

Environmental Information Regulations 2004

Decision Notice

Date 15 February 2007

Public Authority: Lincolnshire County Council
Address: County Offices
Newland
Lincoln
Lincolnshire
LN1 1YG

Summary

The complainant requested copies of statements made by individuals about their use of a supposed route of a public footpath. The public authority released copies of statements where the writers consented but refused to release the remaining statements on the basis they were exempt under section 40 of the Act. Having investigated, the Commissioner is satisfied that the information was appropriately withheld although the Environmental Information Regulations should have been applied and the information withheld under Regulations 12 (5)(f).

The Commissioner's Role

1. The Environmental Information Regulations ("the Regulations") 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.
2. The information requested by the complainant is environmental information as defined in regulation 2 of the Regulations.
3. The Commissioner has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part 2 of the Regulations. His decision is set out below.

The Request

4. The complainant has advised that on 18 May 2005 she made the following request for information concerning a potential local footpath from Lincolnshire County Council ("LCC") in accordance with section 1 of the Act:

"I understand that some people have been approached by your department to make statements as to their supposed use of the route. I believe that I am entitled to know the content of these statements. I would therefore ask you to make copies of these available to me."

5. In its letter to the complainant dated 24 May 2005, LCC explained that the Wildlife and Countryside Act 1981 governs applications for the modification of the Definitive Map of public rights of way and that until a decision had been taken on whether or not the evidence suggests that an Order should be made to add the path to the Definitive Map, copies of the evidence discovered could not be released. Further, the Data Protection Act 1998 (the "DPA") had to be complied with.
6. The complainant reiterated her request in a letter dated 20 May 2005. LCC reconfirmed its views to her in its letter dated 31 May 2005.
7. On 14 June 2005, the complainant complained about LCC's refusal to supply her with information. On 17 August 2005, LCC responded to advise that the information was exempt under section 40. Further, should the matter proceed to the order making stage, the information would be in the public domain as it would be available for inspection. LCC advised that in order to assist, it would seek the consent of the makers of the statements so that the information could be released as the requirements of the DPA would be met. LCC considered this to be "Stage 1" of its complaints procedure and advised the complainant she could proceed to "Stage 2" if she wished.
8. On the 22 August 2005, the complainant requested a "Stage 2" review. In its letter dated 24 May 2005, LCC confirmed it had reviewed and upheld the original decision. LCC also advised the complainant she could proceed to "Stage 3" if she wished.
9. On the 17 November 2005, the complainant requested a "Stage 3" review which is used where there is maladministration by LCC. In its letter dated 29 November 2005, LCC confirmed it did not believe there were grounds to proceed to that stage and advised the complainant that she had a right to complain to the Information Commissioner if she wished.

The Investigation

Scope of the case

10. On 9 September 2005 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - Whether section 40 had been properly applied and in particular
 - Whether it was correct of LCC to withhold the information when it will be in the public domain at a later stage.
11. The Commissioner has been advised by LCC in a letter dated 5 September 2006 that after contacting the makers of the statements (as referred to at paragraph 7 above), consent to disclosure was provided which resulted in the release of 13 of the 19 statements on 14 October 2005. The complainant confirmed she had received the statements in a letter to the Commissioner dated 3 August 2006. For the purposes of the Decision Notice he therefore restricts himself to investigating whether the remaining 6 statements were appropriately withheld.

Chronology of the case

12. During his investigation of the complaint, the Commissioner has reviewed the withheld information and has also considered the Wildlife and Countryside Act 1981 which deals with the procedure for making modifications to the Definitive Rights of Way Map.
13. LCC advised the Commissioner on 10 November 2006 that the “order making stage”, which is directly before when the information will be made available for inspection, is likely to be reached in the near future.

Analysis

14. The Commissioner has considered the information requested and he is satisfied that it falls within the definition of environmental information in the Regulations in accordance with the definition contained in Article 2(1) of Directive 2003/4/EC. As the subject matter is the route of a footpath, it affects the environment or the states of the elements of the environment in the form of the landscape. In particular, where information is collected as evidence as to the existence of a right of way or in support of a claim for a right of way then the Commissioner considers it is environmental information as it falls within regulation 2(1)(c) as it is information on a policy, programme or activity likely to affect the environment.
15. The Commissioner has considered the public authority's response to the complainant's request for information. As the request should have been dealt with under the Regulations, the Commissioner finds that section 40 of the Act was incorrectly applied.

16. However, as the Regulations should have been applied, the Commissioner has considered the information with the Regulations and notes that Regulation 12(5)(f) relates to information provided to a public authority where the supplier of the information:
- was under no legal obligation to provide it,
 - did not supply it in circumstances such that that or any other public authority is entitled (apart from under the Regulations) to disclose it and
 - has not consented to its disclosure.

The provisions of Regulations 12(5)(f) are given in full in the Legal Annex.

Exceptions

Regulation 12(5)(f)

17. The Commissioner has considered the Wildlife and Countryside Act 1981 and is satisfied that the individuals who supplied the information to LCC are not and could not have been put under a legal obligation to supply it; that it was not supplied in circumstances such that LCC or any other public authority is entitled to disclose it (apart from under the Regulations) and that the individuals have not consented to disclosure. Consequently, the Commissioner is satisfied that the exception is engaged.

Public Interest Test

18. Regulation 12 is a qualified exception and as such, where it is engaged, information may only be withheld where the public interest in maintaining the exception outweighs the public interest in disclosure.
19. Whilst there may be public interest in promoting openness and accountability, the Commissioner does not believe that is sufficient to outweigh the preservation of the procedures laid down in the Wildlife and Countryside Act 1981. At the time the request for information was made, LCC was not entitled to disclose it although the Commissioner notes it will be when the order making stage is reached. The Commissioner considers that where a procedure is laid down in statute which allows for information to be inspected and representations and objections to be lodged within a reasonable time frame, it is inappropriate for the Regulations to be used to circumvent the process unless there are good reasons to do so.
20. The Commissioner does not find that there are any good reasons for circumventing the process in this particular case. The information will indeed be available for inspection once an Order about the footpath in question has been made and further, that it is reasonable for the information to be withheld until the Order has been made. Once the order has been made, as the Wildlife and Countryside Act 1981 permits inspection, Regulation 12(5)(f) will no longer be engaged.

The Decision

21. The Commissioner's decision is that the public authority misapplied the Act to the request for information which should have been considered under the Regulations.
22. The Commissioner does however find that the information which was withheld under section 40 would and should be withheld under Regulation 12(5)(f) of the Regulations. Consequently, withholding the information was correct.

Steps Required

23. The Commissioner requires no steps to be taken.

Right of Appeal

24. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 15th day of February 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Environmental Information Regulations 2004

Regulation 12(5)(f) provides:

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.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13....
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that it's disclosure would adversely affect-

- (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure"