

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

Decision Notice

18 September 2008

Public Authority: London Borough of Waltham Forest
Address: Room 101
Town Hall
Forest Road
London
E17 4JF

Summary Decision

The complainant's request concerned the proposed Tesco development at Highams Park and the legal advice the Council obtained concerning an Environmental Impact Assessment (EIA) and whether one was required prior to a planning officer's report dated 4 July 2005. The complainant obtained a copy of the internal legal advice the Council received dated 4 February 2004 but he believed this report and the planning officer's report dated 4 July 2005 suggested that further legal advice was obtained on this issue and was therefore held by the Council. This was the substance of the complainant's information request to the Council. The Council's response to this request was unclear. In one response it stated that any such advice would be confidential and in another it advised the complainant that internal advice was sought; namely, the report dated 4 February 2004, but no further legal advice was obtained on this issue. As the complainant remained dissatisfied with this response he approached the Commissioner. The Commissioner considered the complainant's request and the way in which this was handled by the Council under the EIR. He concluded that no further recorded information was held by the Council of that specified in the complainant's request and therefore that regulation 12(4)(a) of the EIR applied in this case.

The Commissioner's Role

1. The Environmental Information Regulations 2004 (the "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 IV of the Freedom of Information Act 2000 (the "Act") are imported to the EIR.

The Request

2. The complainant inspected the Council's planning files for the proposed Tesco development at Highams Park in September 2006 when these were made available for public inspection. During this inspection the complainant viewed and managed to obtain a copy of an internal legal adviser's report dated 4 February 2004, which discussed this development and whether an Environmental Impact Assessment (EIA) was required. The complainant also obtained a copy of a further report dated 4 July 2005 compiled by one of the Council's planning officers, which also discussed the issue of an EIA. As he felt the planning officer's report suggested that further legal advice was obtained by the Council on the issue of an EIA, he contacted the Council on 24 September 2006 to make the following information request:

"The report mentions that legal opinion has been sought and Counsel advice is that the scheme would not be EIA development. We request a copy of this advice."

3. As the complainant received no reply, he contacted the Council on 9 November 2006 to chase a response.
4. The Council responded on 22 November 2006. It confirmed that legal advice was obtained in relation to the EIA but advice from counsel was not.
5. As he remained dissatisfied, the complainant contacted the Council again on 22 November 2006 to request that it provide the information he initially requested on 24 September 2006. Although this is part of the complainant's first request the wording used was slightly different. He requested the Council to:

"confirm whether there was additional legal advice provided before the officer report on the Screening Opinion was completed [report dated 4 July 2005]."

6. The Council responded further on 12 December 2006. It informed the complainant that any further legal advice on this matter would have been confidential.
7. The complainant wrote to the Council again on 17 December 2006. He advised the Council that it was unclear from its various responses whether further advice on the issue of an EIA is held. He therefore requested again that the Council release a copy of any additional advice that was obtained.
8. On 19 December 2006 the complainant made a fresh information request to the Council. He requested the Council to provide copies of the following information:

"All advice from your Legal Department concerning the planning applications for Tesco Highams Park and the Public Inquiry".

9. The Council responded to the complainant's request dated 19 December 2006 on 22 December 2006. It advised the complainant that it was unwilling to disclose

the requested information as it was of the view that it was exempt from disclosure under regulation 12(5)(b) (the full text of this regulation and any other sections of the EIR referred to in this Notice can be found in the Legal Annex section towards the end of this Notice) of the EIR. In respect of the complainant's first information request, first raised with the Council on 24 September 2006, no further response was provided by the Council.

10. The complainant appealed against the Council's Refusal Notice dated 19 December 2006 on 18 January 2007. He stated that the requested information was required to enable him to understand more fully the Council's decision on environmental issues pertaining to the Tesco development.
11. The Council responded further on 20 March 2007 informing the complainant of the outcome of its internal review. It stated that it remained of the view that the requested information as outlined in his second request dated 19 December 2006 was exempt from disclosure under regulation 12(5)(b) of the EIR.
12. As the complainant remained dissatisfied he contacted the Commissioner to request that his complaint be given formal consideration. In correspondence to the Commissioner the complainant confirmed that he was concerned about the Council's decision not to carry out an Environmental Impact Assessment (EIA) for the development. He stated that he received misleading information from the Council about exactly what information is held (in response to his first request dated 24 September 2006) and therefore requested that it release all the legal advice it received concerning this decision (his second request dated 19 December 2006).

