

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

Decision Notice

Date: 13 April 2011

Public Authority: The Governing Body of Somerset Bridge
Primary School
Address: Somerset Bridge Primary School
Stockmoor Drive
Somerset Bridge
Bridgwater
Somerset
TA6 6AH

Summary

The complainant made a request to the Governing Body of Somerset Bridge Primary School ("the School") for a copy of its maintenance and service records for its septic tank(s), sewage pipes and wells for a defined period of time. The School withheld this information under regulation 12(5)(b) on the basis that its disclosure would adversely affect the ability of a local council to carry out a criminal investigation related to contracts for the maintenance of those services.

The Commissioner has decided that the School was entitled to withhold the requested information under regulation 12(5)(b). However he has determined that the School breached a number of procedural aspects of the Environmental Information Regulations in its handling of the request.

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.

The Request

2. On 16 July 2010 the complainant wrote to the School and requested
 "[A] copy of the maintenance and service records for septic tank(s),
 sewage pipes and wells for the period 20 October 2009 to 20
 December 2009."
3. On 11 October 2010, following the intervention of the Commissioner,
Somerset County Council ("the Council") wrote to the complainant on
behalf of the School and informed him that the information requested
was exempt from disclosure under section 30 of the Act and regulation
12(5)(b) of the EIR as the information was relevant to a criminal
investigation being carried out by the Council.
4. On 17 November 2010 the complainant requested an internal review of
the decision to refuse to disclose the requested information.
5. On 17 December 2010 the Council replied on behalf of the School to
the request for an internal review. The internal review response
acknowledged the School's failure to comply with certain procedural
aspects of the relevant legislation. However it confirmed the decision to
withhold the information under regulation 12(5)(b) of the EIR.

The Investigation

Scope of the case

6. On 10 August 2010 the complainant contacted the Commissioner to
complain about the way his request for information had been handled.
7. During January and February 2011 there was correspondence between
the Commissioner and the complainant concerning the scope of the
complaint. During the course of this correspondence the complainant
informed the Commissioner that he was no longer interested in the
information that he had requested but subsequently confirmed that he
still wished the Commissioner to make a determination as to whether it
should have been released to him when he initially made his request.
8. The complainant specifically asked the Commissioner to consider the
following points:
 - (i) the School's compliance with the provisions of the EIR in
terms of providing responses and the relevant time periods
for providing responses;

- (ii) whether it complied with the relevant provisions regarding advice and assistance;
- (iii) whether it complied with the relevant provisions in the processes it followed in handling the request;
- (iv) whether it transferred responsibility for handling the request to the Council and, if it did, whether it was entitled to do so;
- (v) whether it could ask the Council to handle the request on its behalf, including carrying out an internal review; and
- (vi) whether the information that was requested should have been disclosed.

Chronology

9. On 7 March 2011 the Commissioner wrote to the School to request a copy of the withheld information and for responses to a number of queries regarding its handling of the complainant's request.
10. On 1 April 2011 the Council wrote to the Commissioner on behalf of the School. It provided the Commissioner with a copy of the withheld information and its arguments as to why it believed the information was exempt from disclosure under the EIR. These arguments are detailed in the "Analysis" section of the notice.

Analysis

Substantive Procedural Matters

11. The Commissioner initially considered whether the requested information was "environmental information" under the EIR. He considers that maintenance records for septic tanks, sewage pipes and wells are clearly information falling within the definition contained within regulation 2(1)(a) and (b) of the EIR.

Exception – regulation 12(5)(b)

12. The School explained that it had been informed by the Council that the requested information was important evidence in a criminal investigation that the Council was conducting. It confirmed that the investigation had started shortly before the request was made. The School confirmed that at the time that it responded to the Commissioner, at the beginning of April 2011, the investigation was still ongoing and no criminal prosecutions had been commenced. In

light of this, the Commissioner is of the view that it is not appropriate for him to discuss the investigation in detail in this notice.

