

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

Decision Notice

Date: 12 September 2011

Public Authority: Chelmsford Borough Council
Address: Civic Centre
Duke Street
Chelmsford
CM1 1JE

Summary

The complainant requested a report which the Council commissioned the Royal Society for the Prevention of Accidents to carry out to review the provision of Public Rescue Equipment across the borough. The Council initially treated the request under the Act and stated that it did not hold the information requested. Following clarification from the complainant, the Council confirmed it held the information requested, and considered the information to be environmental information and were dealing with the request under the EIR. The Council refused to provide the information requested under regulation 12(4)(d). Prior to the Commissioner's investigation, the Council disclosed the information requested. As the information has been provided the Commissioner has not considered whether or not any exemptions cited were properly engaged. The Commissioner has concluded that the request should have been handled under the provisions of the Act. The Commissioner has also identified a number of procedural shortcomings in the Council's handling of the request but has not ordered any steps.

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 Act are imported into the EIR.

Background

3. The request in this case is for a copy of a report which the Council commissioned the Royal Society for the Prevention of Accidents ('RoSPA') to undertake to test, evaluate and improve the use of Public Rescue Equipment ('PRE') to ensure appropriate levels of safety along rivers within the borough and at other specific locations. PRE are more commonly known as life rings or life buoys.

The Request

4. On 22 August 2010 the complainant submitted the following request to the Council:

"Please could you email me the RoSPA report BF9/4"
5. On 1 September 2010, the complainant chased the Council for a response. In this communication the complaint referred to the fact that the report he was seeking access to was one which he believed a particular named Council officer was supposed to have sent to the Health & Safety Executive.
6. The Council finally responded on 1 October 2010 stating that it was "not aware of a RoSPA report reference no. BF9/4 and therefore do not have a copy to send to you"
7. On 1 October 2010 the complaint responded to the Council stating that the reference number quoted had been obtained from the Health & Safety case report pages 3 & 4. He advised that a named officer at the Council was aware of the report he was seeking access to and had previously promised to provide him with a copy.
8. The complainant chased the Council on a number of occasions for a response. On 29 November 2010 the Council responded and apologised for the confusion surrounding the handling of the request. It explained that as the reference number of "BF9/4" quoted in the original request was not a Council reference number, it had been unable to identify the document requested. However, based on the clarification provided by the complainant the Council confirmed that it had located the document in question. The Council confirmed that it was dealing with the request

under the EIR as it considered the report to fall within the definition of environmental information as provided by regulation 2(1)(f) of the EIR. The Council refused to provide a copy of the report by virtue of regulation 12(4)(d) of the EIR. It stated that the report formed part of a larger report that was in the process of being completed. The Council confirmed that the requested information would be published once the larger report had been completed but was unable to provide a timescale for release.

9. Further correspondence took place between the complainant and the Council in relation to concerns he raised about the Council treating the request under the EIR as opposed to the Act.
10. On 3 January 2011 the complainant asked the Council to confirm that it was upholding its decision to treat the request under the EIR as opposed to the Act. On 4 January 2011, the Council confirmed that it was treating this communication as request for a review and a further response would be issued in due course.
11. It is not clear to the Commissioner whether the Council undertook an internal review specifically in accordance with the EIR or the Act. However, he understands that the Council wrote to the complainant on 28 January 2011 in accordance with its internal complaint procedures. The Council confirmed that the RoSPA report had been considered by the Council's management team on 26 January 2011 and it was agreed that the recommendations contained within the report be implemented. As such, the Council stated it was now in a position to disclose the RoSPA report, and advised that a copy would be available for collection from its offices. The Commissioner understands that the complainant collected the information from Council offices on 3 February 2011.

The Investigation

Scope of the case

12. On 1 March 2011 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 delays in the Council dealing with his request and providing the requested information and the Council's decision to treat the request under the EIR as opposed to the Act.

Chronology

13. On 14 March 2011 the Commissioner wrote to the Council to confirm that the complaint had been deemed eligible for formal consideration.

On the same day the Commissioner wrote to the complainant to confirm that his understanding of the complaint was that he wished to complain about the delays and the Council's decision to handle the request under the provisions of EIR. The Commissioner asked the complainant to contact him should this not be an accurate representation of his complaint.