The Investigation

Scope of the case

13. As the complainant referred copies of all correspondence relating to both information requests to the Commissioner, the Commissioner first sought to clarify with the complainant exactly what information he wished to obtain and what aspect of his requests he wished the Commissioner to consider. The complainant confirmed that he only wished to pursue access to the legal advice the Council obtained concerning the EIA and whether one was required for this development; not all legal advice obtained by the Council relating to the entire development. He explained that he was aware of an internal report produced by the Council's legal adviser dated 4 February 2004 and had already obtained a copy of this information. However, for reasons that will be addressed in more detail later in this Notice, the complainant believes further legal advice was obtained on this issue. He confirmed that he requires access to any further legal advice that was obtained by the Council on the issue of an EIA.
14. The Commissioner's investigation has therefore focused solely on the complainant's first information request, first raised with the Council on 24 September 2006. The investigation has sought to establish whether any further

recorded information is held relevant to the wording of this request as outlined in paragraphs 2 and 5 above and whether the Council dealt with the complainant's request in accordance with the EIR.

Chronology of the case

15. The Commissioner wrote to the Council on 20 June 2007 to request a copy of all information it holds which relates to the complainant's information requests and to the proposed development at Highams Park.
16. The Council responded on 6 August 2007 providing an extensive amount of information relating to the development. Specifically, it supplied copies of the following information:
 - all files held by the Council's legal department concerning the Tesco development; and
 - a separate file containing copies of all legal advice it obtained, not only relating to the EIA but concerning all aspects of the development, as requested by the complainant on 19 December 2006.
17. As the Council confirmed that some of its legal advice had been left on the planning files in error when these were made available for public inspection, the Commissioner requested some additional information to determine exactly what advice was left on the files in error. He also asked the Council whether it held any records of those staff and members of the public who viewed the planning files whilst these were available for inspection.
18. The Council responded on 13 August 2007. It confirmed that only one piece of legal advice was left on the planning files in error; the report the Council received dated 4 February 2004 from its internal legal adviser, which discussed the development and the option of an EIA. It stated that no other legal advice relating to any aspect of the development was left on the files. In terms of any records of those individuals that requested to inspect the files, the Council confirmed that it does not have any formal record of those who requested to inspect the planning files. It, however, believes that the complainant was the only member of the public to see this advice and confirmed that it was removed from the planning files as soon as the error was identified.
19. As the complainant asked the Commissioner to focus on his first information request and his concerns that further legal advice is held relating to the EIA other than the report dated 4 February 2004, the Commissioner made some further enquiries to the Council on 18 September 2007.
20. The Council responded on 21 September 2007 providing the further information requested.
21. The Commissioner wrote to the Council on 25 September 2007 to request that it obtain a statement, responding to the complainant's concerns, from the planning officer who compiled the report dated 4 July 2005, which referred to the decision reached on the EIA and to the legal advice it obtained on this issue.

