

Environmental Information Regulations 2004

Decision Notice

Date: 21 September 2011

Public Authority: The Local Government Ombudsman
Address: The Oaks No 2
Westwood way
Westwood Business Park
Coventry
CV4 8JB

Summary

The complainant requested information relevant to the investigation of a complaint he had made to the public authority against Cornwall Council. The public authority withheld the relevant information on the basis of section 44 of the Freedom of Information Act (statutory prohibition on disclosure) and regulation 12(5)(d) (confidentiality of proceedings) of the Environmental Information Regulations 2004 (the EIR). During the course of the investigation, the public authority disclosed part of the withheld information.

The Commissioner finds that the remainder of the disputed information is 'environmental' within the meaning of the EIR and was also correctly withheld on the basis of the exception at regulation 12(5)(d).

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. The Commissioner understands the request, which was made on 28 June 2010, was for:

- '[A] complete set of paperwork' that the Local Government Ombudsman (LGO) used to reach the final decision of 14 April 2010 in relation to a complaint the complainant had made to the LGO about Cornwall Council'
3. On 2 July 2010 the public authority responded. It clarified that the request was for the contents of the complainant's complaints file and explained that some of the information was exempt on the basis of section 44 and some on the basis of regulation 12(5)(d) of the EIR by virtue of section 32(2) of the Local Government Act 1974 (the LGA). The public authority also considered part of the information caught by the Data Protection Act 1998 (the DPA) and withheld the relevant information on the basis of an exemption under the DPA.
 4. On 15 July 2010 the complainant wrote to the public authority expressing dissatisfaction with the decision above. The public authority appeared to treat this as continuation of his request above and responded accordingly on 22 July 2010. It reiterated that the information was exempt from disclosure by virtue of the statutory prohibition at section 32(2) of the LGA. On 3 August 2010 the complainant expressed further dissatisfaction with the public authority's decision not to provide him with the requested information. The public authority treated this letter as a request for an internal review.
 5. On 14 September 2010 the public authority wrote to the complainant with details of the outcome of the review. It disclosed some of the withheld information and upheld the application of section 44 and regulation 12(5)(d). It also continued to rely on the relevant exemption under the DPA.

The Investigation

Scope of the case

6. On 11 November 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. Part of the complaint was investigated by the Commissioner under the DPA. However, for the avoidance of doubt, the findings and outcome from that investigation under the DPA does not form part of this Notice.
8. Therefore, the scope of the investigation in so far as this Notice is concerned was to determine whether the public authority was correct

to withhold the remainder of the information in the complaints file on the basis of section 44 of the Act and/or regulation 12(5)(d) of the EIR.

9. However, during the course of the investigation, the public authority made additional disclosures to the complainant. Therefore, the information disclosed to the complainant on 1 September 2011 did not form part of the investigation.

Chronology

10. On 28 April 2011 the Commissioner wrote to the complainant and outlined the scope of his investigation. He invited the complainant to comment if he had any queries regarding the scope. The complainant did not respond.
11. On 17 May 2011 the Commissioner wrote to the public authority. He requested copies of the information withheld on the basis of section 44 and regulation 12(5)(d) (the disputed information). He also invited the public authority's submissions on the application of section 44 and regulation 12(5)(d).
12. On 15 June 2011 the public authority responded. It made additional submissions but did not provide copies of the disputed information.
13. On 29 June 2011 the Commissioner wrote back to the public authority and explained why he needed to have sight of the disputed information before reaching a decision.
14. On 19 July 2011 the public authority provided copies of the disputed information.
15. On 1 September 2011 the public authority provided the complainant with 6 out of the 8 documents it had previously withheld from disclosure.

Analysis

Substantive Procedural Matters

Disputed Information

16. The disputed information consists of:

- Notes to the Ombudsman – 14 May 2010¹ and
 - Draft letter – 1 April 2010
17. The Commissioner finds that the information in both of the documents listed above is environmental information within the meaning of regulation 2(1) of the EIR.
18. 'Environmental Information' is defined at regulation 2(1) of the EIR as 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);
19. In the Commissioner's opinion, 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.