14. The Commissioner telephoned the Council on 22 July 2011 and asked for a copy of any internal review which had been undertaken in relation to the request and for a copy of the information it had disclosed. The Council provided the relevant information to the Commissioner on the same day. The Council confirmed that the complainant had collected a copy of the requested information from its offices on 3 February 2011.
15. On 25 July 2011 the Commissioner wrote to the complainant to confirm his investigation would focus on the delays in the Council dealing with the request and whether the request had been handled under the correct access regime – ie the Act or the EIR.

Analysis

Relevant legislation

16. The Commissioner notes that the Council handled the complainant's request initially under the Act, and subsequently under the EIR. The Council treated the request under the EIR as it believes the requested information falls within the definition of environmental information as defined by regulation 2(1)(f).
17. "Environmental information" is defined at regulation 2 of the EIR. In order to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) – (f) of the EIR (all relevant sections of the legislation are reproduced in the attached Legal Annex). It must be definable as 'information on' any of the subjects covered by those six sub-sections.
18. In reaching a view in any given case the Commissioner believes that the correct approach is to examine the information in question and its relationship, if any, to regulations 2(1)(a) to (f): in effect, is the information held definable as information **on** one of the matters set out in that part of the EIR? In this context, the Commissioner is also of the view that a relatively broad approach should be taken. In deciding whether information is environmental information or not close reference must be made to the provisions of Regulation 2(1)(a) to (f). It is not necessary for the information itself to have a direct effect on the

environment or to record or reflect such an effect, in order for it to be environmental.

19. In this case, the requested information comprises a report which was commissioned to test, evaluate and improve the use of PRE to ensure appropriate levels of safety along rivers and at other watercourse. Whilst rivers and watercourses themselves can be fairly categorised as an element of the environment, namely water, as defined by regulation 2(1)(a) the information itself is not on the state of the watercourses and does not therefore fall within the definition of regulation 2(1)(a).

Can the requested information be linked back to regulation 2(1)(a)?

20. As stated above, the requested information does not constitute information on the state of the environment: it deals with the use of PRE to ensure safety levels at watercourses, including rivers. However, the Commissioner's approach in such a case is to determine whether the information can be linked back to regulation 2(1)(a), either directly or through regulations 2(1)(b) and 2(1)(c).
21. Regulation 2(1)(f) provides that information on "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" is environmental information "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)"
22. The Commissioner's view is that "may be affected" denotes a lower threshold of likelihood. So there must be some likelihood of the state of human health and safety being affected by the elements of the environment but this likelihood need not be substantially more than remote.
23. Under regulation 2(1)(f) it is not sufficient for information to be on the state of human health and safety it must be on the state of human health and safety *as affected by the state of the elements of the environment*. The elements in regulation 2(1)(a) must ultimately affect those things in regulation 2(1)(f).
24. In this case, the Commissioner does not believe that the requested information is on the state of human health and safety as affected by the state of the elements of the environment. The requested information relates to the provision of PRE at watercourses. The Council has experienced problems with repeated vandalism and theft of PRE at locations throughout the borough and commissioned the report to question the suitability of PRE provision in order to address any health and safety issues. This is unlikely to be a situation where human health and safety is affected by any of the elements of the environment.

Therefore, the Commissioner is not satisfied that the withheld information can be linked directly back to regulation 2(1)(a).

25. The Commissioner has also considered whether the requested information can be linked back indirectly to regulation 2(1)(a) through regulations 2(1)(b) or (c). It appears possible that the information could be linked back through regulation 2(1)(c), as the RoSPA report makes a number of recommendations including developing a water safety policy to address the provision of PRE, moving and/or removing PRE at certain sites and providing signage at suitable locations which identifies the water safety provision. It could be argued that the RoSPA report could be considered information on a measure (a review of water safety policy) which is likely to affect the state of the elements of the environment, namely land and landscape given that it recommends moving and removing of some PRE and additional signage. However, the Commissioner considers that this is a tenuous link back to regulation 2(1)(a).
26. The Commissioner considers, in this case, the question of whether or not the requested information constitutes environmental information is a finely balanced point. However he is not satisfied that the requested information is information on one of the matters set out in regulations 2(1)(a) to (f) of the EIR. Further, he is not satisfied that the information can be either directly or indirectly linked back to regulation 2(1)(a). Therefore, the Commissioner has concluded that the withheld information is not environmental information.