22. The Council replied on 18 October 2007 forwarding a copy of the statement it had received from the planning officer concerned.
23. On 5 December 2007 the Commissioner wrote to the Council to obtain some further information to establish more clearly which pieces of legal advice had been left on the planning files in error when these were made available for public inspection.
24. The Council responded further on 10 December 2007 providing the information requested. It confirmed again that it was only the legal adviser's report dated 4 February 2004 that was left on the planning files in error. All other legal advice it received concerning the development was and still remains withheld from the public domain.
25. The Commissioner wrote to the complainant on 29 January 2008 to outline his preliminary assessment and to invite him to withdraw his complaint.
26. The complainant responded on 26 March 2008. He confirmed that he remained dissatisfied with the outcome of his complaint and remained of the view that further recorded information is held by the Council relevant to his first information request to the Council.
27. The Commissioner considered the complaint further and undertook a further review of the various files the Council had supplied as outlined in paragraph 16. These files contain copies of all legal advice the Council obtained concerning the development and copies of numerous, more general communications, internally and externally, in which the development was discussed.
28. The Commissioner identified a further piece of legal advice which he felt falls within the scope of the complainant's first information request. The Commissioner also felt a number of more general communications between departments and the Council's external legal adviser required further explanation. He therefore wrote to the Council on 7 April 2008 to request that these issues be given further consideration.
29. The Commissioner received a partial response from the Council on 21 April 2008. It confirmed that it agreed the further piece of legal advice was relevant to the scope of the complainant's request and apologised for not bringing this to the Commissioner's attention previously. (This information will be addressed in the 'Other matters' section towards the end of this Notice). It confirmed that it was obtaining some further information about the issues raised in the Commissioner's letter dated 7 April 2008 and would respond fully in due course.
30. The Council responded further providing all outstanding information on 27 May 2008. It also supplied copies of further recorded information it had now identified, which it felt may be relevant to the investigation.
31. The Commissioner considered the additional recorded information provided by the Council on 27 May 2008. Although the further recorded information concerned the proposed development, the Commissioner decided that it did not fall within

the scope of the complainant's first information request. He informed the Council of this decision on 30 May 2008.

32. The complainant's concerns were discussed in more detail during a telephone call on 3 June 2006 between the Commissioner and the Council. It came to the Commissioner's attention that further files were held by the Council in its planning department concerning the development, which had not, to date, been checked. The Commissioner therefore requested the Council to review these files as soon as possible to see whether any further recorded information is held.
33. The Council informed the Commissioner on 13 June 2008 that all outstanding files had now been thoroughly checked and it was satisfied that no further recorded information is held relevant to the complainant's request.

Analysis

Procedural issues

34. Although the Council issued brief responses to the complainant on 22 November 2006 and 12 December 2006, these responses were not an adequate Refusal Notice adhering to the requirements of regulation 14 of the EIR. Regulation 14(2) and 14(3)(a) and (b) require a public authority to issue its refusal specifying on which exception it wishes to rely and, if necessary, how it has considered the public interest test within 20 working days of receipt of the request. Under the EIR there is a specific exception for those cases where the requested information is not held at the time of the request. It is the Commissioner's view that the Council should have advised the complainant that it does not hold the requested information and that it therefore wished to rely on exception 12(4)(a) of the EIR within 20 working days of the complainant's first request emailed to the Council on 24 September 2006. Regulation 14(5)(a) and (b) also stipulates that the Council should inform the complainant of their right to make further representations to the Council for reconsideration under regulation 11(1). The Notice should also inform the complainant of his right to approach the Commissioner. As the Council failed to adhere to these requirements, the Commissioner has found that the Council breached regulation 14(2), 14(3)(a) and (b) and regulation 14(5)(a) and (b) of the EIR in this case.

Exception 12(4)(a)

35. As stated above, under the EIR there is a specific exception for those cases where the public authority wishes to claim that the requested information is not held at the time the request is received; regulation 12(4)(a). Although the Council failed to cite this exception when corresponding with the complainant, the Commissioner will go on to consider this case in this context and decide whether regulation 12(4)(a) of the EIR applied to this request.

Is further recorded information held?

Report dated 4 February 2004

36. As this report was inadvertently left on the planning files when these were made available for public inspection, the Commissioner notes that the complainant has already obtained a copy of this legal advice. As stated in paragraphs 13 and 14, this Notice will therefore address the complainant's concerns that further legal advice on the issue of an EIA exists and is being withheld by the Council.