¹ The public authority explained that this document is updated throughout the life of a file and was last updated on 6 August 2010.

The Commissioner considers 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 environmental decision making is likely to be environmental.

20. The disputed information broadly relates to a complaint the complainant had made to the public authority regarding Cornwall Council's decision not to take action to stop developments on a number of sites which he felt breached planning regulations. It summarises the public authority's reasons for not upholding his complaint.
21. The Commissioner finds that the disputed information relates to an activity and a measure likely to affect the elements and factors referred to regulations 2(1)(a) and (b) and for that reason, he finds that it is environmental information within the meaning of regulation 2(1)(c).
22. The Commissioner did not therefore consider the remaining disputed information under the provisions of the Act.

Application of Exception

23. A full text of all the statutory provisions referred to below can be found in the legal annex.

Regulation 12(5)(d)

24. Information is exempt from disclosure on the basis of regulation 12(5)(d) if it would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
25. The Commissioner considers that 'proceedings' includes a public authority exercising its statutory decision making powers. The public authority is statutorily empowered by the LGA to investigate allegations of maladministration in local government by any member of the public.
26. The exception requires a public authority to consider whether disclosure 'would adversely affect' the confidentiality of its proceedings provided by law. In other words, it is not enough that the confidentiality is provided by law, there must also be a demonstrable adverse effect from disclosure. In the Commissioner's opinion, this sets a high threshold which requires that the likelihood of the adverse effect occurring should be more probable than not.

27. As noted, the public authority considers that it is prevented from disclosing the disputed information by virtue of section 32(2) of the LGA.
28. Section 32(2) of the LGA provides, subject to exemptions, none of which apply in this case that:

'Information obtained by a Local Commissioner [of the LGO] or any officer of either Commission, in the course of or for the purposes of an investigation under this part of the Act shall not be disclosed.'
30. The Commissioner finds that disputed information consists of information which was obtained by the public authority from third parties in the course of its investigation of the complaint against Cornwall Council. Whilst the document itself was produced internally, the information therein broadly consists of information obtained by the public authority from both the complainant and Cornwall Council pursuant to its investigation.
31. As noted above, for the purposes of regulation 12(5)(d), a public authority needs to demonstrate that the disclosure 'would adversely affect' the confidentiality of its proceedings.
32. It is statutorily recognised that for the public authority to discharge its functions effectively, the information it obtains during the course of its investigations should normally be held in confidence. It therefore follows that disclosing information caught by this statutory prohibition on disclosure will usually adversely affect the confidentiality of the public authority's proceedings. The Commissioner agrees it is more probable than not that the disclosure would adversely affect the confidentiality of the public authority's investigations as contemplated by section 32(2) of the LGA in the circumstances of this case.
33. In view of the above, the Commissioner finds that the disputed information engages regulation 12(5)(d) of the EIR.

Public Interest Test

34. All exceptions in the EIR are subject to a public interest test. The Commissioner therefore considered whether in all the circumstances of the case the public interest in maintaining the exception at regulation 12(5)(d) outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

35. The public authority acknowledged that disclosure would contribute to public understanding of its decision making process.

36. It further recognised the general public interest in accountability and transparency and acknowledged that disclosure would enhance the accountability and transparency of its investigations process.

Public interest arguments in favour of maintaining the exception

37. The public authority however strongly argued that the statutory restriction from disclosing information obtained as part of, or in the course of, its investigations is vital in encouraging frankness and openness on the part of those providing information to the public authority.
38. The public authority submitted that disclosure would go against the reasonable expectation of confidentiality on the part of those providing information in the course of its investigations. It stressed that an environment which discourages the provision of information to it for fear of disclosure would have an adverse effect on its ability to effectively discharge its functions. The Commissioner accepts that this is a valid public interest argument in favour of maintaining this exception. He accepts that although the public authority could resort to exercising its statutory powers to compel third parties to provide it with information it would not be a good use of public funds and resources to discourage voluntary co-operation and supply of information.

