

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

Decision Notice

Date: 29 June 2011

Public Authority: The Planning Inspectorate (The Department for Communities and Local Government)

Address: Room 5/05
Kite Wing
Temple Quay House
1 The Square
Bristol
Avon
BS 1PN

Summary

The complainant requested any communications between the Planning Inspectorate and DEFRA or any other third parties regarding an inquiry it was undertaking regarding an application to de-register common land. The Planning Inspectorate withheld the information under Regulation 12(4)(e) (internal communications), and Regulation 12(5)(b) (adverse effect on the course of justice). The Commissioner's decision is that the Planning Inspectorate was correct to withhold the information under Regulation 12(4)(e). He has therefore not considered the application of 12(5)(b) further.

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 request is for communications between the Planning Inspectorate (PINS) and the Department for Environment, Food and Rural Affairs (DEFRA) and within PINS internally relating to an application for the deregistration of common land in the area of Rochdale.
3. In 2008 the Land Registry registered absolute title to parcels of land on moors surrounding Rochdale to a person who subsequently applied to PINS for Rights of Common to be de-registered on that land. Rights of Common allow individuals to use the land for recreation and enjoyment, and for other uses such as grazing sheep. Deregistration of that land removes the rights of common which then allows the land to be used for other purposes. The Commissioner understands that the registered landowner in this case has arranged to lease the land to a power company that wishes to develop power facilities on it.
4. Other individuals have subsequently submitted arguments to PINS and the Land Registry that the registered landowner had no right to apply to de-register some of the parcels of land because he did not in fact own them. They have sent evidence to PINS that this was the case, and asked it to reconsider whether the application for deregistration should go ahead because the applicants rights to request that were unsafe. PINS must have the consent of the landowner when considering whether rights of common should be de-registered.
5. PINS responded stating that the process of making decisions on the deregistration applications should continue, whilst recognising that any decision that is made may be affected if the registered title proving ownership of the land is subsequently proven to be incorrect. Users of the land argue that no decision should be taken until the ownership dispute is resolved.
6. PINS states that the applicant was awarded absolute title to the land by the Land Registry. It states that this is the highest proof of land ownership that the Land Registry is able to award, and that it should accept that title as evidence of ownership when considering the application unless the Land Registry subsequently raises issues with it.

The Request

7. The Commissioner notes that under the Act PINS is not a public authority itself, but is actually an executive agency of The Department for Communities and Local Government (DCLG) which is responsible for PINS and therefore, the public authority in this case is actually the

DCLG not PINS. However, for the sake of clarity, this decision notice refers to PINS as if it were the public authority.

8. On 27 October 2010 the complainant requested information from the authority stating:

"I sent the inspectorate evidence that the registered proprietor (name withheld) did not own all of the land he wished to de-register and you sent this to DEFRA for a legal opinion. The legal opinion was that, since the Land Registry had previously granted absolute title to (name withheld) there was no case to answer.

On 31 March, I emailed you requesting

i) all correspondence (letters and emails) between DEFRA and your Department regarding this issue.

ii) All internal correspondence (memos and emails) within the Inspectorate regarding this issue.

iii) All correspondence (letters and emails) regarding this issue with any other party.

You refused this request under regulation 12(4)(e), on the grounds that the public interest would not be served while there was an impending public inquiry. Since the inquiry is now concluded, your grounds for withholding the above information are no longer valid. I would be grateful therefore if you would send me the information I requested previously."

9. The Commissioner understands that the complainant had made a previous request for the information which PINS had rejected whilst an inquiry was underway. The Inquiry sat on 13- 16 July 2010 and therefore the complainant remade his request after that had occurred. The Commissioner understands however that there are other inquiries ongoing and that the complainant has an interest in the decisions of these other inquiries. He further understands that these are all interlinked in that they all relate to the registered landowner's application to deregister the land. Questions which have been asked relating to the landowners title are relevant to more than one of the applications.
10. On 28 October 2010 PINS responded. It stated that the information was exempt from disclosure under Regulations 12(4)(e) and 12(5)(b). The Commissioner notes however that from the original request, on 28

April 2010 PINS wrote to the complainant and disclosed the information at iii) above as follows:

- all correspondence (letters and emails) regarding this issue with any other party. In this context 'any other party' means any party other than DEFRA and Planning Inspectorate officials.
11. On 30 October 2010 the complainant requested that PINS review that decision. PINS responded on 4 November 2010 refusing the request for the same reasons. On 16 December 2010 it provided a further response, again relying on the exceptions to withhold the requested information.

