complainant's request?
 - If recorded information was held but is no longer held, when did the Department cease to retain this information?

- Does the Department have a record of the document's destruction?
 - What does the Department's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the Department describe the way in which it has handled comparable records of a similar age?
 - Is there a business purpose for which the requested information should be held? If so what is this purpose?
 - Are there any statutory requirements upon the Department to retain the requested information?
 - Is there information held that is similar to that requested and has the Department given appropriate advice and assistance to the applicant?
24. On 21 April 2011 the Department responded to the Commissioner's questions as detailed at paragraph 26 above. The Department explained that, where a reported pollution incident is investigated, such as in this case, the Department opens a registered file into which all recorded information pertaining to the case is placed. That file can be electronic, paper or both. It is necessary in some cases to have both paper and electronic files as many such investigations are carried out "in the field" and the field investigators must have access to the most up-to-date information in the investigation.
25. When the Department receives a request for information, it requests the relevant file(s) from the business area concerned and those files are thoroughly scrutinised for information falling within the scope of the request. The Department also scrutinises documents held within its electronic records management system ("EDRM") and holds discussions with officials across the relevant business areas in order to ascertain what information, if any, is held which falls within the scope of the request and what information should be disclosed or released and on what basis. The Department has carried out such searches and discussions in this case and has confirmed to the Commissioner that it does not hold, and never has held, any further recorded information relating to the complainant's request.
26. The Department also explained that it has statutory responsibilities under the Water Order (Northern Ireland) 1999. In this case, the Department instituted proceedings through the Public Prosecution Service ("PPS") for an alleged pollution offence under section 7(1)(a) of that Order (see Legal Annex to this Notice). In order to mount a prosecution, the Department must have had sufficient evidence, i.e. beyond a reasonable doubt. The Department claims that it has provided all such evidence in this case to the complainant. The Department also makes that point that, if it had withheld any evidence

from the Court, it could be held in contempt of court. It states that it has provided the complainant with all evidence which it provided to the Court.

27. The Commissioner has considered the Department's explanation of its search procedures and has concluded that these are thorough and that the Department takes all reasonable steps in the event of a request for information to ascertain what recorded information, if any, it holds which is relevant to the request.
28. The Commissioner also accepts the Department's point regarding its statutory responsibilities and that it must have had sufficient evidence to mount a prosecution in this case. He believes that the Department has carried out a thorough search of its files containing information relating to the prosecution and has provided all evidence in the case which it holds. The Commissioner accepts that, in cases where legal proceedings are being instituted, a comprehensive and detailed file containing all evidence to be used in the proceedings would be maintained. He considers that the Department has thoroughly scrutinised that file and all other electronic documents and has had discussions with the relevant officials as per its policy for dealing with information requests. He has concluded that, given that such a thorough search was carried out, it is unlikely that further information is held pertaining to the complainant's request.
29. The Commissioner accepts the complainant's point that he would have expected there to be more information held such as attendance notes of what transpired in the course of Court proceedings. This would obviously not have been part of the evidence required in order to mount the prosecution and the Commissioner is somewhat surprised that the Department does not have these, as taking attendance notes of Court proceedings is generally a matter of good practice. Nevertheless, he considers that these would have been placed in the registered file opened by the Department in relation to the case and he accepts that a thorough search of this would have been carried out by the Department when it received the complainant's request.
30. The Commissioner has come to the conclusion that the Department complied with regulation 5(1) of the Act as he considers that, on the balance of probabilities, there is no further recorded information held relevant to the scope of the request and that the Department has already complied with regulation 5(1) by providing the complainant with the information which it does hold which falls within the scope of the request.

31. Regulation 5 (1) of the EIR provides that environmental information shall be made available upon request. Regulation 5 (2) provides that this information should be made available as soon as possible and within 20 working days following receipt of the request.
32. The complainant's original request for the information was made on the 26th October 2009. The Department did not respond to the complainant until the 07 July 2010 and later when it provided some information to the complainant on the 28 July 2010 and on 26 November 2010. The Commissioner therefore concludes that the Department has breached regulation 5 (2) by failing to make available the requested information which it held within 20 working days following the receipt of the request.
33. In coming to a conclusion upon this case the Commissioner has considered what information he would expect the Department to hold and whether there is any evidence that the information was ever held. In doing so the Commissioner has taken into account the responses provided by the Department to the questions posed by him during the course of his investigation. The Commissioner is also mindful of the Tribunal decisions highlighted at paragraphs 20 and 21 above. The Commissioner considers that on the balance of probabilities there is no further recorded information held relevant to the scope of the complainant's request.

Regulation 12 (4)(a)

34. When the requested information is environmental an exception to the EIR duty to disclose environmental information may be engaged. Where information is not held, the relevant exception is provided by Regulation 12(4)(a) so that under the EIRs informing an applicant that information is not held is a refusal to disclose. It follows that the provisions of Regulation 14 (Refusal to disclose information) apply. In informing the complainant that the requested information was not held, but without properly refusing it under the EIRs, the Department was technically in breach of regulation 14.

Public Interest Test

35. The Commissioner appreciates that the wording of Regulation 12(1)(b) specifies that 12(4)(a) is a qualified exception. It would therefore imply that a public interest test would need to be conducted when information is not held. The Commissioner considers that a public interest test in situations where the information is not held is not possible. This is because even if the public interest test favoured disclosure the Department would still not hold the information to enable it to be released.

The Decision

36. The Commissioner's decision is that the Department did not deal with the request in accordance with the EIR in the following respects as it breached the regulations set out below:
- Regulation 5 (2) in that the Department failed to provide the requested information which it held within 20 working days of receipt of the request
 - Regulation 14 by not properly refusing the information under the EIRs.
37. The Commissioner also finds that, on the balance of probabilities, no further information falling within the scope of the complainant's request is held by the Department.

Steps Required

38. The Commissioner requires no steps to be taken.

Other matters

39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
40. The Commissioner is concerned with the length of time taken by the Department to respond to the complainant in this case. The Commissioner has further concerns about the delays or lack of response to his correspondence in relation to his investigation. The Commissioner will continue to monitor the Department's compliance with the EIRs and has noted the details of this case in particular.

Right of Appeal

41. 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

48. 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.
49. 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 7th day of June 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

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

Legal Annex

Environmental Information Regulations 2004

Regulation 5 - Duty to make available environmental information on request

- 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.
- (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 14 – Refusal to disclose information

- (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.
- (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.
- (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;

Water Order (Northern Ireland) 1999

Section 7 – Pollution etc. of water

- 1) Subject to the following provisions of this Part, a person commits an offence if, whether knowingly or otherwise—
 - (a) he discharges or deposits any poisonous, noxious or polluting matter so that it enters a waterway or water contained in any underground strata;