

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

Decision Notice

Date: 10 February 2011

Public Authority: Conwy County Borough Council
Address: Bodlondeb
Conwy
LL30 8DU

Summary

The complainant made a verbal request for information from the Council in relation to the strengthening and replacement of a local bridge. The Council considered the request under the Act and stated that the three reports requested were exempt from disclosure by virtue of the Local Government Act 1972. The Council later confirmed its reliance on section 36 of the Act. The Commissioner determined that the information was environmental, and asked the Council to reconsider the request under the EIR. The Council stated that the three reports in question were exempt from disclosure by virtue of regulation 12(4)(e). The Commissioner's decision is that regulation 12(4)(e) is applicable to the information, but he has decided that the public interest in maintaining the exception does not outweigh the public interest in disclosure.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. 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

3. The Commissioner understands that the complainant made a verbal request to the Council on 26 May 2010 for three reports relating to the strengthening and replacement of a bridge.
4. On 2 June 2010, the Council responded to the request and stated that the reports were exempt from disclosure by virtue of Schedule 12A of the Local Government Act 1972. The Council explained that strengthening and replacement works were ongoing and referred to "ongoing issues", stating that the reports would be considered exempt until all "issues" were concluded. The Council did not specify what issues it was referring to.
5. The complainant wrote to the Council on 2 June 2010 and expressed his view about the importance of the reports to the public. Although the complainant did not formally request an internal review of the Council's decision, the Commissioner considers that he expressed his dissatisfaction with the Council's response of 2 June 2010.
6. The Commissioner understands that, during a telephone conversation on 3 June 2010, the Council informed the complainant that, while it considered the reports in their entirety to be exempt from disclosure, he could make a revised request for particular information contained within the reports.
7. On 3 June 2010 the complainant submitted a request for the following information contained within the reports:
 - (a) *Name of contractor successful*
 - (b) *The value of the contract*
 - (c) *The other bidder for the work*
 - (d) *The duration of the contract*
 - (e) *The form of contract between the parties*
 - (f) *The extension to the contract period awarded by the council.*
8. The Council wrote to the complainant on 2 July 2010 and disclosed information falling within the scope of parts (a), (b) and (c) of the complainant's requests of 3 June 2010. The Council stated that there

would be a delay in providing responses to parts (d), (e) and (f) of the request.

9. On 5 July 2010 the complainant wrote to the Council and stated again that he wanted access to the three reports in their entirety.
10. On 5 July 2010 the Council wrote to the complainant and confirmed that the reports were exempt by virtue of Schedule 12A of the Local Government Act. The Council also referred to section 36 of the Act. The Council stated that since section 36 is a qualified exemption, the case needed to be put before its 'Qualified Persons Group' before a decision could be made on the public interest test.
11. On 10 August 2010, the Council wrote to the complainant and provided the outcome of its Qualified Persons Group. The Council clarified its position that the reports in their entirety were exempt from disclosure by virtue of section 36 of the Act. The Council also provided its response in relation to points (d), (e) and (f) above and the revised request of 3 June 2010. The Council stated that the complainant had already had access in person to the information requested at points (d) and (e) and that the information requested in (f) was also exempt from disclosure by virtue of section 36 of the Act.

The Investigation

Scope of the case

12. On 30 June 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 the Council's refusal to disclose the three reports in their entirety.

Chronology

13. The Commissioner wrote to the Council on 2 September 2010 to inform it that he had received a complaint about this matter and to ask it to provide him with a copy of the withheld information.
14. The Council responded on 6 September and provided the Commissioner with copies of the three reports that had been withheld.
15. The Commissioner wrote to the Council on 26 October 2010 and asked it to provide him with further submissions to support its decision to withhold the reports. The Commissioner also informed the Council that his initial view was that the withheld information was environmental,

and he therefore asked the Council to reconsider the request for information under the EIR.

16. The Council responded on 15 November 2010 and provided further submissions to support its decision to withhold the reports. The Council agreed that the requested information was environmental, and provided its initial opinion that the information would remain exempt from disclosure by virtue of regulation 12(4)(e). The Council stated that the public interest would be considered by its Qualified Persons Group on 26 November 2010.
17. On 25 November 2010 the Council wrote to the Commissioner to inform him that its Qualified Persons Group had been cancelled and re-arranged for 7 December 2010.
18. On 7 December 2010 the Council wrote to the Commissioner to inform him that its Qualified Persons Group had been cancelled and would be re-arranged.
19. On 14 December 2010, the Council wrote to the Commissioner to provide the decision of its Qualified Persons Group and full submissions to support its decision that the withheld information was exempt from disclosure by virtue of regulation 12(4)(e).

