

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 March 2014

Public Authority: North York Moors National Park Authority

Address: The Old Vicarage

Bondgate

Helmsley

York

YO62 5BP

Decision (including any steps ordered)

1. The complainant requested information from the North York Moors National Park Authority (the Authority) relating to a planning enforcement matter. The Authority withheld the requested information citing the exceptions in regulations 12(5)(b) (course of justice), 12(5)(e) (commercial confidentiality) and 13(2)(b) (personal information) of the Environmental Information Regulations (EIR).
2. It is accepted by both parties that some information within the scope of the request has been provided to the complainant.
3. The Commissioner has investigated with respect to the information that is not available to the complainant. The Authority refused to provide that information under regulation 13 of the EIR (personal data).
4. The Commissioner's decision is that the information is exempt from disclosure under regulation 5(3) as it contains the personal data of the complainant. Further commentary on the implication of the Commissioner's finding in relation to the Authority's obligations under the Data Protection Act 1998 is set out in the '*Other Matters*' section at the end of the notice.

Background

5. The Commissioner understands that the request in this case was made in the context of the Authority's decision to take formal enforcement action.
6. In correspondence with the Commissioner during the course of his investigation, the Authority confirmed that it considers that EIR exceptions - and in the alternative FOIA exemptions - apply to the requested information.
7. In its submissions it also explained to the Commissioner what information it had provided to the complainant and in what manner. It told the Commissioner:

"Attachment 3 is our correspondence with [the complainants'] representative which includes the Acorus report and explains the basis on which it was released.

Attachment 6 is a copy of our correspondence with the Planning Inspectorate in relation to [the complainants'] appeal which attached the 2 appendices to the Acorus report (Attachments 4 and 5) in relation to [the complainants'] business. This letter is dated 2 August and it was sent to the Planning Inspectorate in the full knowledge that its contents would be shared with [the complainants]. The calculations contained in Attachment 7 were subsequently supplied to the Planning Inspectorate (and therefore [the complainants] and their representatives).

....When the Authority decided, as part of the litigation that this information could be disclosed, it was right to carefully disclose in a restricted way it did to [the complainants] and the Planning Inspectorate to avoid releasing the information into the public domain".

8. The Commissioner's website provides, amongst other things, advice about what a public authority should do when it receives a request for environmental information, including whether the Regulations allow it to disclose information to a specific person or group alone¹. His advice in that respect is that:

¹

http://ico.org.uk/for_organisations/environmental_information/guide/receivi

"Disclosures under the Regulations are 'to the world'. However, you can restrict the release of information to a specific individual or group at your discretion, by providing information outside the scope of the Regulations".

9. In this case, both parties accept that information within the scope of the request has been provided, albeit outside of the EIR.

10. Accordingly, the Commissioner wrote to the complainant as the steps taken by the Authority appeared to have satisfied his request for information.

11. In response he told the Commissioner on 14 November 2013:

"yes we still do want a Decision Notice as we are unsure that we have received all the Acorus appendices. Their should be calculations that they did on the buildings and these are still missing. We also asked for all data on the cubical building so we can try to understand their decision this has also been refused [sic]".

12. Subsequently, on 20 November 2013, the complainant told the Commissioner:

"We received late on Thursday the 14th [November 2013] some calculations made by Acorus although they seem incomplete. These calculations came from the NPA's solicitor who said we should have received them on the 2nd of August. The Planning Inspectorate had also not received them. This left us unable to seek professional help to assess these complex calculations in time for the hearing. We feel in the interest of an open and fair planning system all information should be where possible disclosed in a timely manner so that all parties can prepare before committee meetings etc and it not be left until just before hearings".

Request and response

13. On 5 December 2012 the complainant wrote to the Authority and made the following request for information:

ng_a_request#what-should-we-do-when-we-receive-a-request-for-environmental-information-14

"Under the Freedom of Information Act and the Environmental Information Regulations I request all information held on computers, e-mails printed or hand written documents as well as images, video and audio recordings relating to the unauthorised cubical building at [address redacted]. To include all information relating to Acorus and its reports and correspondents [sic]".

14. The Authority responded on 16 December 2012. It confirmed holding information in paper and electronic form and that it held a report prepared by Acorus on the matter. However, it refused to provide that information citing regulation 12(5)(b) (course of justice) and regulation 13(2)(b) (personal information) of the EIR.

15. It also told the complainant that *"for completeness"* it had considered the request under FOIA. In that respect it said that the information is exempt under section 40 of FOIA (personal information) and *"potentially exempt"* by virtue of the following sections of the FOIA:

- section 30 (investigations and proceedings);
- section 36 (prejudice to effective conduct of public affairs); and
- section 41 (information provided in confidence).

16. It advised:

"If you are unhappy with the way in which your request for information has been dealt with you are able to request an internal review under the Authority's Complaints procedure and I attach a copy for your information".

17. The complainant requested an internal review on 10 June 2013. (The Commissioner has addressed the matter of timing of the request for an internal review in the 'Other Matters' section below).

18. The Authority responded, telling the complainant:

"... this will be considered under Stage 2 of our complaints procedure".

19. The Authority provided its internal review response on 8 July 2013. It confirmed that while it does not hold any video or audio recordings it does hold other information within the scope of the request.

20. With respect to the appendices of the report prepared by Acorus, the Authority refused to provide those appendices citing the exception at regulation 12(5)(e) (commercial confidentiality).

