

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

Decision Notice

Date: 29 November 2010

Public Authority: Norwich City Council
Address: City Hall
Norwich
NR2 1NH

Summary

The complainant made two connected requests a few days apart, requesting information about the traffic aspects of a planning consent application within a consultants' report which Norwich City Council (Norwich) had once held. Norwich refused the request on the grounds that the information was not held.

The Information Commissioner decided that the Environmental Information Regulations 2004 (EIRs) applied. He decided that Norwich had breached Regulation 2(1)(c) in not recognising that the EIRs applied but that the information requested was not held and that the request should have been refused relying on the exception in Regulation 12(4)(a).

In respect of the second request the Commissioner decided that Norwich had refused the request within the time allowed by Regulation 14(2). The time taken by Norwich to complete its review of its refusal to provide the information requested fell well within the Regulation 11(4) time limit.

The Commissioner decided that Norwich had breached Regulation 14(2) in its late refusal of the first request and that Norwich should have refused the request under the exception at Regulation 12(4)(a).

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.

Background

3. A planning application was made to Norwich City Council (Norwich), application 04/00453/F, and was agreed subject to conditions and to securing a committed sum to address transport issues arising from the proposed development. There were discussions between the applicant and consultants acting for the applicant (the consultants) during which the consultants were required to produce a report (the consultants' report) covering the traffic aspects of the application. Norwich considered that the consultants' report of October 2005 was not sufficiently detailed and returned it to the consultants for further work to be done. After further contact with Norwich, the consultants provided the detail required by Norwich's planners in the form of a letter which Norwich accepted. The complainant subsequently asked for, and was given, a copy of the consultants' letter. Norwich explained much of this background to the complainant in a letter dated 27 March 2007.

The Request

4. On 21 March 2009 and again on 5 April 2009 the complainant asked Norwich
"Further to the previous Request for 453F Planning Copy please act also as to the attached request."
5. On 1 May 2009 Norwich told the complainant it was unable to provide a copy of the consultants' report but added that it had provided her with a copy of the final letter from the consultants.
6. On 12 September 2009 the complainant asked Norwich to review its decision to refuse access to the consultants' report which she said had been placed in the public domain and was therefore retrievable and accessible to the public. The complainant sent a further supporting email dated 12 September and two others dated 14 September.

7. On 15 September 2009 Norwich confirmed to the complainant that it did not hold a copy of the consultants' report which, Norwich said, had been insufficient for its requirements and had been returned to the consultants. Norwich told the complainant that it could not provide her with a copy of the consultants' report as it had not retained a copy.
8. On 19 September 2009 the complainant emailed Norwich challenging its statement that no copy had been retained on the grounds that Norwich had subsequently compared the information in the consultants' letter with that in the consultants' report.
9. On 2 October 2009 Norwich reiterated to the complainant that it did not now hold a copy of the consultants' report and had nothing further to add to its earlier response.

The Investigation

Scope of the case

10. On 7 April 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She made further representations on 4, 5 and 7 May 2010.
11. On 14 May 2010 the Commissioner's staff told the complainant that the time period for complaining to the Commissioner was within two months of the outcome of Norwich's internal review of the matter on 15 September 2009 and that her complaint could not now be accepted. Following further representations from the complainant, it became evident that there had been some communication difficulties between the parties and the Commissioner decided that it would be in the interests of justice for him, exceptionally, to investigate the complaint. Accordingly he accepted the complaint for investigation on 26 May 2010.
12. The Commissioner considered whether the EIRs applied and whether or not the information requested was held.
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 9 June 2010 the Commissioner told Norwich that he would be investigating the matter and invited comments from Norwich.
15. On 7 July 2010 Norwich told the Commissioner that it had spent a considerable amount of time and resources in responding to the complainant's many information requests concerning this planning matter. Norwich said that the consultants' report had not provided the level of detail required and had been returned to them. Subsequently the consultants had provided a letter with the detail required. The complainant had been provided with a copy of that letter. Norwich said it had not been able to provide the complainant with a copy of the consultants' report because Norwich had not retained one; it had been returned to the consultants.
16. On 17 August 2010 Norwich wrote to the Commissioner apologising for the delay in responding. Norwich said that its planning office had carried out extensive searches of relevant paper and electronic files to establish whether the consultants' report was held but had concluded that it was not. Norwich said it was not its practice to retain copies of all documents received as it did not have sufficient storage space.
17. On 27 August 2010 Norwich provided additional information to the Commissioner. Norwich said that it had received the consultants' report by email on 31 October 2005; hard copy had not been received and the electronic version of the consultants' report had not been retained. Norwich added that the consultants' report had not been placed in the public domain.
18. On 2 September 2010 the Commissioner put further questions to Norwich about the searches that had been conducted for the consultants' report.
19. On 7 October 2010 the complainant told the Commissioner that the consultants' letter, which she had received in 2006, had referred back to the [October 2005] consultants' report. She inferred from this that Norwich must have still retained the consultants' report at that time in order to make comparisons between the two documents. The complainant added that she had made a series of information requests related to this matter starting in 2005.
20. On 18 October 2010 Norwich confirmed to the Commissioner that appropriate searches had been made by its information technology provider of the electronic record archives but that it had been unable to locate a copy of the consultants' report.

