

Environmental Information Regulations 2004

Decision Notice

Date: 27 July 2011

Public Authority: Dartmoor National Park Authority
Address: Parke
Bovey Tracey
Newton Abbot
Devon
TQ13 9JQ

Summary

The complainant requested information regarding a specific planning application. The public authority applied the exemption available under section 21 of the Act and stated that most of the information was available by other means. The public authority refused to disclose copies of legal advice and applied section 42 of the Act. The complainant maintained that further information was held by the public authority and this formed the basis of her complaint to the Commissioner. The Commissioner found that the EIR was the relevant legislation under which the request should have been considered but that further information was not held by the public authority. The Commissioner requires no steps to be taken by the public authority but raised concerns about its ability to identify environmental information, as defined by the EIR.

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.
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.

Background

3. In 2008 Dartmoor National Park Authority (the "Authority") granted planning permission for the demolition of a specified existing property and its replacement with a single dwelling. The complainant has concerns about the granting of the planning permission and is seeking an explanation of the Authority's decision in this matter.

The Request

4. On 17 August 2010, the complainant made the following request to the Authority:

"I would like to request photocopies of all correspondence, telephone calls etc to and from DNPA in connection with Planning Application [application number], between the dates Sept 07 – March 08. With particular reference to all inter-departmental correspondence between the case officer [named officer of the Authority] & [named officer of the Authority] & [named officer of the Authority]."

5. The Authority responded on 2 September 2010. It stated that some information was exempt under section 21 of the Act because it was readily accessible by other means:
 - Minutes of public meetings of the Authority, including the Development Control Committee – available on the Authority's website.
 - Report for public meetings of the Authority, including reports on planning applications to the Development Control Committee – available on the Authority's website.
 - Documents in Part I and Part II of the Statutory Register of planning applications – a public record available for inspection and the principle documents are also available on the Authority's website. The Council also offered copies of some or all of the documents available for inspection.

The Council stated that legal advice from its Head of Legal Services was exempt under section 42 of the Act.

6. On 5 September 2010, the complainant wrote to express her dissatisfaction with the response of the Authority. She stated that legal exemptions were irrelevant to communications between officials of the Authority, the applicant and his agent. The complainant stated that such communications were absent from the publicly available files, as were

records of communications between the complainant and the case officer of the Authority who dealt with the planning application in question.

7. The Authority responded on 9 September 2010 and concluded that no further information was held. The Authority's findings are summarised in paragraph 22, below.
8. There followed correspondence between the complainant and the Authority, the outcome of which was that the complainant maintained that further information was held by the Authority while the Authority maintained that it had – aside from the legal advice referred to above – made available all the relevant information it held.

The Investigation

Scope of the case

9. On 11 January 2011 the complainant contacted the Commissioner via her father who was acting as her representative at that time. For ease the Commissioner has continued to refer in this notice to the complainant and her father collectively as the "complainant". The complainant specifically asked the Commissioner to consider the following points:
 - The complainant had considered all available documents at the offices of the Authority and considered there to be "serious gaps in the record relating to the essential issue of what evidence was used in coming to a faulty conclusion about a planning application".
 - The complainant went on to state that several emails to the Authority from the complainant's family, with replies, were not found. The complainant also stated that there was reference (presumably in the available information) to a "crucial letter from a case officer asking for information which has disappeared".
 - The complainant stated that the Authority has failed to provide the information requested and asked the Commissioner to investigate.
10. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:

- The complainant confirmed that she was not pursuing the legal advice referred to in the Authority's refusal notice of 2 September 2010.
 - The Commissioner clarified that his investigation would focus on whether further information was held by the public authority – ie not an assessment of the Authority's application of section 21 of the Act.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act; namely that the decision of the Authority in relation to the planning application was flawed. The Commissioner has no authority to investigate such issues and he has not therefore made any comment.
12. The Commissioner's investigation therefore focused on whether the Authority held further information – other than the legal advice previously referred to – that is not otherwise publicly available; for example whether, at the time of the request, the Authority held further internal communications between its officials in relation to the planning application in question.

Chronology

13. The Commissioner wrote to the complainant on 16 May 2011 to clarify the scope of her complaint and he received a response on 16 June 2011.
14. The Commissioner received correspondence from the Authority on 14 March 2011 and 24 June 2011, in which it provided further arguments to support its position that it held no further information relevant to the request of 17 August 2010.

Analysis

Substantive Procedural Matters

The relevant access regime

15. The Authority's refusal notice of 2 September 2010 referred to the provisions of the Act and the findings of its internal review made no reference to either the Act or the EIR.
16. The Commissioner's view is that the information in this case clearly falls under the definition of environmental information provided by regulation 2(1)(a)-(f) of the EIR. As such the request should have been considered under the provisions of the EIR. In correspondence with the Commissioner the Authority agreed with his view but said that in this case no detriment or injustice was caused to the complainant as a result

of the application of the incorrect legislation. The Commissioner has made further comments on this issue in the 'other matters' section of this notice, below.

Does the Authority hold further information?

17. Notwithstanding the application of the incorrect access regime, the Commissioner's approach – regardless of whether the Act or EIR is relevant - in cases involving disputes over whether further information is held by a public authority, is to consider the balance of probabilities that further information is held. This is consistent with the approach taken by the Tribunal in the case of Linda Bromley & others and the Environment Agency (EA) (EA/2006/0072), in which it said:

"...we must consider whether the IC's [Information Commissioner's] decision that the EA did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities..." (para 10) because *"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records..."* (para 13).