The Investigation

Scope of the case

12. On 11 January 2011 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 information he had requested should have been disclosed to him.
13. The Commissioner notes that on 28 April 2010 PINS wrote to the complainant and disclosed the information at iii) above as follows:
- all correspondence (letters and emails) regarding this issue with any other party. In this context 'any other party' means any party other than DEFRA and Planning Inspectorate officials.
 - The Commissioner also notes that PINS disclosed some correspondence which it had had with the Land Registry which related to the question of ownership.
14. The Commissioner therefore notes that on 28 April 2010 PINS disclosed the information at iii)
15. The Complainant has not raised this as an issue, and so the Commissioner considers therefore that part iii of the request has already been satisfied by PINS and has not considered this further.

Chronology

16. The Commissioner wrote to PINS on 18 March 2011 informing it that a request had been received and that he considered this to be an eligible complaint. He asked PINS to send him a copy of the withheld information together with any arguments which PINS wished to submit in support of its position.
17. PINS responded on 1 April 2011 providing the information together with its arguments for withholding the information.

Analysis

Substantive Procedural Matters

Is the information environmental information?

18. PINS argued that the information was environmental information and that information falling within the scope of the request should be considered for disclosure under the Environmental Information Regulations 2004. It stated that:

"Whilst the information you have requested concerns the right to own property and the protection of that right, rather than environmental concerns per se, it is held by us for the sole purpose of progressing applications to de-register common land. The fact that you may wish to use the information for other purposes does not affect the purpose for which we hold it."

19. The Commissioner has considered the information in question and is satisfied that it falls within the definition of environmental information.
20. Section 2 of the Regulations defines environmental information and is provided in the legal annex to this Decision Notice. The Commissioner considers that the information falls within the definition provided in Regulation 2(1)(c) in that it is information on a measure, plan or activity which is likely to affect the elements and factors outlined in regulation 2(1)(a) – in particular the land and landscape.
21. The Commissioner is therefore satisfied that the information is environmental information and that PINS was correct to consider the information under the Environmental Information Regulations 2004.

Exceptions

12(4)(e)

22. The information which has been requested is communications between PINS and DEFRA and internally within PINS. Clearly emails and other correspondence sent internally within PINS are internal communications and fall within the scope of the exception.
23. The Regulations also state that information between government departments is still considered to be an internal communication. Regulation 12(8) provides that:

“For the purposes of paragraph (4)(e), internal communications include communications between government departments.”
24. The Commissioner is therefore satisfied that correspondence between PINS and DEFRA also constitutes internal communications for the purposes of Regulation 12(4)(e).
25. The Commissioner is therefore satisfied that Regulation 12(4)(e) is engaged.
26. Regulation 12 requires that a public interest test is carried out to ascertain whether the information should be disclosed in spite of the fact that an exception applies. The test is whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.
27. The Commissioner has therefore carried out a public interest test as required by regulation 12(1)(b). He has also taken into account the presumption in favour of disclosure provided in Regulation 12(2).

Public interest arguments in favour of disclosing the requested information

28. The central public interest arguments supporting the disclosure of the information surrounds increasing transparency and accountability of PIN'S refusal to delay its decision on the de-registration of the Land until the land ownership issues are resolved. There are also public interest arguments in increasing public participation in decision making, and in informing public debate on matters such as the protection of the environment and of the appropriate protection of registered common land.
29. The Information Tribunal has previously recognised that planning decisions should be made as openly as possible in order to facilitate good decisions being made. A decision to de-register the land in

question will have a significant effect on those currently using the land due to the ultimate intentions of the registered landowner to lease large sections of it to a power company. Rights of Common will be removed and power facilities will be built on the land, permanently changing its appearance and the uses which can be made of it. The Commissioner understands that planning permission for that development has already been granted. All that is therefore required is a decision as to whether the land can be de-registered.