The complainant's view

37. In addition to the report dated 4 February 2004, the complainant believes the Council holds further legal advice, which discusses the EIA and whether one was required for the development. He is also of the view that the Council has deliberately withheld information from him. The report dated 4 February 2004 was inadvertently left on the planning files by the Council when these were made available for public inspection. The complainant viewed this report and obtained a copy whilst viewing these files. The report dated 4 February 2004 discusses the development and the option of an EIA. It also suggests that, at the time it was written, the decision as to whether an EIA was required was inconclusive. The complainant therefore believes that as the decision appeared inconclusive, further legal advice may have been obtained by the Council on this matter prior to it reaching any formal decision on whether an EIA was required.
38. The complainant also referred to a further report dated 4 July 2005, which was compiled by a planning officer in the Council. This report addressed the proposed development and the issue of an EIA. The complainant believes this document confirms that legal advice was sought on the issue of an EIA and that a decision that one was not required for this development was based on advice from counsel. As the complainant is aware of the existence of the internal legal advice that was obtained; the report dated 4 February 2004, he is of the view that further legal advice was sought from counsel; an external legal source between 4 February 2004 and 4 July 2005.
39. The complainant also stated that the way in which the Council handled his information requests led him to believe that further legal advice exists. He explained that when the Council was asked to confirm whether any further legal advice was held relating to the decision that was made that no EIA was required (his first information request), it responded by saying that any such advice would be confidential. As the Council appeared reluctant to confirm whether it does hold further recorded information, the complainant reached the view that it was being deliberately unhelpful in order to prevent any additional legal advice it did obtain prior to the report dated 4 July 2005 being traced and therefore potentially disclosed. The complainant also stated that the Council's Refusal Notice dated 22 December 2006 confirmed that it did hold information that it was unwilling to disclose. The complainant believes this means that the Council was either misleading him or that there is recorded information held that falls within the scope of his first request.

40. As stated in paragraph 16, the Council provided the Commissioner with copies of all files held by its legal department, together with a separate file containing copies of all legal advice it received concerning all aspects of the development. The Commissioner has reviewed the contents of these files in conjunction with the complainant's concerns and the submissions he received from the Council.

The Commissioner's view

41. Concerning the two reports dated 4 February 2004 and 4 July 2005 and the complainant's concerns that these seem to suggest that further legal advice may have been sought, the Council confirmed that it had contacted the planning officer who compiled the report dated 4 July 2005 in respect of the complainant's arguments. The planning officer provided a statement responding to those elements of the complainant's request that he was able to address. A copy of this statement was provided to the Commissioner. The planning officer confirmed that he did obtain legal advice on the issue of an EIA prior to any formal decision being reached as to whether one was required. This was the report dated 4 February 2004, of which the complainant has already obtained a copy. He stated that internal legal advice was sought concerning the conditions or criteria to be applied when considering the requirement of an EIA for this development. However, the decision reached that no EIA was required in this case was his decision. He explained that such decisions are made by the planning department; they are therefore not a legal conclusion. The purpose of obtaining internal legal advice was to ensure that he was correctly interpreting the Environmental Impact Regulations 1999 so that this could be appropriately applied to the decision making process undertaken by the planning department. The planning officer confirmed that he did not obtain any further legal advice, either internally or externally, prior to making this decision.
42. Although the Council accepted that the use of the wording "counsel" could possibly lead someone to assume that advice from counsel was obtained, it advised that the word "counsel" was not used in the planning officer's report in this context. The planning officer explained that he was referring to the internal legal advice he had obtained (report dated 4 February 2004) and confirmed that he did not seek external legal advice from counsel on this matter. The Council explained that it had undertaken repeated searches of all files held, both in its legal and planning departments and made enquiries to all relevant members of staff, but could not locate any evidence to suggest that further legal advice was sought from any source regarding the EIA other than the report dated 4 February 2004. It confirmed that it was on this advice only that the planning officer reached the decision that no EIA was required for the development.
43. Regarding developments of this scale, the Council stated that advice from counsel would not necessarily be sought before the determination of a planning application, although it might possibly be. However counsel's advice and representation would be obtained at, for example, inquiry stage particularly if the development involved a major commercial developer and planning consultants. The Council advised that it is at the discretion of the planning officer to decide whether or not to take legal advice internally or from counsel depending upon the

complexity or controversial nature of the case. It explained that this would be the same for any complex planning matter which has legal implications.

