

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

Decision Notice

Date: 26 January 2011

Public Authority: Knowsley Metropolitan Borough Council
Address: Chief Executive's Directorate
PO Box 21
Archway Road
Huyton
Liverpool
L36 9YU

Summary

The complainant requested all email communication to or from the Chief Executive of Knowsley Metropolitan Borough Council ("the Council") that mentions "Everton" in May and June 2008. Some relevant information was disclosed however the Council withheld one email using the exemption under section 36 of the Freedom of Information Act 2000 ("the FOIA"). The Information Commissioner ("the Commissioner") investigated and decided that the Council should have applied the Environmental Information Regulations 2004 ("the EIR"). The Council refused to accept that the EIR applied but stated that if it was wrong about this, it would in the alternative seek to rely on regulation 12(5)(e) of the EIR. However, the Commissioner did not consider that the Council provided sufficient information to justify its reliance on this exception and he has therefore ordered the Council to disclose the email within 35 days. The Commissioner finds that the Council breached regulation 5(1), 5(2), 14(2) and 14(3) of the EIR.

The Commissioner's Role

1. 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 Commissioner. In effect, the enforcement provisions of Part 4 of the FOIA are imported into the EIR.

The Request

2. On 3 April 2009, the complainant sent an email to the Council requesting information in the following terms:

"All e-mail communication between your Chief Executive and [sic] that mentions "Everton" in the months of November and December 2006".
3. The Council replied on 24 April 2009 stating that the earliest emails it would hold would date from April 2008.
4. The complainant replied on 8 May 2009 stating the following:

"I'll have May and June 2008 then".
5. Following a complaint from the complainant, on 2 November 2009 the Commissioner issued a Decision Notice (FER0255298) finding that the Council had failed to respond to the request. The Commissioner ordered the Council to respond within the timescale set by the Decision Notice.
6. The Council wrote to the complainant on 6 November 2009 following the Decision Notice. It stated that it had located seven emails falling within the scope of the request, two of which it disclosed to the complainant in full and one of which it disclosed with personal data redacted. In relation to the remaining four emails, it stated that these emails represented communications to or from individuals who are neither elected members nor council employees. It stated that it was in the process of consulting these individuals about disclosure.
7. On 7 December 2009 the Council wrote to the complainant again, disclosing copies of two of the four remaining emails. It advised the complainant that two of the remaining emails may be subject to one or more exemptions under the FOIA and this matter was being considered further.
8. The Council provided its refusal to the complainant on 21 April 2010. It disclosed one of the two remaining emails but in relation to the last email, it stated that the Council's qualified person was of the view that the exemption under section 36 was engaged. The Council also confirmed its position that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

The Investigation

Scope of the case

9. On 20 May 2010 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 whether the Council had been correct to withhold the email in question.

Chronology

10. On 7 September 2010, the Commissioner wrote to the complainant to set out his understanding of the complaint. The Commissioner noted that in the complainant's original request, he had used the word "between" but did not specify any party other than the Chief Executive. The Commissioner noted that the Council had treated the request as being for emails to or from the Chief Executive. He invited the complainant to let him know if this had been incorrect.
11. On 7 September 2010, the Commissioner also wrote to the Council. In this letter, the Commissioner asked the Council to provide a copy of the email for inspection. The Commissioner also noted that the email in question appeared to concern a scheme known as "Destination Kirkby" which involved the proposed move of Everton Football Club to a new site alongside a new retail development. He explained that in view of this it was likely that the email should have been considered for disclosure under the terms of the EIR rather than the FOIA and he explained why. The Commissioner invited the Council to reconsider its position under the EIR and to provide appropriate rationale if it wished to withhold the email. The Commissioner also asked for some clarification concerning the chronology of the request.
12. On 9 September 2010, the complainant replied to the Commissioner. The complainant confirmed that the Commissioner had correctly understood the nature of his request and complaint.
13. On 1 October 2010, the Council wrote to the Commissioner providing its response. The Council provided a number of different attachments demonstrating how it had handled the request as well as a copy of the withheld email. The Council went on to state that it did not accept that the email should have been handled under the EIR. It added that it wished to maintain that section 36 of the FOIA had been correctly relied upon for the reasons provided amongst the attached information.