30. PINS disclosed some information to the complainant which shows that the Land Registry relied on submissions from the individual as to his ownership of the land. It shows that in some cases the documents detailing ownership of some parcels of the land were unclear about the exact boundaries of the land in question. The Deeds provided descriptions of the land rather than specific lines on a map indicating lines of ownership. The Commissioner understands that the applicant or his agents drew the boundary lines themselves based on those descriptions. The Land Registry states however that that is not unusual in such cases, and that it will normally rely on the applicant to show the boundaries unless any party disputes that ownership.
31. The Commissioner recognises that the Land Registry or the courts are the organisations which are responsible for deciding the correct ownership of the land rather than PINS. As it currently stands the Land Registry's decision is that the title which it awarded is sound.
32. The Inquiry detailed above was heard on 13 – 16 July 2010. At Para 35 of the published decision of the Inquiry, land ownership arguments were detailed and considered by the Inspector. In that, and the following paragraphs, the inspector states:

"Whilst extensive research has been carried out as regards ownership of the land in question, the land registry title provides conclusive evidence as to the registered owner. As a consequence it is not my role to go behind that registration."

33. And referring to the potential for a legal challenge to be made against the ownership issues he stated

"In view of the uncertainty of any legal challenge and the timescales of any such challenge, which may be considerable, I considered it inappropriate to adjourn the inquiry pending such a challenge. I must have regard to the conclusive effect of the registration of title."

34. The Commissioner's public interest considerations must focus on whether it was correct to withhold the information rather than any

wider considerations as to whether PINS was correct not to delay the inquiry or whether the Land Registry's decision to award absolute title was correct. However some aspects of those arguments impact upon his considerations as to whether the public interest rests in disclosing the information.

The public interest in disclosing information showing the discussions PINS had with other parties on this issue

35. The Commissioner recognises that a decision based on a false premise that the individual's title to the land is correct could possibly cause significant problems at a later time. If the Land Registry's decision is proved to be incorrect at too late a point in time it is possible that work will have already begun on the development by the power company concerned. Therefore damage to the environment would already have occurred.
36. The Commissioner also notes that a decision to allow deregistration will remove individuals' rights to use some of the land concerned. Many of those seeking to overturn the land ownership decision currently use the land to graze sheep or enjoy it for its openness and unspoilt nature. The development will also significantly affect the skyline and the landscape in question for years.
37. There is therefore clearly a public interest in the issue of land ownership being settled prior to the inquiry making its decision in order that a correct decision can be made as to whether there is a right to de-register the land for these purposes. Consequently there is a strong public interest in allowing the public access to documents which would shed greater transparency on the decision to continue with the inquiry without waiting for the land ownership issues to be resolved.
38. Greater transparency may also prevent any suggestion that any party acted in an underhanded way.
39. The Commissioner recognises the significant public interest in decisions being made properly, and with all due evidence considered. The parties may ultimately need to resort to court proceedings to settle the question of land ownership and clearly the submission of the evidence collected by parties arguing that the Land Registry's decision is unsafe puts PINS on notice that any decision it takes may itself be subsequently proven to be unsound. PINS seemingly recognised that this is the case but asserted that in the interim period they must rely on the award of title provided by the Land Registry because an award of title by the Land Registry is intended to be conclusive proof of ownership.