Analysis

Substantive Procedural Matters

20. The Council initially refused the request by virtue of Schedule 12A of the Local Government Act and subsequently relied on section 36 of the Freedom of Information Act in withholding the requested information. However, the Commissioner considers that the information was environmental and should have been considered under the EIR. The Council agreed with the Commissioner's view and reconsidered the request under the EIR.
21. The withheld information all relates to the strengthening and replacement of a bridge. The first report seeks approval for the contract to be awarded to the selected third party. The second report relates to the procurement process in respect of the project, and the third report relates to a review of the project once it was underway. The Commissioner considers that the project constitutes a measure likely to affect the elements and factors listed in regulation 2(1)(a) and (b) of the EIR. The Commissioner has determined that the requested information would fall within the definition of environmental information set out at

regulation 2(1)(c) of the EIR, for the reasons set out below. Regulation 2(1)(c) provides that:

“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 on –

(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”.

22. The factors referred to in (a) and (b) include:

(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).

23. In coming to his view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term “any information...on” in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

24. The Commissioner is satisfied that information regarding the replacement and strengthening of a bridge falls within the definition of environmental information for the purposes of the regulations as provided in regulation 2(1)(c).

25. Specifically, the information in question is contained within three reports in relation to the works taking place on the bridge. The strengthening and replacement of the bridge is a measure, as defined in regulation

2(1)(c), it is an activity likely to affect the elements and factors referred to in 2(1)(a) and (b); for example the landscape, waste generation, disposal and noise, and the withheld information in question is "on" that measure.

Exceptions

26. The Council and the Commissioner were in agreement that the withheld reports constituted environmental information and that the request should have been considered under the provisions of the EIR rather than the Act. As such the Commissioner has assessed the Council's application of the exception to disclosure provided by regulation 12(4)(e) and had not considered the application of any exemptions under the Act.

Regulation 12(4)(e)

27. Under regulation 12(4)(e) a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. This exception is subject to a public interest test.
28. The Commissioner first considered whether the withheld information can be considered to be an internal communication.
29. The information which has been withheld from the complainant consists of three reports entitled:
- Approval of Contract Award
 - Review of Contract Procurement
 - Project Review and Funding Proposals
30. The Commissioner considers each of the reports to have been prepared by a Council employee, and each is clearly marked for the attention of the Council Cabinet. The Commissioner is therefore satisfied that the intention of the reports was to seek approval from, or provide information to, the Council's Cabinet in order for it to grant approval or take next steps in the scheme. He therefore accepts that the reports are internal communications and that regulation 12(4)(e) is therefore engaged.

Public interest arguments in favour of disclosing the requested information

31. The complainant argued that there was great concern amongst local taxpayers about the circumstances surrounding the award of the contract for replacing the bridge. The complainant also argued that there was local concern about the delays that have occurred, which will

result in the project overrunning and an increase in the Council's financial commitment to it. The complainant argued that the Council was preventing taxpayers from exercising their legal right to be involved in the process.

32. The Commissioner is aware of evidence in the media of public concern surrounding the bridge¹. A press release published on the Council's website in May 2010 also made reference to the delays associated with the project and the potential increase in the Council's financial commitment².
33. The Council provided its own arguments in favour of disclosing the requested information. The Council recognised the public interest in promoting public accountability in decisions taken by the Council in relation to the works carried out at the bridge and in the spending of public money in relation to this scheme.
34. The Council also recognised the public interest in allowing the public to understand decisions taken that affect their lives in relation to the works being carried out at the bridge.
35. The Council recognised the public interest in enabling the public to challenge decisions made, and to participate in issues of local importance.

Public interest arguments in favour of maintaining the exemption

36. The Council argued that at the time of the request, the reports were produced for the attention of members to enable due consideration of various issues with a view to planning the way forward. The reports at the time did not represent the settled view of the Council.
37. The Council argued that, at the time of the request, there were still a number of unresolved contractual issues outstanding between the Council and a third party. Disclosure of the reports could result in information being misrepresented thereby straining the Council's relationship with the third party in question.
38. The Council argued that there remained a "distinct possibility" of litigation between the Council and the third party, and that disclosure could prejudice the Council's ability to instigate legal proceedings.

