

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

Decision Notice

Date: 13 January 2011

Public Authority: British Waterways
Address: 64 Clarendon Road
Watford
Herts
WD17 1DA

Summary

The complainant requested from the public authority information relating to canal and waterways maintenance. The public authority provided part of the information to the complainant while refusing the remainder on grounds of cost and that a proportion of the information was not held. The public authority carried out an internal review and upheld its original decision. The Commissioner has investigated and finds that the request is for environmental information and as such should have been dealt with under 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.

The Request

2. On 13 January 2010 the complainant requested the following information:

"Please provide the following for each of the 6 years 2003/4 to 2008/9 inclusive together with an estimate for 2009/10:-

- 1. The amount spent on maintenance and how it is calculated by reference to your annual accounts (e.g. for 2008/9 it would seem to be £95.1m made up of waterway maintenance and customer service (£68.8) plus major infrastructure works (£21.5) plus canal dredging (£4.8)).*
 - 2. The steady state model prediction for spend required to keep the network in the same condition as the previous year (please provide an estimate for any year that the model was not in operation, indicating that you have done so).*
 - 3. Year end maintenance backlog divided into 'major works' and 'other'.*
 - 4. After tax profit (or loss) on non-operational property activities."*
3. On 15 February 2010 the public authority responded and stated it had enclosed all the information it held pertaining to the request.
 4. On 17 February 2010 the complainant contacted the public authority requesting clarification regarding the response and information which had been provided.
 5. On 24 February 2010 the public authority responded and stated the following.
 - The Act does not require a public authority to create new information in order to satisfy a request.
 - The Act does not require a public authority to provide analysis, explanation, reason or justification about the requested information.
 - In providing the information which the public authority already had to the complainant, it had exceeded the appropriate costs limit and therefore could not provide any further information in relation to the request.
 6. The public authority then provided clarification or further information relating to the complainant's previous correspondence and initial request. Regarding various parts of the requested information the public authority went on to state that the following information was not held. Part one – information for the years 2005/6 and 2004/5 was not held; part two – information pre 2005/6 was not held; part three – information was not held and not held in the format requested; and part four – information for years 2009/10 was not held.

7. On 26 February 2010 the complainant contacted the public authority dissatisfied with the response and asked for an internal review. He disputed the application of section 12 to the request and the public authority's claims that certain parts of the requested information were not held. The complainant offered reasons as to why he believed the information would be held by the public authority.
8. On 12 March 2010 the public authority responded with the results of the internal review. The internal review upheld the public authority's decision that it had provided all the requested information to which the complainant was entitled and that providing further information pertaining to the request would exceed the appropriate costs limit.

The Investigation

Scope of the case

9. On 26 February 2010 the complainant made initial contact with the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's refusal to comply with the request on grounds of cost under section 12(1) of the Act and its claim that it did not hold part of the information.

Chronology

10. On 13 August 2010 the Commissioner wrote to the public authority to outline the scope of the case and draw the public authority's attention to the fact that, in his view, the requested information should have been dealt with under the Environmental Information Regulations 2004 (the EIR). The Commissioner provided links to guidance published on the website of the Information Commissioner's Office concerning what information can be considered to be environmental, and asked the public authority to provide a response under the EIR or further details of its arguments that the request did not fall within the scope of the EIR.
11. On 9 September 2010 the public authority responded to the Commissioner. It provided arguments in support of its position that the information was not of an environmental nature and therefore the public authority had been correct to deal with the request under the Act. The public authority also stated that information pertaining to part four of the request had now been provided to the complainant.

Analysis

Substantive Procedural Matters

Regulation 2

12. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
13. Environmental information is defined in regulation 2 as:

“any information in written, visual, aural, electronic or any other material form on –

- *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;*
- *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);*
- *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;*
- *reports on the implementation of environmental legislation;*
- *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and*
- *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)”.*

14. When defining environmental information the Commissioner makes it clear that, for regulation 2(1)(b) to (f), it is not necessary for the information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect. What is relevant instead is that the information should be on something falling within these sections. In order to establish this connection consideration must be given to the meaning of any information ...on in the context of regulation 2.
15. This point was considered by the Tribunal in *Ofcom v the ICO and T-Mobile* (EA/2006/0078) where the applicant had requested information about the location, ownership and technical attributes of mobile phone cellular base stations. Ofcom had argued that the names of Mobile Network Operators were not environmental information as they did not constitute information "*about either the state of the elements of the environment....or the factors.....that may affect those elements.*"
16. The Tribunal disagreed and commented (at paragraph 31) that:

"The name of a person or organisation responsible for an installation that emits electromagnetic waves falls comfortably within the meaning of the words 'any information...on...radiation'. In the Commissioner's view it would create unacceptable artificiality to interpret those words as referring to the nature and affect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in the first recital, to achieve '...a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making...'. It is difficult to see how, in particular, the public might participate if information on those creating emissions does not fall within the environmental information regime".

At further appeal (to the High Court and the Court of Appeal) Ofcom did not challenge the Tribunal's finding that the names were environmental information.

17. The Commissioner agrees with the Tribunal's comments and would not accept the approach of separating out (as non-environmental information) details such as names, which form an integral part of information falling under the EIR. The Commissioner's more general approach is to interpret "*any information... on...*" fairly widely. The relevant Oxford English Dictionary definition of "on" is "*In reference to, with respect to, as to, concerning, about*". The Commissioner's view, in line with the purpose expressed in the first recital of the Directive, is that "*any information ...on...*" 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 environmental decision making is likely to be environmental information.

18. In this case the requested information detailed in the first three parts was the amount of money spent by the public authority on canal and waterways maintenance and related information concerning customer service and a maintenance backlog. The Commissioner holds that information of this nature is environmental as it is information on an activity or measure as defined in regulation 2(1)(c) which affects or would be likely to affect the state and factors referred to in regulation 2(1)(a) and 2(1)(b).
19. In correspondence to the Commissioner the public authority accepted that the definition of environmental information is to be interpreted broadly. However, it also drew the Commissioner's attention to the guidance produced by the Department for Environment, Food and Rural Affairs (DEFRA) on the matter of interpretation. The guidance states that the Directive (and therefore the EIR) imports a concept of 'remoteness' which requires that information, to be treated as 'environmental information', must be sufficiently connected to the environment to be covered by the definition. The public authority is of the view that there was not a sufficiently strong connection between the information the complainant requested and the environment for it to be treated as environmental within the meaning of the EIR and the Directive.
20. The public authority stated that the requested information was not a report concerning or information on work done which directly affected the environment. It held that the amounts spent on maintenance – a steady state prediction of expenditure required to achieve a certain objective and a record of work not done (i.e. the backlog) – was not sufficiently connected to the environment.
21. The Commissioner appreciates the public authority's position and is aware of DEFRA's guidance on interpreting information under the EIR. However, he has decided that the requested information is environmental owing to the fact that it is information (even financial information) which is information on an activity (i.e. the maintenance of the waterways) affecting or likely to affect the environment.

Regulation 5 and Regulation 14

22. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request.
23. Regulation 14 states that if a request for environmental information is refused, the refusal should be made in writing no later than 20 working days after the date of the request. The refusal must specify any exception being relied upon under regulations 12(4), 12(5) or 13; and the matters considered in reaching a decision with respect to the public interest under regulation 12(1)(b). The refusal should also inform the applicant of how to make representations about the public authority's handling of the request and of the applicable enforcement and appeal provisions.

The Decision

24. The Commissioner's decision is that any information falling within the scope of the request is or would be environmental if held and that the authority is therefore obliged to respond to the request in line with the provisions of the EIR.

Steps Required

25. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
 - either provide the requested information complying with regulation 5(1); or
 - issue a refusal notice complying with regulation 14.
26. The public authority must take the steps required within 35 calendar days of the date of this Notice.

Failure to comply

27. 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

28. 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 13th day of January 2011

Signed

**Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

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 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 –

- (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).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.