14. On 21 October 2010, the Commissioner replied to the Council. The Commissioner stated that it was his view that the EIR should have been applied and he therefore required full rationale for withholding the email under the EIR. The Commissioner referred to previous Decision Notices on the EIR available on his website as guidance. The Commissioner stated that if the Council did not present full rationale under the EIR by 5 November 2010 he would be likely to issue a formal Decision Notice ordering the Council to respond under the EIR.
15. On 27 October 2010, the Council replied stating that it did not consider that the Commissioner had explained why the EIR applied to the request.
16. On the same day, the Commissioner telephoned the Council referring to the explanation provided in the Commissioner's letter dated 7 September 2010. He explained this again over the telephone and pointed out that he did not feel there was anything to add to this explanation. The Commissioner invited the Council to reconsider its position, particularly noting the fact that the Council had already been served with a Decision Notice in respect of this request for its failure to respond initially. As requested by the Council, the Commissioner wrote to confirm his position on the same day.
17. On 10 November 2010, the Council replied. The Council continued to assert that it believed that the Commissioner had not properly explained why he was of the view that the EIR applied. It indicated that it believed the Commissioner's interpretation of what constituted environmental information was "extremely broad" and that it was clear that the email did not constitute environmental information. The Council added that in the event that it was wrong, it considered that it would be entitled to rely on regulation 12(5)(e) as a basis for non-disclosure. The Council asserted that there was no difference in the application of this exception and the exemptions claimed in section 43 (which the Commissioner notes had not been applied by the Council) and 36 of the FOIA. It stated that it did not therefore intend to add anything to the explanation it had already provided.

Analysis

Substantive Procedural Matters

Does the email constitute “environmental information”?

18. As stated in the Chronology above, the Council was strongly of the view that the Commissioner was wrong to state that the email should have been considered under the EIR. The Commissioner is of the view that the information clearly falls within the definition of environmental information provided by regulation 2(1)(c) of the EIR. This regulation provides that any information on (meaning relating to or concerning) plans affecting the elements or factors of the environment described in regulation 2(1)(a) and (b) is environmental information for the purposes of the EIR. The email in question concerns a discussion between the Council’s Chief Executive and a third party described by the Council as a “potential investor”. This conversation is clearly about the Destination Kirkby plan. In view of the nature of this plan as described in paragraph 11 of this Notice, it is the Commissioner’s view that there can be no doubt that this plan would affect the environment and that the email in question is therefore information on a plan affecting the state of the elements of the environment.
19. In a letter dated 1 October 2010, the Council made the following submissions to the Commissioner regarding its reasons for not accepting the application of the EIR in this case:

“...the Council’s view is clear that the email does not fall within the definition of the EIR as set out under Regulation 2(1) and was therefore correctly and properly considered under the Freedom of Information Act (FOIA). Indeed, we are surprised and disappointed at the Information Commissioner’s view (as expressed in your letter) in relation to the extent of the definition of ‘environmental information’ under the EIR. To agree to this interpretation would have the effect of the Council accepting that a question relating to any form of development of land or anything relating to land within the Borough would, as a consequence, fall to be considered under the terms of the EIR and not the FOIA.

The Council’s view is that the definition is intended broadly to relate to matters affecting the physical environment and its impact on human health and safety and any policies or measures relating to it. The Council does not accept that this definition extends to pure commercial negotiations with any potential developer of that land. Indeed, Regulation 12(5)(e) of the EIR makes specific provision for the

protection of the confidentiality of commercial information by making this an exception to the duty to disclose. This approach is consistent with the FOIA. The Council is also fully aware that the planning process itself provides significant protection for individuals and a means of obtaining relative information regarding the impact of any development on the environment. As the EIR is secondary legislation and the FOIA is primary legislation, the Council does not believe that it was the intention of Parliament when enacting the EIR to undermine the principles and statutory protection afforded under the FOIA. Your interpretation would suggest a completely contrary view".

20. In a further letter to the Commissioner dated 10 November 2010, the Council added the following:

"I note from paragraph 25 of the Decision Notice issued on 21 December 2009 against the Department of Health (Reference: FS50080236) that "The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion, a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environment decision making is likely to be environmental information". In respect of the email which is in dispute, it is the Council's view that there is nothing in the email which would "facilitate effective participation by the public in environment decision making" and therefore under the Commissioner's own criterion it cannot be 'environmental information'.

21. The Commissioner understands that the Council considers that the Commissioner has adopted too broad an interpretation however the Commissioner believes that the wording of the legislation supports his interpretation. The Commissioner does not agree with the Council's point that considering this information as environmental would in some way undermine the FOIA. The Commissioner also notes that the Council has questioned the value in disclosure of the information and suggested that this means it cannot be environmental information. This is a subjective analysis of the value of the information but in any event, the Commissioner does not consider that the perceived public interest in disclosure of the information could have any bearing on whether the information is environmental. The comments in the Decision Notice in question were designed to give a general overview of the value in disclosure of environmental information, not to present a strict test as suggested by the Council. The Commissioner did not

consider that there was any merit in the arguments presented by the Council. The Commissioner's view is that the matter is a straightforward one in the circumstances of this case for the reasons he has presented.

22. As the Commissioner was satisfied that the EIR was applicable given the contents of the email, the Commissioner went on to consider the application of regulation 12(5)(e).