¹ http://news.bbc.co.uk/1/hi/wales/north_west/8677943.stm

² <http://www.conwy.gov.uk/doc.asp?cat=7561&doc=26244>

39. The Council also argued that the final costs of the works had yet to be finalised, and that outstanding disputes were yet to be resolved.
40. The Council's view was that the public interest in maintaining the exception at regulation 12(4)(e) of the EIR outweighed the public interest in disclosure of the information in question. The Council argued that the harm resulting from disclosure of the reports could have an effect on the wider community if the Council's position in resolving the ongoing issues were to be compromised. The harm that would be caused would be financial loss to the Council, which would then have an impact on the Council's provision of other services to the community at large. The Council's position is that once ongoing legal issues have been resolved the reports in their entirety can be further considered for disclosure.

Balance of the public interest arguments

41. The Commissioner is mindful of the fact that there will always be some inherent public interest in preserving confidentiality but the Commissioner will be cautious about placing significant weight on this generic argument. The Commissioner has taken into account the presumption in favour of disclosure provided in regulation 12(2) of the EIR.
42. The Commissioner is of the view that there is generally a strong public interest in public authorities being accountable for the decisions they make and the money they spend.
43. The Commissioner has taken into account the timing of the request. At the time of the request, the replacement of the bridge was ongoing.
44. The Commissioner is not persuaded by the Council's argument that, at the time of the request, the information contained within the reports did not reflect the settled view of the Council. The Commissioner considers that there is a public interest in the chronology of events and in the deliberations of the Council in relation to this issue. If the Council is concerned about the disclosure of misrepresentative information, the Commissioner considers that it could issue an explanatory statement when disclosing the reports.
45. The Council stated that the final cost of the works was not resolved at the time of the request and that this was factor that weighed in favour of maintaining the exception. As the value of the contract and the name of the successful contractor has been disclosed to the complainant and as the local media had already reported on the potential increase in the Council's financial commitment to the project, the Commissioner is not persuaded by this argument set out at paragraph 39 above.

46. The Commissioner does accept that at the time of the request it was likely that there were outstanding legal and contractual issues and does accept this is a factor to consider when weighing up the public interest test in this case. However, the Council has provided him with limited detail around the ongoing legal and contractual issues and has not specifically explained the harm that disclosure would cause. It is because of this and the reasons outlined below, that the Commissioner does not consider that this factor outweighs the public interest in disclosure.
47. The Commissioner considers the weight of factors in support of the public interest in disclosure to be significant in this case. It is clear that the construction of the bridge in question is an issue significantly affecting the community; including residents, shopkeepers and other local workers. The Council itself has provided further evidence of the significant public interest in this case, by describing it as an "issue of local importance".
48. The strengthening and replacement of the bridge in question has clearly been an issue that has affected the personal and working lives of many in the local community. The Commissioner considers that there is a significant public interest in tax payers knowing the full details of how public money is spent and a public interest in the chronology of this project, which has been subject to delays and has had a direct impact on people's lives. The Commissioner agrees with the complainant's view that local dissatisfaction with the delays and the unrest they have caused are factors that weigh in favour of disclosure.
49. The Commissioner accepts that the 'ongoing issues' between the Council and the third party in question go some way to establishing a public interest in maintaining the exception but he considers that this is outweighed by the public interest in disclosure. The Commissioner does not consider that the Council has provided sufficient information to demonstrate how disclosure would inhibit any future litigation or harm its position in respect of any such litigation. Neither is the Commissioner clear how disclosure would impact on 'ongoing issues' between the Council and third parties.
50. In conclusion, the Commissioner has decided that the Council has failed to show that the public interest in maintaining the exception outweighs that of disclosing the information in this instance. Therefore he finds that the public interest favours the disclosure of the withheld information.

Procedural Requirements

Regulation 5

51. As the Commissioner has concluded that some of the information requested was not exempt by virtue of regulation 12(4)(e), he considers that the Council breached regulation 5(1) in failing to make this information available on request, and regulation 5(2) for failing to make it available within 20 working days following receipt of the request.
52. During its handling of the information request, the Council disclosed some information within the scope of the request. The Commissioner finds that the Council breached regulation 5(2) in respect of the information disclosed on 2 July 2010 for failing to make it available within 20 working days following receipt of the request.

Regulation 14

53. Regulation 14 of the EIR requires a public authority to inform a complainant in writing as soon as possible and no later than 20 working days from the date of the request if it is refusing to supply the information requested. It is also obliged to specify the reasons for not disclosing the information, state the regulation that applies and the matters that it considered in reaching its decision with respect to the public interest test. The authority must also tell the applicant that they can make representations (and appeal the decision) to the authority and that they ultimately have a right to complain to the Commissioner.
54. The Council failed to consider the request under the EIR. As such, the Commissioner concludes that the Council breached regulations 14(1), 14(2) and 14(3) of the EIR for failing to issue a refusal notice no later than 20 working days after receipt of the request stating the exception being relied on and the matters considered in reaching its decision with respect to the public interest under regulation 12(1)(b).

The Decision

55. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:
 - The Council incorrectly relied on the exception at regulation 12(4)(e) in relation to the three reports requested by the complainant.
 - The Council breached regulations 5(1) and 5(2) in respect of the information that the Commissioner has concluded not to be exempt under 12(4)(e).

- The Council breached regulation 5(2) in respect of the information disclosed on 2 July 2010.
- The Council breached regulations 14(1), 14(2) and 14(3) for failing to issue a proper refusal notice under the EIR within 20 working days.

Steps Required

56. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To disclose the three reports requested by the complainant.
57. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

58. 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

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

EIR code

60. Paragraph 1 of the Code of Practice issued under regulation 15 of the EIR (the "EIR Code") states:

"All communications to a public authority, including those not in writing and 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”.

Paragraph 2 states:

“Requests for environmental information may come in the form of verbal requests which has specific implications for training provision”.

61. As it has subsequently been established that the information in question is environmental information, it was appropriate for the Council to have dealt with this verbal request formally under the EIR. However, in view of the Council's failure to specify that the request was being handled under the EIR or to otherwise deal with it appropriately, the Commissioner considers that this approach may have occurred by default rather than design; i.e. the Council correctly considered the verbal information request to be a valid request, but not necessarily as a result of a conscious decision to consider the request under the EIR. The Commissioner recommends as good practice that, where authorities receive verbal requests, key details should be recorded in a log.
62. In view of the Council's handling of the request, the Commissioner is concerned that staff might not have been provided with adequate training and recommends that, in future, it has regard for the recommendations of the EIR Code.

Internal review

63. The complainant's email to the Council of 2 June 2010 does not explicitly express dissatisfaction with the Council's handling of the request. However, in relation to the engagement of review procedures, the EIR Code states:

“Any written reply from the applicant (including one transmitted electronically) expressing dissatisfaction with an authority's response to a valid request for information should be treated as a complaint, as should any written communication from a person who perceives the authority is not complying with its publication scheme where it has one. These communications should be handled in accordance with the authority's review procedure pursuant to Regulation 11, even if the applicant does not state his or her desire for the authority to review their decision or the handling of their application”.

64. The Council emailed the complainant on 3 June 2010. The purpose of this email was unclear. A further response was sent to the complainant on 2 July 2010; with a disclosure of additional information. On 5 July 2010 the Council wrote to the complainant again, reaffirming that it was relying on the Local Government Act 1972 but additionally stating that its Qualified Persons Group was considering the public interest

arguments in relation to the exemption at section 36 of the Act. The Council provided the final response of its Qualified Persons Group, on 10 August 2010.

65. Paragraph 61 of the EIR Code states:

"The complaints procedure should be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the EIR, including decisions taken about where the public interest lies. It should be possible to reverse or otherwise amend decisions previously taken. Complaints procedures should be clear and not unnecessarily bureaucratic. They should be capable of producing a prompt determination of the complaint".

66. Having viewed the Council's review procedure, this would appear to be a 3 stage process. The Commissioner recommends that reviews should not consist of more than one stage and it is likely that a 3 stage procedure also does not conform to the EIR Code's recommendation that reviews be "unnecessarily bureaucratic". The Commissioner expects that future internal reviews conducted by the Council will conform to the recommendations of the EIR Code.

Right of Appeal

67. 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

68. 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.

69. 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 10th day of February 2011

Signed

**Anne Jones
Assistant Commissioner
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 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 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.