44. Concerning the Council's handling of this request, it accepts that it should have provided the complainant with a clearer response, particularly when the complainant questioned whether any further legal advice was obtained from counsel or any other source prior to the planning officer's report dated 4 July 2005. It accepts that it should have advised the complainant that it only held the report dated 4 February 2004 and that no further legal advice was sought at this time on this issue. The Council advised that it should, also, have offered the complainant an explanation as to why the report dated 4 July 2005 refers to counsel, when in fact the planning officer was referring to the internal legal advice he received dated 4 February 2004 and no advice from counsel was obtained.
45. In respect of the complainant's concerns regarding the Refusal Notice dated 22 December 2006 as outlined in paragraph 39, the Council confirmed that this was issued to the complainant in response to his second information request dated 19 December 2006 as described in paragraph 8 of this Notice. As stated previously, the complainant's second request was much wider in scope than his first request and the issues he later asked the Commissioner to consider. This Refusal Notice was therefore responding to the complainant's second request, which was for all legal advice obtained by the Council concerning all aspects of the development, not necessarily the EIA. As legal advice was obtained regarding many aspects of the development the Refusal Notice confirmed that the Council wished to withhold this information under regulation 12(5)(b) of the EIR. As explained in paragraphs 13 and 14, this request did not form part of the complaint referred to the Commissioner. The complainant narrowed the scope of his complaint to his first information request and his concerns that further recorded information is held by the Council.
46. As stated previously, the Commissioner has searched through the files supplied by the Council to ensure that no further legal advice is held of the description specified in the complainant's first information request. These files contain numerous internal and external communications between the Council and third parties, some of which are to its external legal adviser. The Commissioner requested the Council to address those communications to its external legal adviser and to explain why such information is not considered relevant to this request. The Council confirmed that such communications are not relevant, as they relate to the Council's case at the public inquiry. It explained that it instructed an external legal adviser to act on behalf of the Council at the inquiry and therefore it was necessary for the external legal adviser to see all information that is held on the development, including that which exists concerning the decision that was reached concerning an EIA. It explained that the inquiry instigated many communications and meetings of this nature but the purpose of these communications/meetings was to discuss the inquiry itself; not to obtain counsel's opinion on whether an EIA was required since a binding decision on this matter had already been made by the planning department.
47. The Commissioner is satisfied that the Council has undertaken sufficient checks of the records it does hold and made extensive enquiries to those officers

concerned in this development to establish whether further legal advice was obtained concerning the EIA prior to the report of 4 July 2005. Based on the submissions received from the Council and the Commissioner's own review of all files held by the Council's legal department, he is satisfied that on the balance of probabilities no further recorded information exists of the description specified in the complainant's first request and that regulation 12(4)(a) of the EIR applies in this case.

48. As briefly explained in paragraph 28, the Commissioner's search of the files held by the Council's legal department did locate a further piece of legal advice which he felt was relevant to the scope of the complainant's first information request. As this information is the complainant's own personal data and should be considered in accordance with the Data Protection Act 1998 ('the DPA'), it does form part of this Notice and will be addressed in more detail in the 'Other matters' section of this Notice below.

The Decision

49. As explained in more detail in paragraph 34, the Commissioner found that the Council breached regulation 14(2), 14(3)(a) and (b) and 14(5)(a) and (b) of the EIR in this case.
50. Although the Council failed to cite regulation 12(4)(a) of the EIR when responding to the complainant's first information request, the Commissioner is satisfied that this exception applies to the circumstances of this case. As explained above, he is satisfied that on the balance of probabilities the Council does not hold any further recorded information relevant to the complainant's first information request.

Steps Required

51. The Commissioner requires no steps to be taken.

Other matters

52. As stated in paragraph 40 above, the Commissioner's searches of the files held by the Council's legal department located a piece of legal advice dated 20 December 2006 which he felt was relevant to the complainant's request. The Commissioner has considered the contents of this document and he has decided that the information is the complainant's own personal data. Right of access to this information should be considered under the DPA not the EIR. The Commissioner therefore requested the Council on 14 August 2008 to reconsider this information under the DPA and to inform the complainant within 40 working

days of its decision under this legislation. If the complainant remains dissatisfied once he has received this response, this will be treated as a separate complaint.

Right of Appeal

53. 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 18th day of September 2008

Signed

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

Legal Annex

Environmental Information Regulation 2004

Regulation 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.

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 12(5)

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (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 the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

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(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.