Exception – regulation 12(5)(e)

23. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will consider the following questions:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality required to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

24. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. When the Commissioner asked the council to explain the nature of the third party's involvement in the matter, the Council stated simply that the third party was a "potential investor". It did not outline any further details or describe why it was of the view that the email represented commercial information. Although the Commissioner accepts that the information may well be commercial or industrial in nature, ultimately the Commissioner was not satisfied that the Council had adequately demonstrated that this was the case.

Other criteria to engage the exception

25. As the Commissioner was not satisfied that the public authority had adequately demonstrated that the information was commercial in nature, he has not gone on in this Notice to address the other elements of the criteria listed in paragraph 23 in detail. However, the Commissioner would observe that the Council's arguments for withholding the email, which were focused on the application of section 36 of the FOIA, did not address in sufficiently persuasive detail why, if

the information was commercial in nature and subject to confidentiality provided by law, that confidentiality was required to protect a legitimate economic interest.

26. In terms of whether the information was confidential, while it was clear that the Council felt that it owed a duty of confidence to the third party, the Commissioner also considered that it was possible that the Council felt that it was also owed a duty of confidence by the third party. This is because the Council referred to its own interests being adversely affected. It was established in the Information Tribunal decision *South Gloucestershire v Information Commissioner* (EA/2009/0032) that regulation 12(5)(e) includes confidentiality owed by a third party to a public authority. However, the Commissioner was not persuaded that the Council provided adequate arguments to explain why a duty of confidentiality was owed in the circumstances of this case.
27. In terms of any harm to legitimate economic interests, the Council argued that disclosure would be unfair to the third party because his involvement in the scheme had never been publicly acknowledged. The Council sought to rely on a particularly broad argument that the disclosure of the email would leave the Council in a position where all negotiations would be exposed to full public scrutiny which would be unworkable and unfair both to the Council and the third parties it deals with.
28. With the introduction of the EIR, there is always a possibility that third party communications will be disclosed under the EIR and all third party organisations in contact with a public authority should be aware of this. This is particularly so in respect of third party involvement in planning matters which generally attracts a strong expectation of transparency. However, where it can be shown that a particular disclosure would genuinely cause harm, there are exceptions available in appropriate circumstances. The Commissioner would however stress that it is not sufficient for public authorities to make speculative or generic arguments which are not supported by appropriate evidence that demonstrate that disclosure *would* (i.e. more probably than not) adversely affect the third party's commercial interests.
29. In addition, as outlined in the Commissioner's published guidance¹, any arguments presented in relation to regulation 12(5)(e) relating to the interests of a third party must represent the genuine concerns of the

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/commercialdetachmentof3rdparties.pdf

third party involved rather than speculation on their behalf. This is in line with the Information Tribunal's decision in *Derry City Council v Information Commissioner* (EA/2006/0014). The Council suggested that the third party had never given any indication to officers that he wished to be associated with the scheme and that it was clear that he had not intended for his involvement to be made public. Although the Commissioner understands that when asked, the third party refused to consent to the disclosure, the Council did not indicate or provide evidence that the arguments presented to the Commissioner represented the genuine concerns of the third party involved.

30. In this case, it was the Commissioner's view that the Council failed to justify adequately why the disclosure of the specific contents of this email would result in commercial harm, either to itself or the third party. The Commissioner was not prepared to accept a generic argument that because one item of correspondence is disclosed this necessarily means that all other similar items of correspondence will be disclosed or that other transactions between the Council and third parties would be adversely affected.
31. As the Commissioner was not satisfied that the exception was engaged, he has not gone on in this Notice to address the public interest test associated with regulation 12(5)(e).

Procedural Requirements

32. As the Commissioner considers that the Council did not demonstrate that the email was correctly withheld, he finds that the Council breached regulation 5(1) and 5(2) of the EIR.
33. The Commissioner also finds that the Council breached regulation 14(2) and 14(3) for failing to specify in a refusal notice any exception it wished to rely upon under the EIR by the date of its internal review.

The Decision

34. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR for the following reasons:
 - It breached regulation 5(1) and 5(2) for failing to disclose the email
 - It breached regulation 14(2) and 14(3) for failing to specify in a refusal notice any exception it wished to rely upon under the EIR by the date of its internal review

Steps Required

35. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
 - Disclose a copy of the email that is being withheld directly to the complainant
36. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

37. 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.

Other matters

38. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Appropriate Legislation

39. Paragraph 1 of the Code of Practice issued under regulation 16 of the EIR ("the EIR Code") states:

"All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided."

40. The Commissioner notes that, in this instance, the Council failed to recognise and process the request under the appropriate legislation. He would like to direct the public authority to the recommendations of the EIR code and remind it of the importance of providing staff handling requests with adequate training in this regard

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

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 sent.

Dated the 26th day of January 2011

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

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
- (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(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 –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

Regulation 14 - Refusal to disclose information

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).