Findings of fact

21. The consultants' report had been produced to support a planning application and covered the traffic aspects of the planning application; it was also used to inform discussions about the calculation of an appropriate transportation contribution from the planning applicant.

Analysis

Substantive Procedural Matters

22. The Commissioner considered whether he should determine the matter under the provisions of the Act or the EIRs. This was problematic because the information was said by Norwich not to be held; it follows that the Commissioner has been unable to examine the information to decide whether or not it is environmental in character.
23. Where a document potentially contains both environmental and other information that cannot be easily divided, then a "predominant purpose test" may be applied. This test would be applied to determine the extent to which an entire document or section of a document can be taken to be environmental information despite the fact that some of the information, taken in isolation, might not be regarded as environmental information.
24. In determining whether a public authority does hold any requested information the Commissioner uses the normal standard of proof, the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
25. The Commissioner noted that the purpose of the consultants' report was to inform discussions about the traffic aspects of a planning consent application. He decided therefore, on a balance of probabilities, that this was best considered to be a measure involving plans, programmes and an environmental agreement affecting the state of the elements of the Norwich environment and therefore best regarded as environmental information as set out in EIR Regulation 2(1)(c).

26. It is clear that the consultant's report was held by Norwich during part of 2005 and perhaps later. However, the issue for the Commissioner to decide was whether or not it was still held at the time of the request, in March and April 2009. In this matter, the Commissioner has received firm assurances that Norwich conducted thorough searches of all the relevant electronic and paper records including those within its planning department. Norwich also confirmed to the Commissioner that it was not its practice to retain copies of all documents received as it lacked sufficient storage space. The Commissioner has seen that Norwich required its information technology provider to review the relevant electronic archives. Despite these searches having been made, the information requested – the consultants' report – was not found. Accordingly the Commissioner decided that the information was not held.

Exceptions

27. When the requested information is environmental an exception to the EIR duty to disclose environmental information is engaged. Where information is not held, the relevant exception is provided by Regulation 12(4)(a) so that under the EIRs informing an applicant that information is not held is a refusal to disclose. It follows that the provisions of Regulation 14 (Refusal to disclose information) apply. In informing the complainant that the requested information was not held, but without properly refusing it under the EIRs, Norwich was technically in breach of regulation 14(3).

Public interest

28. Regulation 12(1)(b) requires that all exceptions are subjected to a public interest test. However it is not possible in this case and there are few if any situations in which the Commissioner would envisage it being appropriate.

Procedural Requirements

29. The refusal by Norwich of the 21 March and 5 April 2009 information requests was made on 1 May 2009. This was within the 20 working days required by Regulation 14(2) for the second request but was in breach of that regulation for the first request.
30. The complainant requested a review of the 1 May 2009 decision that the information was not held, technically a refusal, on 12 September 2010. This was more time after the refusal than the 40 working days allowed to an appellant in Regulation 11(2). It follows that Norwich could reasonably have refused to consider the request for a review but

they did not do so. Norwich considered the matter again promptly and replied on 19 September 2009 well within the 40 working days allowed in Regulation 11(4).

The Decision

31. The Commissioner's decision is that the information requested is not held and that Norwich dealt with the following elements of the request in accordance with the requirements of the Regulations:
- Norwich complied with the requirements of Regulation 14(2) in respect of the second request
 - Norwich completed its review of the refusal to provide the information requested well within the Regulation 11(4) time limit.
32. However, the Commissioner has also decided that Norwich did not deal with the following elements of the request in accordance with the Regulations:
- Norwich did not recognise that Regulation 2(1)(c) applied and that the information requested was environmental in character
 - Norwich breached Regulation 14(2) in its late refusal of the first request
 - Norwich did not refuse the request as required by Regulation 12(4)(a).

Steps Required

33. No information is held and the Commissioner requires no steps to be taken.

Right of Appeal

34. 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 29th day of November 2010

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Environmental Information Regulations 2004

2.—(1) In these Regulations—

“the Act” means the Freedom of Information Act 2000(**1**);

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

“appropriate records 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(**2**) 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;

....

Representations and reconsideration

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.

(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.

(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.

(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 date of receipt of the representations.

Exceptions to the duty to disclose environmental information

12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

...

(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;

Refusal to disclose information

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.

(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.

(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).