18. In weighing up where the balance lies in this case, the Commissioner has considered the scope and thoroughness of the investigations conducted by the Authority in order to locate further relevant information and other explanations it provided. The Commissioner has also considered the view of the complainant.

The complainant's view

19. The complainant has stated that she is seeking an explanation of the Authority's decision in relation to the planning application in question. The complainant believes that the available information does not explain the actions taken by the Authority and its ultimate decision to approve the application. For example, the complainant believes that the Authority must have recorded information setting out the reasons for and against approving the application.
20. Further details of the reasons why the complainant believes further information to be held are set out in the following correspondence, copies of which were provided to the Commissioner during the course of his investigation:
- On 5 September 2010 a letter from the complainant to the Chief Executive of the Authority referred to communications between Council

officials the applicant and his agent and said that they were absent from the publicly available files.

- On 22 September 2010 an email from the complainant to the Chief Executive of the Authority referred to other information that she believed to be held by the Authority.
- On 27 October 2010 an email from the complainant to the Authority referred to interdepartmental communications that the complainant considered to be missing from the available information.
- In a letter of 2 November 2010 the complainant referred to other information believed to be held by the Authority, for example; communications to the case officer at the Authority from the agent of the applicant; records of a telephone conversation between the complainant and the case officer; written evidence that listed building status did not apply to the property in question; evidence of the case officer's recommendation that the application be approved and the reasons for this.

The Authority's position

21. The Authority's position throughout correspondence with the complainant and the Commissioner has consistently been that it holds no further information relevant to the request.
22. In the findings of its internal review of 9 September 2010 the Authority stated that it had searched its records and found that the public available files contained all the information it held in relation to the specified planning application. The Authority stated that it held no other record of communications between Council officials, the applicant and his agent. The Authority also said that it was not its practice to routinely note all telephone conversations and record them on the planning file and that sometimes officers may forget to print and retain a copy of emails. The Authority did say that it would expect the relevant files to contain a record of any meeting between its officials and the applicant or an interested third party, in connection with a planning application. The Authority stated that it would be most concerned if a number of relevant emails or letters, which the complainant knew to have existed, had gone missing from the file and asked the complainant to provide any evidence she held so that an investigation could be undertaken.
23. In correspondence with the Commissioner the Authority stated that the complainant had provided no evidence that further information was held but has focused on information that she believes should be held. The Authority also stated that it is a small public authority, whose staff work in close proximity, and it is not unusual "to discuss cases, give advice and receive instructions without any written file record".

24. The Authority informed the Commissioner that it relies on a simple paper-based filing system for planning applications, which is supported by electronic archiving, and that all information regarding planning applications or listed building applications is placed on the relevant planning file. The Authority stated that there is no other location for information to be stored and that individual officers do not hold personal files of information regarding planning applications.
25. The Authority was of the view that while it was impossible to rule out the theoretical possibility that information may have misfiled and therefore be held on another file somewhere within its records, it was satisfied that it had conducted searches of all places where relevant information was likely to be held; it had searched electronic and paper planning files and spoken to officers involved in the application in order to determine whether any further information was held. The Authority's Head of Legal and Democratic Services stated that he personally conducted such searches.

The Commissioner's position

26. The Commissioner is mindful that the Authority has invited the complainant to supply evidence that further information exists or is missing from the publicly available files so that it might investigate further. The Commissioner also asked the complainant to provide specific evidence that further information existed at the time of her request. He has seen nothing to suggest that the complainant has evidence that further information exists or that she has seen any of the information that she asserts should or must exist.
27. The Authority recognised that it cannot categorically state that further information is not held somewhere within its files and it has acknowledged that the complainant perceives there to be gaps in the available information. However it has stated that it has conducted all reasonable searches in an attempt to locate further information.
28. The Commissioner's role in this case is not to determine whether a public authority should hold further information; rather he has to reach a view, after weighing the balance of probabilities, on whether further relevant information was held at the time of the request. The Commissioner has considered the explanations provided by the Authority both in relation to the searches it conducted to locate the information and its record keeping policies and has concluded that, based on the balance of probabilities, no further information was held by the Authority at the time of the request.

Procedural Requirements

29. The provisions of the EIR state that a public authority may refuse to disclose information where it does not hold that information when a request is received and that, within the statutory timescale for responding, it should issue a refusal notice specifying the exception relied on. By applying the provisions of the Act and therefore failing to specify that it was relying on the exception provided by regulation 12(4)(b) of the EIR, the Authority breached regulation 14(3)(a).

The Decision

30. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- It correctly determined that it held no further information relevant to the request.

31. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- By failing to cite a relevant exception to disclosure in its refusal notice or in the findings of its internal review the Authority breached the requirements of regulation 14(3)(a) of the EIR.

Steps Required

32. The Commissioner requires no steps to be taken.

Other matters

33. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

34. The Commissioner is concerned that the public authority failed to identify in this case that the request was for environmental information. This resulted in the Authority applying the provisions of the Act rather than the EIR. This is of particular concern given the statutory purpose of the Authority as set out on its website:

"The Environment Act 1995 sets out two statutory purposes which the Authority has the duty to pursue:

- to conserve and enhance the natural beauty, wildlife and cultural heritage of the National Park
 - to promote opportunities for the understanding and enjoyment of the special qualities of the National Park by the public”
35. While the outcome of this case was not ultimately affected by the application of the incorrect access regime – ie the Commissioner’s decision in relation to whether further information would have been the same - the Commissioner would expect the Authority to ensure that its staff have sufficient training to allow them to identify the relevant access regime under which requests for information should be handled.

Right of Appeal

36. 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

37. 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.
38. 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 27th day of July 2011

Signed

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1)

In these Regulations –

...

“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 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.