13. The School argued that disclosure of the requested information would have adversely affected the ability of the Council to conduct an inquiry of a criminal nature. It therefore believed that the information was exempt from disclosure under regulation 12(5)(b) of the EIR.

14. Regulation 12(5)(b) provides that

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

(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;"

15. In deciding whether this exception has been applied correctly, the Commissioner had to consider whether the withheld information related to an inquiry of a criminal nature conducted by a public authority. He is satisfied that it relates to a criminal inquiry being conducted by the Council at the time that the request was made.

16. The Commissioner took into account, when considering whether disclosure of the requested information would have had an adverse affect, that the threshold to justify non-disclosure is a high one and that it is necessary to show that disclosure "would" have had an adverse affect, not that it could or might have had an adverse affect.

17. In determining whether disclosure of the withheld information would have adversely affected the Council's ability to conduct its criminal investigation, the Commissioner was influenced by the stage that had been reached in the investigation, the significance or sensitivity of the requested information in relation to the investigation and whether the information was already in the public domain.

18. The School informed the Commissioner that, from information provided by the Council, it was of the view that disclosure of the withheld information would have adversely affected the criminal investigation being conducted by the Council as it would have placed important evidence which was being used for the purposes of the Council's investigation in the public domain.

19. The Commissioner recognises that the success of an investigation often depends on the quality of the evidence obtained. Prematurely revealing evidence or lines of enquiry could prejudice that investigation.

20. The Commissioner acknowledges that, as a general principle, it is important to allow a public authority that is investigating potential criminal offences to withhold relevant evidence until such time as it is appropriate to release it. He notes that there are well defined rules governing the disclosure of information in relation to criminal investigations. These will determine the process to be followed and determine when it is appropriate for relevant information to be disclosed. To disclose important evidence in a criminal investigation prematurely under the EIR would clearly undermine the existing procedures and could adversely impact on the investigative process.
21. The Commissioner notes that at the time of the request the investigation was at a relatively early stage and the information that was requested was viewed by the Council as important evidence in that investigation. It was not information that was in the public domain.
22. The Commissioner considers that the disclosure of the requested information at such an early stage of the investigation would have adversely affected the Council's ability to determine the direction of the investigation. It would have placed important evidence in the public domain that could have resulted in premature public discussion about the case without the benefit of all of the facts being known. In addition, it would have lead to those under suspicion being publicly identified and as a result being less willing to cooperate with the Council's investigation.
23. The Commissioner is consequently satisfied the disclosure of the withheld information whilst the investigation was ongoing would have had an adverse affect on the Council's ability to conduct that investigation. He therefore finds that the exception was engaged.
24. As the exception is subject to the public interest test set out in regulation 12(1)(b), the Commissioner went on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

25. The Commissioner notes the strong public interest in the disclosure of environmental information reflected in regulation 12(2) which states that:

"A public authority shall apply a presumption in favour of disclosure."

26. The Commissioner recognises that there is a general public interest in increasing the public's understanding of how the Council conducts its

investigations, ensuring that it is accountable for its actions in relation to the investigation and transparent about the way that the investigation is conducted. However, the Commissioner notes that the investigation was still at an early stage at the time of the request and that the request was for a specific piece of evidence rather than for all the information relevant to the investigation. Consequently, he does not believe that the disclosure of the requested information would have been of significant value in enhancing the particular public interests in favour of disclosure that he has identified.

Public interest arguments in favour of maintaining the exception

27. The Commissioner acknowledges the strong public interest in allowing bodies, such as the Council, to carry out criminal investigations thoroughly, effectively and free from the public gaze. Linked to this, there is also a strong public interest in ensuring that any prosecution that may ultimately be brought is not prejudiced.
28. The Commissioner accepts that it would clearly be contrary to the public interest for important evidence in a criminal investigation to be released into the public domain prematurely so as to adversely impact on a public authority's ability to determine the direction of that investigation. It would also not be in the public interest if the release of that information were to make those under suspicion less willing to cooperate with the investigation.
29. In addition, the Commissioner is of the view that it is not in the public interest for the current processes and procedures related to the disclosure of information under the criminal justice system to be undermined by the premature release of important evidence under the EIR.

