

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 February 2014

Public Authority: Durham County Council
Address: County Hall
Durham
DH1 5UF

Decision (including any steps ordered)

1. The complainant requested information relating to the precautionary principle and wind turbines. The Commissioner's decision is that on the balance of probabilities Durham County Council (the Council) does not hold any information relevant to the complainant's request.

Background

2. The precautionary principle in planning or environmental matters is designed to prevent undue risk or harm occurring. The European Union brought the principle into its environmental policy in Article 191 of the Lisbon Treaty.¹
3. The article is worded in general terms, with objectives such as "preserving, protecting and improving the quality of the environment". In the context of the request in this decision notice, the precautionary principle is referred to in relation to a planning application for a wind turbine.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0132:0200:EN:PDF> (see page 132)

Request and response

4. On 23 June 2013, the complainant wrote to the Council and requested information in the following terms:

"[U]nder the Freedom of Information Act 2000, I require the following information, in digital format, for the period March 11th 2013 to the date of this letter:

- 1. A list of all internal departments and external public or private bodies who were consulted by yourself, or by others acting on your instruction or behalf, before arriving at your decision not to apply the precautionary principle for wind turbine development.*
 - 2. A copy of all requests for information, guidance or advice issued by yourself, or by others acting on your instruction or behalf, to help you make your decision, including, but not limited to, letters, emails, internal memoranda, texts etc.*
 - 3. A copy of all replies from the above sources including, but not limited to, letters, emails, internal memoranda, texts etc.*
 - 4. A copy of all internal agendas and minutes where the precautionary principle as applied to wind turbine development was mentioned or discussed."*
5. The Council responded on 29 July 2013. It provided a detailed response about its planning process and confirmed that no relevant information was held.
6. Following an internal review the Council wrote to the complainant on 13 August 2013. It upheld the decision in the original response.

Scope of the case

7. The complainant contacted the Commissioner on 11 August 2013 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of the case to be whether on the balance of probabilities the Council is likely to hold any information relevant to the complainant's request.

Reasons for decision

Is the information environmental?

9. Regulation 2 of the EIR provides the definition of environmental information (bold sections are the Commissioner's emphasis):

*"(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;"*

10. The Commissioner's view is that any information relevant to the request would relate to regulation 2(c) of the EIR as it would concern measures or plans which would relate to a number of elements listed in paragraph (a) and factors listed in (b).

Regulation 5(2)

11. Regulation 5(2) of the EIR states that:

"(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."

12. As the Council's response was 25 working days after the request was received it has breached regulation 5(2) of the EIR. The Commissioner asks that the Council ensure where possible to issue its responses promptly and within the 20 working day deadline.

Regulation 12(4)(a)

13. Regulation 12(4)(a) of the EIR states that:

"(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;"

14. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner – in accordance with a number of First-Tier Tribunal decisions – applies the civil standard of the balance of probabilities.
15. The Commissioner considers that items 2 and 3 of the request relate to item 1. In the Commissioner's opinion the wording "*before arriving at your decision not to apply the precautionary principle*" is significant as this assumes that a decision was made on whether to apply the principle. As items 2 and 3 relate to the decision referred to in item 1, it follows that if no such decision has been made then it is unlikely that there is any relevant information for all items of the request.
16. The Council in its submissions to the Commissioner it explained that the precautionary principle is taken into consideration for policy at national level, and that the guidance provided to local government does not stipulate that the precautionary principle needs to be applied. The Council stated that it had not taken a formal documented decision to not apply the precautionary principle and was not aware of any local planning authority that had. This supports the Council's position that information relevant to the request is not held.
17. This appeared at odds with the Council's response of 29 July 2013 which stated:

"The decision taken by the Council specifically not to apply the precautionary principle to all wind turbine developments in County Durham since 11th March 2013 as per your request for information and subsequent confirmation is evident in the documents which exist and provide detail in respect of planning policy and the determination of planning applications."

This wording would appear to suggest that a specific decision had been made not to apply the precautionary principle, and that it was possible there would be recorded information about this decision.

18. In response to this the Council answered that the development plan policies and government guidance against which wind turbines are assessed do not refer to the precautionary principle. The only mention of it occurring in a planning matter was in objection to a wind turbine and this came about because of concerns raised by the complainant. The Council was clear that there was no formal decision made about applying the precautionary principle to wind turbines and that there is no recorded information held.

19. The Council stated that in an outdated version of The County Durham Plan there is mention of the precautionary principle but only in relation to air quality and light, and not in relation to wind turbines. The Commissioner agrees that this would not come within the scope of the complainant's request and so does not consider it relevant information.
20. In its submissions the Council explained that the only internal correspondence it held in relation to the precautionary principle was emails relating to communications received by the complainant. The Commissioner has reviewed this correspondence and does not consider it to come within the scope of the complainant's request. Whilst the information is correspondence that mentions the precautionary principle and therefore could be viewed as relating to item 2 of the request, the Commissioner considers that the correspondence is concerned primarily with how to respond to the complainant's communications and not about any Council decision whether or not to apply the precautionary principle in relation to wind turbine development. Therefore the information is not within the scope of the complainant's request.
21. The Council stated that this internal correspondence was also the information being referred to in its response of 29 July 2013 when it claimed "there has been internal debate on the subject of whether to apply the principle". The Council admitted that this debate had "perhaps been overstated" in the response to the complainant. Having viewed the correspondence the Commissioner does not consider that it relates to debate on whether to apply the precautionary principle to a planning application for a wind turbine but how best to respond to the complainant's concerns. The Commissioner is satisfied with the Council's confirmation that this is the information referred to in the response but would ask that it takes greater care not to give a misleading impression about what information is held as the response of 29 July 2013 suggested that relevant information was in the Council's possession.
22. The Council referred to a committee report from its Planning Services department². This report mentions that a letter of objection to a proposed wind turbine development expressed a concern about the precautionary principle. The Council confirmed that this concern was raised by the complainant, and is not due to the Council consulting any internal or external bodies in order to reach a decision on whether or not to apply the precautionary principle. The Commissioner accepts this

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<http://democracy.durham.gov.uk/documents/s30408/Middle%20Heads%20Firm.pdf> (see paragraph 69 on page 12)

explanation and having looked at the report does not consider that it would come within the scope of the complainant's request.

23. The Commissioner notes that item 4 of the request asks for internal minutes and agendas. As per the other items of the complainant's request – the Council confirmed that the only internal documents held are the correspondence relating to handling the complainant's communications and the Planning Services committee report. It is the Commissioner's view that the Planning Services committee report as well as the internal correspondence does not meet the scope of item 4 of the complainant's request as they are not minutes of meetings or agendas.
24. The Commissioner considers that the submissions put forward by the Council explaining it did not make a decision on the precautionary principle and how this was actually incorporated into guidance at national level are well made and provide a reasonable explanation for why it is unlikely any relevant information is held. The Council has confirmed in its submissions that it has carried out the reasonable searches that would be expected of it and therefore it has met its obligation to identify information relevant to the complainant's request.
25. Based on the arguments that have been put forward the Commissioner's view is that on the balance of probabilities there is no relevant information held in relation to the complainant's request. While he considers that there are statements in the Council's initial response to the complainant of 29 July 2013 which suggested that relevant information may be held, he is satisfied with the clarification the Council has subsequently provided on this point.
26. Under the EIR all exceptions within regulation 12 – including regulation 12(4)(a) – are subjected to a public interest test. However, it is not possible for the Commissioner to carry this out given his finding that the Council does not hold the information to which the public interest would apply.

Right of appeal

27. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

28. 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.
29. 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

Alexander Ganotis
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