Exemptions/Exceptions

27. The information in this case was disclosed prior to the Commissioner's investigation. The complaint to the Commissioner was focussed on the delays and the Council's decision to treat the request under the EIR. As the Commissioner has concluded that the requested information was not environmental information, he is unable to consider whether or not the Council was correct in citing regulation 12(4)(d) it had previously relied upon.

Procedural Requirements

Section 10

28. Section 10(1) of the Act of the Act states the following:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

29. The request was made on 22 August 2010. Due to a misunderstanding in relation to the original request, the Council did not confirm that it held the requested information until 29 November 2010. The Council subsequently disclosed the requested information on 3 February 2011.
30. In failing to comply with section 1(1) of the Act within 20 working days, the Council breached section 10(1) of the Act.

Section 16

31. Section 16(1) of the Act requires that:

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".

32. Section 16(2) of the Act confirms that:

"Any public authority which in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection(1) in relation to that case".

33. Generally the code issued under section 45 relates to good practice which public authorities should consider adopting rather than obligations which arise under the Act. However, because Part II relates specifically to the duty to provide advice and assistance under section 16, failure to comply with this part of the code can indicate a breach of section 16(1).
34. In his submissions to the Commissioner the complainant argued that the Council failed to comply with its duties under section 16 by failing to provide advice and assistance within 20 working days of receipt of his request. In addition, the complainant is of the view that, under section 16, the Council should have advised him within 20 working days that it was treating his request under the EIR as opposed to the Act.
35. A public authority is required to read a request objectively. That is to say that it is not intended to 'read into' request interpretations that are not the obvious intention of the applicant. If there is ambiguity in what the applicant is requesting then an authority is under a duty under section 16 of the Act to provide help and assistance, and to go back to the applicant and ask them to clarify their request. In *Berend v the Information Commissioner and London Borough of Richmond upon Thames* EA/ 2006/0049 & 50 however the Information Tribunal clarified that if there is no ambiguity in the request for information then there is no requirement on the authority to go back to the applicant.

36. Paragraphs 8 to 11 of the section 45 Code outline the situations when a public authority would be expected to go back to the applicant and clarify a request for information. It states this would be expected when the public authority is not able to identify and locate the information sought.
37. On the face of it, the Commissioner considers the initial request for information was clear in scope. This is because the complainant specified that the information sought was a "RoSPA report" and provided what he believed to be the relevant reference number for the report. The Commissioner notes the Council initially stated it was not aware of a report with the reference number quoted and therefore did not hold the information requested. On provision of further clarification from the complainant, on 29 November 2010 the Council confirmed it had located the report in question. It explained the confusion had arisen because the reference number quoted by the complainant was not a Council generated reference number.
38. However, the Commissioner notes that, on 1 September 2010, ie prior to the Council's initial response that it did not hold the requested information, the complainant provided further information relating to his request. The complainant advised the Council that a named Council officer had apparent knowledge of the report in question. He also referred to an email in his possession from a named Council officer to the Health and Safety Executive relating to the report. In the circumstances therefore, the Commissioner considers the Council should have asked for further clarification from the complainant in order to establish the exact information being sought, prior to stating that the information was not held.
39. In failing to offer appropriate advice and assistance to the complainant, the Council breached section 16(1) of the Act. The Commissioner does not believe that it is appropriate to order any remedial steps in respect to this breach because the complainant has confirmed he has received the requested information.

The Decision

40. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the Act:
 - It failed to comply with section 10(1) of the Act.
 - It failed to comply with section 16(1) of the Act.

Steps Required

41. The Commissioner requires no steps to be taken.

Right of Appeal

42. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. 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 September 2011

Signed

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

"Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Duty to provide Advice and Assistance

Section 16(1) provides that -

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."

Section 16(2) provides that –

"Any public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

Environmental Information Regulations 2004

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 –

- (c) 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;
- (d) 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);
- (e) 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;
- (f) reports on the implementation of environmental legislation;

- (g) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (h) 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);