40. It does not fall within the Commissioner's remit to investigate or make any sort of judgement as to whether PINS is acting correctly or reasonably in refusing to delay the inquiry. He cannot therefore consider this as a relevant factor when making his decision on this case. He must simply consider whether greater transparency on the discussions and advice which occurred would be in the public interest. In that sense PINS explained its decision both within its response to the complainant, and within the decision on the inquiry held on 13 - 16 July 2010. The internal discussions would provide greater transparency as to how that decision was made.
41. The Commissioner recognises that the ultimate appeal open to the complainant is judicial review. The question would be whether PINS' decision to continue with the inquiry was unreasonable given its awareness of all of the facts and circumstances of the case.
42. The Commissioner also notes that the information includes discussions which PINS had regarding correspondence it had received from a number of Members of Parliament who raised issues with the inquiry continuing whilst the question of ownership remains in dispute.

Public interest arguments in favour of maintaining the exception

43. The Commissioner must restrict himself to considering public interest arguments which are inherent within the reasons for maintaining the exception. Although wider public interest arguments may also be relevant to withholding the information, the Regulations require that only those which are applicable to maintaining the exception are given weight.
44. For Regulation 12(4)(e) arguments are likely to be focused on issues relating to the preservation of internal confidentiality and the protection of internal decision making processes that are required for the sound performance of the authority.
45. In this case the Commissioner needs to consider whether a disclosure of the information would be likely to impinge upon the safe space used for the deliberation of policies or decisions taken by PINS. There is a public interest in the protection of the safe space which an authority needs to seek, weigh and consider advice when deciding on a course of action or policy direction without external interference.
46. In *Scotland Office v the Information Commissioner (EA/2007/0070)* the Information Tribunal defined safe space arguments as "the importance of preserving confidentiality of policy discussion in the interest of good government". There is an argument that the policy making process

should be protected whilst it is ongoing so as to prevent it being hindered by lobbying and media involvement.

47. The Commissioner also needs to consider whether the effect of disclosing the information in question would be a loss of the safe space to fully consider and debate the issues before it and whether the organisation, or officers of the organisation would feel less able to record or discuss issues of a similar nature in the future because that information may subsequently be disclosed.
49. PINS argues that the common land deregistration application is a quasi-judicial process. In determining the application, a public inquiry is held where anyone can ask to be heard. Following the inquiry, the Inspector's decisions on the applications are publicly issued. The procedural decisions on the validity of the applications and the Inspector's decisions can be challenged by judicial review.
50. It argues that a disclosure needs to be considered in the context of the common land de-registration application procedures - where all parties are provided with opportunity to submit their representations, view the submissions of others and participate at the inquiry. In order to run the inquiry efficiently, culminating in the issue of prompt and proper decisions, it argues that there is a need for space to discuss issues and time for the Inspector to consider the evidence submitted and reach a decision without disclosure of additional information prejudicing or diverting from this process. It argues that there is also opportunity to challenge the decision through judicial review.
51. It adds that the further disclosure of the information in this case, prior to a decision on the de-registration applications being issued, would prejudice the proper conclusion of the inquiry as parties would seek to introduce further evidence to further promote their case. PINS argues that the disruption to the inquiry process would not be warranted by the additional transparency the requested information would provide. A disclosure of the information together with the subsequent 'redrafting' of the arguments may also detract from the findings of the inquiry itself.
52. The Commissioner understands that the basis of this argument is that officers have the space to enable them to discuss the issues to hand in a free and frank manner without fear that those discussions might be disclosed prior to the formal conclusion of the issues involved. Effectively, interested parties would be able to obtain the background 'thinking' of officers prior to the conclusion of the inquiry and would use that information to amend, and develop their arguments and submit these to the inquiry prior the inspector reaching a conclusion. In submitting these amended arguments it argues that the process

itself will be lengthened and decisions made more difficult and cumbersome to reach. It argues that this is not in the public interest.

