

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

Decision Notice

Date: 07 September 2010

Public Authority: Shropshire County Council
Address: Shirehall,
Abbey Foregate,
Shrewsbury,
Shropshire
SY2 6ND

Summary

The complainant made a request to Shropshire County Council for the Commons Register to show legal ownership of Prees Heath Common. The public authority provided the complainant with a copy of the Commons Register for the land in question and informed the complainant that ownership details were held by HM Land Registry and therefore exempt by virtue of section 21 – information accessible by other means. The Commissioner investigated and found that the request should have been dealt with under the Environmental Information Regulations 2004 (“EIR”). However he has determined that the exception in Regulation 12(4)(a) of the EIR applied. As the public authority did not issue a refusal notice compliant with the requirements of Regulation 14(1) the public authority failed to comply with that Regulation. The Commissioner has not ordered the public authority to take any steps.

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.

Background

2. Common land is land owned by one person over which another person is entitled to exercise rights of common (such as grazing animals or cutting bracken for livestock bedding), and these rights are generally exercisable in common with others.
3. The Commons Registration Act 1965 introduced the first statutory definition of "common land", but this is strictly relevant only for the purposes of deciding whether the land was or was not eligible for registration under the Act. The 1965 Act attempted to record all common lands, owners and rights. Unfortunately, many failed to be registered at that time and disputes have arisen as a result.
4. The Commons Register is a statutory document which shows all such registered land. Each area of common land and town or village green is listed in the registers under a unique 'unit number'. Each unit number in the register is divided in three sections showing details of:
 - Land - this includes a description of the land, who registered it and when the registration became finally registered. There are also related plans which show the boundaries of the land.
 - Rights - this includes a description of the rights of common (eg the right to graze 100 sheep), over which area of the common they are exercisable, the name (if known) of the person (the 'commoner') who holds those rights, and whether the rights arise by virtue of a separate land ownership by the commoner (ie they 'attach' to their land).
 - Ownership - this includes details (if known) of owners of common land. However, entries in this section of the registers are not held to be conclusive.
5. A database of registered common land in England is available at the following website page which contains a link to the database:

<http://www.defra.gov.uk/rural/protected/commonland/about.htm>

The database is believed to contain records for all parcels of common land, with various data including location, area, extent of rights etc. The information was assembled between 1982 and 1993. The database is not kept up to date. The Commissioner can confirm that the database has been viewed and it does contain an entry (CL21) for the land which is subject of the request below.

The Request

6. On 9 November 2009 the complainant requested the following information:

"1. Copy of the preregistration of titles that would have been acquired when purchasing the common land now used as a vehicle park "Prees Heath Lorry Park".

a) The rights to lease off the "lorry park" to the midway

b) The rights to remove persons off the lorry park

2. Other evidence as to the lawful registration of owners of the common

3. The title deeds, or lawful rights of application by Harrison

4. Evidence to show the lawful construction of the dual carriageway, round-about, lorry park and toilet

5. The approval to block off the Tilstock/Ash Magna access, to block off Green Lane

6. Addresses of people prosecuted and convicted in 2005/06 for not paying and displaying on 'the lorry park'

7. The register to show legal change of use where the hangers"[sic]

7. Shropshire County Council (SCC) provided a response to the complainant on 18 December 2009 in which it provided information on points 1, 4 and 5. SCC refused point 2 by virtue of section 21 and directed the complainant to the Land Registry; stating that it did not hold information in relation to point 3 and instead directed the complainant to the Butterfly Conservation Trust; refused point 6 on the basis of the exemption contained at section 40(2); and finally stated that it did not hold information relevant to point 7, directing the complainant to DEFRA instead.

8. In an email dated 18 December 2009 the complaint stated the following:

"The council does not have a Commons Register to show the legal ownership of any part of the common (this is the nucleus of the frauds being committed)"

9. The complainant requested an internal review of the public authority's decision on 15 January 2010, specifically referring to the application of section 21 to point 2 of his request, which was clarified on 18 December as is quoted in paragraph 8 above. The complainant stated that he accepted he would not receive the third party information refused at point 6 of his request and did not wish to challenge its refusal. He did not raise any specific concerns or questions in relation to points 3 and 7.
10. On 9 March 2010 the public authority provided the complainant with the outcome of its internal review. SCC upheld its initial decision of 18 December 2009.

The Investigation

Scope of the case

11. On 9 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant stated that he specifically asked the Commissioner to consider the following points:
 - SCC's application of section 21 to point 2 of his request for proof of ownership of the land in question.
12. The Commissioner first considered whether the request for information was for environmental information and therefore whether the request should have been dealt with under the EIR. He then went on to consider whether or not SCC held any further information falling within the scope of part 2 of the request and if so whether that information should have been disclosed.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

14. On 12 April 2010 the Commissioner wrote to SCC stating that he considered that the information in dispute was in fact environmental and as such should have been considered under the Environmental

Information Regulations 2004 (EIR). The Commissioner asked SCC to reconsider the request under EIR.

15. In an email dated 11 May 2010 SCC wrote to the complainant and included a copy of the Commons Register which it held for the land in question. This information had previously been provided to the complainant as a result of a request made in 2007. SCC also provided the complainant with an extra page to show updates to the Register since his previous request. The public authority stated that this was the only information it held and that it may not be accurate as it relied on HM Land Registry to update SCC of any land ownership changes. Therefore the information provided to the complainant could not provide him with conclusive proof of land ownership. SCC confirmed that it did not hold any further information relevant to the request.