Balance of the public interest arguments

39. Having carefully considered the arguments both in favour of and against disclosure, the Commissioner finds that the balance weighs heavily in favour of maintaining the exception. It is statutorily recognised that for the public authority to discharge its functions effectively, the information it obtains during the course of its investigations should be held in confidence. There will of course be circumstances where the public interest might nonetheless be in favour of disclosure. For instance, where there is strong evidence that the matter under consideration was not thoroughly investigated. The Commissioner is satisfied that in the circumstances of this case, the public interest is clearly in favour of maintaining the exception.

Procedural Requirements

40. By virtue of regulations 11(3) and (4), a public authority is required to complete an internal review within 40 working days.
41. The Commissioner considers that an expression of dissatisfaction with a public authority's decision under the Act or the EIR is sufficient to constitute a request for an internal review.

42. The Commissioner therefore finds the public authority in breach of regulation 11(4) for failing to complete its review within the statutory time limit.

The Decision

43. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- It correctly withheld the disputed information listed at paragraph 16 on the basis of the exception at regulation 12(5)(d).

44. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- It breached regulation 11(4) for failing to complete its internal review within 40 working days.

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

47. 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.
48. 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 21st day of September 2011

Signed

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

Legal Annex

Regulation 11 - Representation and reconsideration

Regulation 11(1)

Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2)

Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3)

The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4)

A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

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 –

- (a) international relations, defence, national security or public safety;
- (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;
- (c) intellectual property rights;

- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 3. has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Section 32(2) – Local Government Act

Information obtained by a Local Commissioner, or any person discharging or assisting in the discharge of a function of a Local Commissioner in the course of or for the purposes of an investigation under this Part of this Act shall not be disclosed except—

- (a) for the purposes of the investigation and of any report, statement or summary under section 30 31 or 31B above; or
 - (b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this Part of this Act, by a Local Commissioner or by a person discharging or assisting in the discharge of a function of a Local Commissioner or for an offence of perjury alleged to have been committed in the course of an investigation under this Part of this Act or for the purposes of an inquiry with a view to the taking of such proceedings, or
 - (c) for the purpose of any proceedings under section 29(9) above,
- and a Local Commissioner and the persons discharging or assisting in the discharge of a function of a Local Commissioner shall not be called upon to give evidence in any proceedings (other than proceedings within paragraph (b) or (c) above) of matters coming to his or their knowledge in the course of an investigation under this Part of this Act.

(3) A Minister of the Crown or any of the authorities to which this Part of this Act applies may give notice in writing to a Local Commissioner with respect to any document or information specified in the notice, or any class of documents or information so specified, that in the opinion of the Minister, or as the case may be of the authority, the disclosure of that document or information, or of documents or information of that class, would be contrary to the public interest; and where such a notice is given nothing in this Part of this Act shall be construed as authorising or requiring the Local Commissioner or any person discharging or assisting in the discharge of a function of a Local Commissioner to communicate to any other person, or for any purpose, any document or information specified in the notice, or any document or information of a class so specified:

Provided that a notice given under this subsection by any authority may be discharged by the Secretary of State.

(4) Nothing in subsection (3) above shall affect the obligations imposed by subsections (3) and (4) of section 29 above.

(5) Where information is disclosed in accordance with section 29(3) above, being information which is derived from a communication from a government department and which has not been made public, a Local Commissioner shall not without the written consent of an officer of the government department make a report which includes all or any of that information unless he has given the department not less than one month's notice in writing of his intention.

(6) The provisions of this section shall apply to the Commissioners of Customs and Excise and Commissioners of Inland Revenue as they apply to a Minister of the Crown.

(7) Information obtained from the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 shall be treated for the purposes of subsection (2) above as obtained for the purposes of an investigation under this Part of this Act and, in relation to such information, the reference in paragraph (a) of that subsection to the investigation shall have effect as a reference to any investigation.