53. "Safe space" arguments are about the need to formulate policy and debate 'live' issues without being hindered by external comment and/or media involvement. The Commissioner accepts that officers must be allowed thinking space to discuss the issues involved and develop their policies and decisions free from interference in some circumstances. It also argues that a disclosure of the information in this case at the time that the request was received would impinge on its officers' ability to discuss such issues frankly in the future. Decisions have not been made on all of the applications as of yet, and the Commissioner understands that an inquiry was held on 25 May 2011 considering the de-registration of further common land associated with this request. A disclosure at this stage would be likely to reignite the arguments surrounding the decision not to delay the inquiry at a time when the main issue is still 'live', and the process of reaching a decision is still ongoing.
54. PINS adds that the information does not contain information supplied by the Land Registry (other than information which has already been disclosed), and that it is not considered to provide evidence of maladministration by the Land Registry. Therefore, other than the weight given to transparency in general, it considers that this does not add additional public interest on the side of disclosure. The Commissioner notes that the correspondence it had had with the Land Registry regarding the issue was disclosed to the complainant.
55. The Commissioner recognises a strong public interest in maintaining the integrity of the inquiry process. A disclosure of discussions which have taken place internally within the departments prior to the conclusion of the process may undermine, or at the least complicate that process, slowing it down and making it more difficult to reach a decision within an appropriate time.
56. He notes that there is a public interest in officers being able to discuss the merits and robustness of their position and of their arguments frankly, including identifying and questioning any weak areas of their arguments in private. In this way they can test that their decisions and actions are robust and will stand up to scrutiny or legal challenge.
57. A disclosure of such discussions would have the effect of weakening the authority's position in any legal challenge which is made in the future. This would impinge upon its officers' ability to discuss issues in a full and frank way in the future.

58. The Commissioner also recognises that there is a need for officers to liaise with each other in private to discuss and “compare notes” in order that a common (and accurate) response can be issued to MPs’ questions relating to a particular issue. In that way the responses provided to MPs will be more thorough, more informative and more certain of accuracy. Such discussion is essential in order that the democratic process can continue in an efficient and well informed way. There is a public interest in protecting the privacy of those discussions in order that the process of discussion and information sharing can continue in a free and frank manner.
60. The Commissioner considers that a disclosure of this information would stifle candid discussion as to what can be said to the MP, and this may degrade the ability of MPs to obtain all of the information necessary for them to be able to represent their constituent.

Balance of the public interest arguments

61. The Commissioner has considered the above. He recognises the very strong public interest in information being disclosed if it would allow a correct decision to be made as to the true ownership of the land. The withheld information in this case would not do that, but it would shed light on PINS’ decision not to delay the inquiry.
62. On the counter side the Commissioner recognises the potential importance of allowing those involved in decision making to be able to discuss matters frankly and to seek advice without fear that their discussions will be disclosed prior to a final decision being issued. The Commissioner recognises that there is a strong public interest in allowing such discussions to occur and advice (including legal advice or opinion) to be provided about the options open to the authority in this way. Where a disclosure of those discussions may ultimately affect its ability to defend its position, and may lead to a loss of its ability to discuss and test its options and reach a robust and legally correct position in the future there is a greater public interest in allowing that information to be excepted from disclosure until such time as a disclosure would not have that effect.
63. PINS’ clearly explained its decision not to delay the inquiry to the complainant. Its argument is that the complainant's real recourse is via a challenge to the decision of the Land Registry. Whether PINS refusal to wait for an outcome of that challenge is reasonable is not a question for the Commissioner. It is also not a factor he can take into account in his decision.
64. In this case his decision is that a disclosure of the information would affect the ability of the officers at PINS and DEFRA to explore and

discuss their policy on procedures freely and frankly in the future. He therefore considers that the greater public interest rests in maintaining the exception in this instance.

65. As regards the discussions regarding responding to the letters from MP's the Commissioner is also satisfied that the public interest rests within maintaining the exception in this instance.

12(5)(b)

66. In light of the Commissioner's decision as regards the application of Regulation 12(4)(e) the Commissioner has not considered the application of Regulation 12(5)(b) further.

The Decision

67. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

68. The Commissioner requires no steps to be taken.

Failure to comply

69. 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

70. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

71. 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.
72. 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 29th day of June 2011

Signed

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

Legal Annex

Regulation 12(4)

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) 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

- (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;

Regulation 12(8)

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

Regulation 2

Regulation 2(1)

In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);