Analysis

Legislation

16. The Commissioner is satisfied that the information held for the purposes of the Commons Register will constitute environmental information. These matters are considered to be administrative measures likely to affect the elements and factors listed in paragraphs (a) and (b) of the definition of environmental information as set out in regulation 2(1). The use of common land is likely to affect land, landscape, and soil as per 2(1)(a). The Commissioner is satisfied that such a Register will fall within the broad definition set out in regulation 2(1)(c).

Exceptions

Regulation 12(4)(a)

17. Regulation 12(4)(a) states that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
18. The EIR states that where information is not held a public authority is required to apply the exception found in Regulation 12(4)(a), which allows a request to be refused where the information is not held.
19. An important initial point to make is that the Commissioner is limited to considering whether or not recorded information is held at the time

of the request for information. This is the only information that a public authority may be obliged to provide.

20. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal (the 'Tribunal') in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The Commissioner will apply that standard of proof to this case.
21. The Commissioner's test has recently been confirmed in the Tribunal decision of *Innes v Information Commissioner* (EA/2009/0046) that was published on 27 October 2009. The central issue of the appeal was whether the balance of probabilities was the correct test when reaching a finding as to whether information is held or not. The Tribunal stated at paragraph 41 that;

" This Tribunal is not prepared to introduce any kind of sliding scale in terms of the standard of proof beyond the balance of probabilities. The House of Lords and other senior courts in recent decisions have confirmed the importance of maintaining the core principle -- in civil proceedings -- that the correct test is the balance of probabilities. It is only in relation to Asylum and childcare and child safety issues that there is any kind of variation."
22. The Council stated that it did not hold conclusive details of land ownership, and that such information is held by HM Land Registry. The Council provided the most current information it held by providing the complainant with a copy of the commons register in relation to the land in question but advised that this was likely to be out of date, the reason for this is explained in the background section above. The Council also advised the complainant how to pursue his enquiries, by directing him to HM Land Registry. The complainant declined to follow this advice.
23. The Commissioner is satisfied that the Council does not hold the requested information. This is because there is no reason or expectation that the Council should hold the information regarding land ownership as the information is available at HM Land Registry.
24. The Commissioner appreciates that the wording of Regulation 12(1)(b) specifies that 12(4)(a) is a qualified exception. It would therefore imply that a public interest test would need to be conducted when

information is not held. The Commissioner believes that a public interest test in the event where the information is not held is not possible. This is because even if the public interest test favoured disclosure the public authority would still not hold the information to enable it to be released.

Procedural Requirements

25. As the public authority dealt with the information request under the wrong regime, the Commissioner has identified procedural breaches in this case. As such, the Commissioner concludes that the public authority breached regulations 14(1) and 14(2) which require that where environmental information is being withheld the exception that is relied on must be communicated within twenty working days of receiving the request. The public authority failed to specify the exception it relied on in this case, which was 12(4)(a) and in doing so breached regulation 14(3)(a).
26. The Commissioner has considered whether the public authority should have transferred the request directly to HM Land Registry in this case to comply with its obligations under regulation 10. The Commissioner believes that the public authority provided the complainant with sufficient information in this case to assist him in accessing the requested information elsewhere and therefore complied with regulation 10(1)(b).
27. The complainant was also not informed directly of his right to make representations to the public authority under regulation 11 or of the enforcement and appeal provisions of the Regulations applied by regulation 18. This meant that the public authority also breached regulations 14(5)(a) and 14(5)(b).

The Decision

28. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Regulations:
 - Correctly informing the complainant that it did not hold the information, however it failed to state that this was in accordance with Regulation 12(4)(a) of the EIR.
 - Complying with its obligations under Regulation 10(1)(b).

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

- Failed to cite the correct exception within twenty working days, so contravening Regulations 14(1), 14(2) and 14(3)(a).
- Failed to inform the complainant in the refusal notice that he was entitled to make representation to the public authority under Regulation 11, so contravening Regulation 14(5)(a).
- Failed to inform the complainant in the refusal notice of his right to request an internal review and complain to the Commissioner so contravening Regulation 14(5)(b).

Steps Required

30. The Commissioner requires no steps to be taken.

Other matters

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

Paragraph 1 of the EIR Code of Practice states:

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

In this instance, the public authority erroneously handled the request under the Act rather than the EIR. The Commissioner expects that in its future handling of requests the authority will have regard for the

codes of practice issued under the Act and the EIR and ensure that staff handling requests are provided with proper training.

Right of Appeal

31. 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 06 day of September 2010

Signed

**Rachael Cragg
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Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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 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);

Regulation 10 - Transfer of a request

Regulation 10(1) Where a public authority that receives a request for environmental information does not hold the information requested but believes that another public authority or a Scottish public authority holds the information, the public authority shall either –

- (a) transfer the request to the other public authority or Scottish public authority; or
- (b) supply the applicant with the name and address of that authority, and inform the applicant accordingly with the refusal sent under regulation 14(1).

Regulation 10(2) Where a request is transferred to a public authority, for the purpose of provisions referred to in paragraph (3) the request is received by that public authority on the date on which it receives the transferred request.

Regulation 10(3) The provisions referred to in paragraph (2) are –

- (a) regulation 5(2);
- (b) regulation 6(2)(a); and
- (c) regulation 14(2).

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.