21. The Authority told the complainant:

"I must stress that a decision to release information to a specific individual under either the Environmental Information Regulations or Freedom of Information Act is a decision to release information completely into the public arena. Officers have in the interim agreed to release a copy of the Acorus report (excluding the appendices which the company have indicated they consider being commercially sensitive). The decision to release this document was taken to assist in the preparation of your appeal and does not automatically mean that the information is now within the public domain. In addition over the course of the next few months the Authority may decide to release further information to you as part of the Appeal process".

22. The Authority confirmed:

"In December 2012, the information including the report and other contents of the file was withheld on the basis that the exception in Regulation 12(5)(b) of the Environmental Information Regulations applied to the documents.....The file contains information which is of a personal nature in relation to your property and I consider that release of the information into the public domain by disclosure would breach the Data Protection Principles and Regulations 13 (1) applies".

23. In its internal review correspondence, the Authority also confirmed that it considers that the FOIA exemptions relied on in December 2012 are still relevant. Additionally, it cited sections 42(1) and (2) of FOIA (legal professional privilege).

24. It summarised its position saying:

"In conclusion I uphold the decision in December 2012 to refuse the information under Environmental Information Regulations and Freedom of Information for the reasons provided above. However, I acknowledge that one document (the Acorus Report excluding the appendices) is to be disclosed to you under a separate regime, namely disclosure of evidence as part of your planning appeals".

Scope of the case

25. The complainant contacted the Commissioner on 28 July 2013 to complain about the way his request for information had been handled.

26. During the course of his investigation, the complainant acknowledged that the Authority has provided him with information within the scope of his request, as detailed above. However, in his correspondence to the Commissioner of 20 November 2013, he confirmed "*we still believe relevant data is being withheld*".
27. In light of the above, the Commissioner has excluded from the scope of his investigation the information that has been provided to the complainant and has focussed his decision notice on the remaining contents of the planning enforcement file.
28. With respect to the timeliness of disclosure via a separate regime, the Commissioner has no powers to make a decision as regards that aspect of the complainant's complaint.

Reasons for decision

Is the information environmental?

29. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

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

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)..."
30. In the Commissioner's view, the use of the word "on" indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
31. In this case, the withheld information comprises information within a planning enforcement file which, at the time of the request, formed part of an ongoing enforcement case.
32. In the Commissioner's view this constitutes environmental information under regulation 2(1)(c) as it is on a measure affecting, or likely to affect, the elements of the environment in 2(1)(a), in particular the land and landscape.

Regulation 5 duty to make available environmental information on request

33. The duty to make environmental information available on request is imposed by regulation 5(1) of the EIR. Regulation 5(3) provides that regulation 5(1) does not apply to information that is the personal data of the requester. The Commissioner has first considered whether any of the requested information is the personal data of the complainant. If it is, the EIR will not require the Authority to disclose this information.
34. Personal data is defined in section 1 of the Data Protection Act 1998 (the DPA) as data which relates to a living individual who can be identified:
- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
35. In this case, the Authority acknowledged in its correspondence with the Commissioner that it considered that the withheld information contains personal data relating to the complainant. It told the Commissioner:
- "The personal data is that of [the complainant] and relates to his private life, principally about his business and which [the complainant] could reasonably expect not to be published".*
36. Having viewed the withheld information, the Commissioner is satisfied that the complainant is clearly identifiable from the information and that the information is significant and biographical to him. For example, the information includes references to his name and/or his property. The Commissioner is satisfied that the information is his personal data.
37. The Commissioner therefore finds that regulation 5(3) is engaged. As this is an absolute exception there is no public interest test to apply.

Other matters

38. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters.

Correct access regime

39. Whilst he notes that the complainant quoted the EIR and FOIA in their original request, in the Commissioner's opinion, responsibility for determining whether a request should be considered under the FOIA, EIR or the DPA rests with the public authority and not the requestor. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance.

40. The approach of the Commissioner where a request is made for information which is the requester's own personal data is that the public authority should deal with the request as a subject access request made under section 7 of the DPA. This action should be taken without it being necessary for the requester to make a further request specifying section 7 of the DPA.
41. In this case the Commissioner recommends and expects the Authority to consider whether the information which is exempt from disclosure under section 5(3) of the EIR could be disclosed to the applicant in accordance with its obligations under section 7 of the DPA.

Refusal to disclose information

42. Regulation 14(5) of the EIR states:

"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".

43. Regulation 11 of the EIR states that a public authority must reconsider its decision in the light of any representations made by the applicant. In order to trigger the obligation in regulation 11, the requester must express their dissatisfaction in writing within 40 working days of *"the date on which the applicant believes that the authority has failed to comply with"* a requirement of the EIR.
44. The Commissioner would therefore expect that such representations would usually be made within 40 working days of the refusal. However, he accepts that the regulation stipulates that the representation must be made within 40 working days of *"the date on which the applicant believes..."*. In his view, while any representations do not necessarily need to be made within 40 days of the refusal, the right to make representation is nevertheless not unlimited.
45. In this case the Authority issued its refusal on 16 December 2012. It advised the complainant that if he was not satisfied with its response he could request an internal review under the Authority's complaints procedure.
46. The complainant submitted his request for internal review on 10 June 2013. In acknowledging the request, the Authority advised the complainant that it would be considered *"under Stage 2 of our complaints procedure"*.

47. While the Commissioner accepts that the Authority provided the complainant with details of its complaints procedure, it appears that that procedure may not have included relevant information about the timescale for dealing with EIR complaints.
48. The Commissioner would take the opportunity to remind the public authority of issuing a good refusal notice. In this case, the inclusion of details of the timescale in which the complainant could complain to the public authority and ask it to reconsider its response may have resulted in matters being resolved in a more timely manner.

Right of appeal

49. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jon Manners
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF