

Freedom of Information Act 2000 (Section 50)

Environmental Information Regulations 2004

Decision Notice

Date: 7 April 2011

Public Authority: Gateshead Council
Address: Civic Centre
Regent Street
Gateshead
NE8 1HH

Summary

The complainant requested legal advice received by the public authority concerning the possible diversion of a footpath. The public authority refused this request, citing the exemption provided by section 42(1) (legal professional privilege) of the Freedom of Information Act 2000. The Commissioner finds that the information requested is environmental and so the request should have been handled under the Environmental Information Regulations 2004 (EIR). The public authority is now required to reconsider the request under the EIR and either disclose the information requested, or issue a refusal notice compliant with the EIR.

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. The complainant requested the following information on 23 June 2010:

"The Barrister's first round of advice [upon rights of way issues that have arisen in the vicinity of North View, High Spen] given to the Council in May 2009".

3. The public authority responded to this on 28 June 2010. The request was refused, with the public authority citing the exemption provided by section 42(1) (legal professional privilege).
4. The complainant responded on 6 July 2010 and requested that the public authority carry out an internal review. After a delay, the public authority responded with the outcome of the internal review by letter dated 7 October 2010. The conclusion of this was that the refusal under section 42(1) was upheld. Little reasoning for this outcome of the review was given.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner's office in connection with this case on 21 October 2010. The complainant indicated that he did not agree with the refusal of his request and also raised the issue of the delay in the completion of the internal review. The Commissioner comments on the internal review issue at paragraph 19 below.
6. Upon allocation of this case to an official within the Commissioner's office, it became apparent that the information requested by the complainant may be environmental according to the definition given in Regulation 2 of the EIR. Consideration was therefore given as to whether it would have been appropriate for the public authority to have handled the request under the EIR. The result of this consideration is recorded in the *"Analysis"* part of this Notice.

Chronology

7. The Commissioner contacted the public authority in connection with this case on 7 January 2011 and asked that it supply a copy of the withheld information. The public authority responded with this information on 10 January 2011.
8. The Commissioner contacted the public authority for further clarification about the citing of section 42(1) on 7 February 2011. The public authority responded with the requested clarification on 9 February 2011.

Background

9. The complainant provided the following description of the background to his request:

"The dispute's origins date back to November 2004, when the overwhelming majority of the residents of numbers 11 to 23 North View requested the diversion of a footpath...this led to a prolonged dispute between the majority of North View residents and Gateshead Council."

Analysis

Substantive Procedural Matters

Regulation 2

10. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR. The full wording of the Regulations referred to in this Notice can be found in the Legal Annex.
11. Environmental information is defined within regulation 2(1) of the EIR as follows:

"any information in written, visual, aural, electronic or any other material form on –

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances, energy, noise, radiation or waste, emissions...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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

12. The complainant requested information relating to a request for the diversion of a footpath. The Commissioner believes that any information relating to this matter would be environmental information by virtue of Regulation 2(1)(c). The implementation of a diversion to the footpath, or

a decision that there should not be a diversion, would be likely to affect the state of the land or landscape as noted in Regulation 2(1)(a). Therefore the Commissioner considers the requested information in this case to be environmental as it relates to information on an activity which would be likely to affect the land or landscape.

Regulation 5 and Regulation 14

13. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. Regulation 14 states that if a request for environmental information is refused, this refusal should be made in writing and no later than 20 working days after the date of the request. The refusal must specify any exception being relied upon under regulations 12(4), 12(5) or 13; and the matters considered in reaching a decision with respect to the public interest under regulation 12(1)(b). The refusal should also inform the applicant of how to make representations against the public authority's handling of the request and of the applicable enforcement and appeal provisions.

The Decision

14. The Commissioner's decision is that any information falling within the scope of the request is environmental and that the authority is therefore obliged to respond to the request in line with the provisions of the EIR.

Steps Required

15. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - either provide the requested information in compliance with regulation 5(1); or
 - issue a refusal notice in compliance with regulation 14.
16. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

17. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

18. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
19. Whilst it is not the case that the requirement imposed by section 10(1) of the Act to respond within twenty working days applies in relation to internal reviews, the Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the review within twenty working days. Neither did the public authority respond within 40 working days. The public authority should ensure that internal reviews are carried out promptly in future.
20. As referred to above at paragraph 4, when giving the outcome of the internal review, the public authority gave little reasoning for concluding that the refusal of the request should be upheld. Paragraph 39 of the Freedom of Information Act section 45 Code of Practice states the following:

"The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."
21. The internal review response from the public authority did not reflect that a reconsideration of the request conforming to the description above took place. The Commissioner would advise the public authority that a response giving the outcome to an internal review should state the reasoning for why the initial refusal was upheld and should reflect that there has been a genuine reconsideration of the request.

Right of Appeal

22. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

23. 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.
24. 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 7th day of April 2011

Signed

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

Legal Annex

Freedom of Information Act 2000

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Environmental Information Regulations 2004

Regulation 2(1) provides that –

“‘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;”

Regulation 5(1) provides that –

“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 12(1) provides that –

“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 14 provides that –

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."