

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

Decision Notice

Date: 12 May 2011

Public Authority: Darlington Borough Council
Address: Town Hall
Feethams
Darlington
County Durham
DL1 5QT

Summary

The complainant requested from Darlington Borough Council a copy of the assessment made by the Local Government Ombudsman in relation to a complaint made by a developer of a neighbouring property. The council relied on regulation 12(5)(d) to withhold information. The Commissioner decided that some of the information was the complainant's personal data and therefore requested the council to treat part of the request as a subject access request under the Data Protection Act 1998. In respect of the remaining information, the Commissioner decided that the council had correctly applied regulation 12(5)(d) and therefore had rightly withheld it.

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.

AND

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.

The Request

3. On the 12 July 2010 the complainant made a request for 'a copy of the assessment from the ombudsman following the developer's complaint and quoted by his agent in the design and access statement'.
4. The council responded on the 29 July 2010 stating that the information requested is exempt from disclosure under Regulation 12(5)(d) of the Environmental Information Regulations 2004 by virtue of section 32 of the Local Government Act. The council stated that it had consulted with the Local Government Ombudsman ('the LGO') before applying the exception and provided arguments as to why the public interest in maintaining the exemption outweighs the public interest in disclosure.
5. The complainant requested an internal review of the council's decision on 10 August 2010. He stated that the developer has not respected the confidentiality of the assessment as his agent has quoted part of the report in a publicly accessible document, to wit a design and access statement for another application.
6. The council responded on 7 September 2010 maintaining its original decision. It provided further arguments as to why the exception is engaged and also stated that it does not believe that simply because the developer may or may not have breached confidentiality that that is a justification for the Local Authority to follow suit.

The Investigation

Scope of the case

7. On 15 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - "It is the developer's agent who has breached confidentiality of the assessment and done so in a document circulated for public consultation. We believe, therefore, that the developer cannot

reasonably expect confidentiality to be maintained for the rest of the document.”

- “Individuals have the right now to see their own personal information and we believe that this request is for us in the nature of personal information, and also impinges, as it does, on our legal position. Therefore we consider that the information request should not be considered under the terms of EIR 2004.”
8. During the course of the investigation the Commissioner identified that some of the information requested is personal data of the complainant and therefore, in relation to the complainant's personal data, the request should have been dealt with as subject access request under the Data Protection Act 1998. The complainant's personal data is therefore outside the scope of this Decision Notice and is dealt with under a separate data protection case.

Chronology

9. The Commissioner wrote to the council on 19 October 2010 requesting a copy of the withheld information and any further arguments in support of the application of the exception.
10. A copy of the withheld information was sent on 1 November 2010 along with a copy of the council's third party consultation response from the LGO. The reasons for the application of the exception as provided in the initial response and internal review were reiterated.
11. The Commissioner wrote to the complainant on the 9 March 2011 providing a preliminary view that the exception would be likely to be engaged and that the public interest is best served by allowing the application of the exemption in this case.
12. On 20 March 2011 the complainant provided further argument for their position.
13. The Commissioner wrote to the council on the 30 March 2011 requesting its comments on the alleged breach of confidentiality of the withheld information.
14. On 13 April 2011 the council responded stating that in its view the publication of an extract of the LGO's determination letter as part of the developer's design and access statement does not constitute a breach of confidentiality by the Council for the following reasons:

"1. Sections 28(2) and 32(2) of the Local Government Act 1974 exist to protect confidentiality between the LGO and the complainant (in this case the developer). If the complainant chooses to waive this confidentiality by publishing communications, then that is his prerogative. We do not find it persuasive that the fact the complainant has waived confidentiality in relation to one small extract of the document that the entire document is disclosable.

2. The design and access statement was provided to the Council as part of the planning application. Planning files form part of a public register, which means that the Council had to make the design and access statement available for public inspection. The Council now publishes information relating to all planning applications on its planning portal. The application in question pre-dates the introduction of the planning portal, however, due to the level of interest in the Manor Farm development, the Council made the decision to publish certain documents on the website to give people access to information about the development in a timely manner. Given that the Council had a duty to make the design and access statement available to the public, I do not accept that publication of the document on our website constitutes a breach of confidentiality."

Analysis

Is the information environmental?

15. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

'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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

16. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
17. The withheld information consists of an assessment made by the LGO in relation to a complaint about the council's actions in respect of a specified planning application. The Commissioner is satisfied that this constitutes environmental information by virtue of Regulation 2(1)(c).

Exceptions

18. Regulation 12(5) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
19. The Commissioner interprets "proceedings" as possessing a certain level of formality. Accordingly they are unlikely to encompass every meeting held / procedure carried out by a public authority. They will include (but may not be limited to):
 - legal proceedings;
 - formal meetings at which deliberations take place on matters within the public authority's jurisdiction; and

- where a public authority exercises its statutory decision making powers.
20. Public authorities can only refuse to disclose information relating to proceedings where the confidentiality of those proceedings is provided by law. This includes common law or specific statutory provision. If the confidentiality of the proceedings is not provided by law, regulation 12(5)(d) will not apply.
 21. Section 32(2) of the Local Government Act 1974 ('the LGA') provides a statutory prohibition on the disclosure of any information which was obtained in the course of or for the purposes of an investigation by the LGO. The full text of the legal provision can be found in the annex.
 22. The council maintain that section 32(2) of the LGA provides for the LGO's investigations to be conducted in private and, accordingly, any correspondence between the Council and the LGO is confidential. It has stated that the report is the LGO's decision on this matter and constitutes correspondence between the complainant and the LGO and the Council was sent a copy of the decision to enable it to understand the LGO's reasoning. The council maintain that as such, it is clear that the report constitutes "information obtained... in the course of or for the purposes of an investigation...".
 23. The council acknowledge that the Regulations do not define "proceedings", but state that it is evident from the guidance on this exception (i.e. Defra's guidance on the EIR and the Aarhus Convention Implementation Guide) that the exception is designed to cover more than just legal proceedings. The council stated that as LGO investigations are formal investigations into an authority's conduct, it believes that they fall within the scope of this exception. The council also comment that the exception states that the confidentiality of the proceedings must be "provided by law" and it believes that this test is satisfied due to the provisions set out in section 32(2) of the LGA.
 24. The council have also stated that;

"Having asked the LGO for their opinion on this matter they responded saying, 'Under the 1974 Local Government Act, investigations by the Ombudsman are conducted in private and so any information gathered and letters written are confidential. It is Section 32.2 of the Act which states that information obtained during the course of an investigation may not be disclosed except

in specific circumstances which do not appear to apply in this case".

25. The Commissioner notes the complainant's argument that confidentiality has been breached through the publishing of the developer's agents report with some of the withheld information in it. However, the Commissioner's opinion is that regardless of the actions of the developer's agent, disclosure under the Regulations would adversely affect the confidentiality of proceedings.
26. In view of the above, the Commissioner considers that the exception under regulation 12(5)(d) is engaged in respect of the withheld information.

Public interest arguments in favour of disclosing the requested information

27. The council have submitted the following argument in favour of disclosing the information:
 - Disclosure would enable the complainant to understand why the LGO reached its decision, which would in turn assist the complainant in participating in discussions related to the development. Given the proximity of the complainant's property to the development and the history of this case, we recognise that this is a significant argument for disclosure of the information.
28. The Commissioner has also identified the following arguments in favour of disclosure:
 - There is public interest in the transparency of the way the LGO investigates complaints made to him.
 - There is public interest in the openness of how the LGO generally, and in relation to this case, carries out his functions.
 - Disclosure may increase the understanding and trust of the public in the LGO's investigation and decision making process both in the specifics of this case and generally.
29. The complainant has argued that the developer has not respected the confidentiality of the assessment as the developers agent has quoted part of the report in a publicly accessible document suggesting that the assessment affects his legal expectation of consultation on the discharge of planning conditions for a previous planning application. The complainant asserts that this right to be consulted was upheld by the High Court, which ordered an agreed

protocol for consultation and that Darlington Borough Council has not adhered to the protocol and no reference has been made to him about any changes to his legal rights. He argues that the LGO would not appear to have any authority to change the legal position and he needs to know what was written, because the quote, in a public document, may be misleading.

30. The complainant further asserts that he has personally suffered from various other untruths being circulated by others and he wishes to know what other inaccuracies have been perpetuated in this complaint. He argues that the protection provided for complaints to the LGO was surely not intended to allow victimisation of other individuals without their knowledge and that this is what has happened in this instance. The complainant stated that the provision of the information would enable him to see whether this is the case.

Public interest arguments in favour of maintaining the exemption

31. The council have submitted the following arguments in favour of maintaining the exemption:
 - In his decision involving The Commissioner for Local Administration in England (FER0065671), the Commissioner states that "it is clear from the review of the statutory prohibitions to disclosure by the Secretary of State for the Department for Constitutional Affairs that section 32 (2) of the Local Government Act should stand as an ongoing prohibition and that information pertaining to such investigations should, in the vast majority of cases, be outside the bounds of the information access provisions". It is therefore clear that there must be strong arguments for disclosing information covered by section 32(2) LGA.
 - Given the presence of section 32(2), the Council, the LGO and the complainant would all have had a reasonable expectation of confidentiality when providing any information to the LGO.
 - Disclosure of this information would breach the understanding of confidentiality outlined above and could deter complainants from providing full and frank information in relation to complaints. We are also concerned that disclosure of the information could prejudice the relationship between the Council and the LGO.
32. The Commissioner has also identified the following arguments in favour of maintaining the exemption:

- It is clear that parties submitting information to the LGO would have expected it to be held in absolute confidentiality, particularly due to the statutory prohibition in place. In addition, investigation reports published by the LGO are anonymised, with place and party names being replaced with aliases and pseudonyms. It is noted that section 32 of the Local Government Act even curtails LGO investigators being called upon to give evidence in legal cases other than in specified circumstances in order to protect the confidentiality of such information.
- A disclosure of such information would breach this understanding of confidentiality, and has the potential to cause complainants and witnesses to withhold information or curtail evidence to protect them from exposure in future requests. It is also possible that the knowledge that such disclosures are possible will prevent or dissuade members of the public from making a complaint in the first instance, thereby diminishing a strong element of accountability and scrutiny which is currently in place. Any detrimental impact upon the LGO's ability to receive information in confidence may therefore adversely affect his ability to investigate complaints in the future, to the detriment of the general public and the public interest in transparency and accountability.
- There is public interest in allowing organisations under investigation to provide information required by the LGO in confidence and disclosure may undermine the relationship between the LGO and the public authorities it investigates.

Balance of the public interest arguments

33. In considering the public interest arguments the Commissioner notes that the Information Tribunal in *Ofcom v the ICO and T-Mobile* found that "for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception. It is a factor in favour of maintaining that exception, not any matter that may generally be said to justify withholding information from release to the public, regardless of content"¹. On appeal to the High Court Lord Justice Laws confirmed the Tribunal's approach as lawful, commenting (at paragraph 47) that "the Tribunal's view set out at paragraph 58 was indeed reasonable; but more than that... it accords with the statutory scheme".

¹ Appeal no. EA/2006/0078, para 58

34. The Commissioner is of the opinion that the arguments presented in favour of maintaining the exception do arise naturally from the nature of the exception and has therefore given them due weight.
35. The Commissioner acknowledges that there is a public interest in the transparency of the way the LGO investigates complaints made to him and how he generally carries out his functions. However, he considers that this factor is met by the provision of other information, for example, the publication of 'Complaint outcomes' on the LGO website. The Commissioner does not consider that the disclosure of requested information in this case would add significantly to the public's understanding in this regard.
36. Far greater weight, however, is placed on the LGO's ability to carry out his functions effectively. The LGO relies on his ability to acquire information in order to conduct effective investigations. Disclosing this information may discourage those that have relevant information from co-operating fully and frankly with the LGO in future for fear of the public dissemination of such information.
37. The Commissioner, when considering factors that favour the maintenance of the exemption, gives significant weight to the fact that the legislator has placed in statute (section 32(2) LGA) that information received by the LGO during a relevant investigation shall not be disclosed except in specified limited circumstances.
38. The Commissioner notes the complainant's arguments that he needs to know what was written as regards his legal right to consultation and that the protection provided for complaints to the LGO was not intended to allow victimisation of other individuals. However, the Commissioner does not believe that these counter the public interest arguments in favour of maintaining the exception due to the 'applicant blind' nature of the legislation and the fact that the interests to be balanced are 'public' interests, not 'private' interests.
39. The Commissioner recognises that the public interest arguments in favour of maintaining the exception provide a high threshold which needs to be surpassed before a decision in favour of disclosure would be made. The Commissioner's decision in this case is that that the threshold has not been met.
40. Therefore the Commissioner's conclusion is that the exception to the duty to disclose environmental information at Regulation 12(5)(d) applies to the requested information.

The Decision

41. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

43. 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

44. 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.
45. 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 12th day of May 2011

Signed

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

Legal Annex

Environmental Information Regulations 2004

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);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

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

Regulation 12 – Exceptions to the duty to disclose environmental information

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.

Local Government Act 1974

Section 32 (2) of the Local Government Act 1974 states:

(2) Information obtained by a Local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this Part of this Act shall not be disclosed except—

- a) for the purposes of the investigation and of any report to be made under section 30 or section 31 above; or
- b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this Part of this Act, by a Local Commissioner or by an officer of either Commission or for an offence of perjury alleged to have been committed in the course of an investigation under this Part of this Act or for the purposes of an inquiry with a view to the taking of such proceedings, or
- c) for the purpose of any proceedings under section 29(9) above

and a Local Commissioner and the officers of his Commission shall not be called upon to give evidence in any proceedings (other than proceedings within paragraph (b) or (c) above) of matters coming to his or their knowledge in the course of an investigation under this Part of this Act.