Balance of the public interest arguments

30. The Commissioner notes that the Council has confirmed that it was in the course of carrying out a criminal investigation at the time that the request was made. This investigation was still in its early stages where the Council was attempting to identify and analyse relevant evidence. Consequently, the Commissioner believes that a very considerable weight should be given to the public interest in maintaining the exception. The Commissioner is therefore satisfied that the public interest in maintaining the exception outweighed the public interest in disclosure and that the public authority was entitled to withhold the requested information.

Procedural Requirements

31. The complainant sent his request to the School on 16 July 2010. A response was not sent to the complainant until 11 October 2010. By failing to provide the complainant with a refusal within 20 working days, the School breached regulation 14(2) of the EIR.
32. By failing to specify in its refusal the matters it considered in reaching its decision with respect to the public interest under regulation 12(1)(b), the School breached regulation 14(3)(b).
33. By failing to inform the complainant in its refusal that he could make representations to it under regulation 11, the School breached regulation 14(5)(a).
34. The complainant asked the Commissioner to consider whether the School had complied with the relevant provisions regarding advice and assistance. While the Commissioner has identified a number of procedural breaches of the EIR by the School in handling the complainant's request, he has not identified a failure by the School to offer appropriate advice and assistance and, consequently, has not identified a breach of regulation 9 of the EIR.
35. In addition, after examining the correspondence between the parties, the Commissioner is satisfied that the Council informed the complainant that it was acting on behalf of the School in providing a response to him rather than that the request had been transferred from the School to the Council for a response. The Commissioner has determined that there has been no breach of the provisions of the EIR in the Council acting on behalf of the School in responding to the complainant.
36. The Commissioner is also satisfied that the School was entitled to ask the Council to carry out an internal review on its behalf. To do so did not result in a breach of the EIR.

The Decision

37. The Commissioner's decision is that the School dealt with the following elements of the request in accordance with the requirements of the Act:
 - it correctly applied regulation 12(5)(b)
38. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- it breached regulation 14(2) by failing to provide the complainant with a refusal within 20 working days;
- it breached regulation 14(3)(b) by failing to specify in its refusal the matters it considered in reaching its decision with respect to the application of the public interest under regulation 12(1)(b); and
- it breached regulation 14(5)(a) by failing to inform the complainant in its refusal that he could make representations to it under regulation 11.

Steps Required

39. The Commissioner requires no steps to be taken.

Right of Appeal

40. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

41. 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.
42. 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 13th day of April 2011

Signed

**Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

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 3 - Application

Regulation 3(1)

Subject to paragraph (3) and (4), these Regulations apply to public authorities.

Regulation 3(2)

For the purposes of these Regulations, environmental information is held by a public authority if the information –

- (g) is in the authority's possession and has been produced or received by the authority; or
- (h) is held by another person on behalf of the authority.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1)

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(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.

Regulation 9 - Advice and assistance

Regulation 9(1)

A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Regulation 9(2)

Where a public authority decides than an applicant has formulated a request in too general a manner, it shall –

- (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
- (b) assist the applicant in providing those particulars.

Regulation 9(3)

Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

Regulation 9(4)

Where paragraph (2) applies, in respect of the provisions in paragraph (5), the date on which the further particulars are received by the public authority shall be treated as the date after which the period of 20 working days referred to in those provisions shall be calculated.

Regulation 9(5)

The provisions referred to in paragraph (4) are –

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

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 11 - Representation and reconsideration

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 11(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.

Regulation 11(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.

Regulation 11(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 receipt of the representations.

Regulation 11(5)

Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 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.

Regulation 12(2)

A public authority shall apply a presumption in favour of disclosure.

Regulation 12(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.

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 these 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 - 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.