

Environmental Information Regulations 2004

Decision Notice

Date: 1 August 2011

Public Authority: Department of the Environment
(Northern Ireland)

Address: Clarence Court
10-18 Adelaide Street
Belfast
BT38 8BY

Summary

In December 2009, the complainant requested minutes of internal meetings relating to two planning applications. The Department of the Environment NI (the 'DoE') advised it did not hold this information but failed to conduct an internal review of its decision as required by the regulations. The matter was subsequently investigated by the Commissioner and a Decision Notice was issued requiring the DoE to conduct an internal review of its response to the original information request. On 25 January 2011 the DoE wrote to the complainant with the result of that internal review, advising that the requested information was not held. The complainant was not satisfied with the DoE's response and considers it should hold the information requested.

The Commissioner's decision in this case is that, on the balance of probabilities, no recorded information is held in relation to the complainant's request. However, the Commissioner also finds that the DoE breached regulation 14(3)(a) in that it failed to specify the exceptions it relied on to refuse the request. The Commissioner requires no further steps to be taken.

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.

2. This Notice sets out the Commissioner's decision in respect of the complainant's request.

Background

3. The DoE's handling of this request was the subject of a previous investigation by the Commissioner following which a Decision Notice (DN) was issued on 13 December 2010 (the 2010 DN¹). In this previous case, the Commissioner's decision was that the DoE had failed to comply with the requirements of regulations 11(3) and 11(4) of the EIR and was required by the Commissioner to conduct an internal review that complied with the EIR.
4. In June 2010, and as a result of the complainant's previous representations to the Commissioner, the Commissioner's staff met with the DoE to look at the wider issue of good practice regarding the level of access to documents made available by the working planning file in what is commonly known as the DoE's 'Open Files Policy'. At that meeting the DoE confirmed to the Commissioner the types of documents which legally ought to be included in a planning file as required by the planning laws of Northern Ireland. They also discussed the level and detail of information contained within the working files as standard. The meeting provided a satisfactory explanation to the Commissioner as to why certain information was contained in the working planning files and other information, such as legal advice or drafts of documents was not available for public inspection – but would obviously need to be considered by the public authority should it receive a request for that particular information. Details of this meeting were communicated to the complainant in a letter dated 24 June 2010.

The Request

5. The complainant made the following request to the DoE on 3 December 2009:

"Can I please be supplied with the minutes of internal meetings which took place in relation to the following applications:

¹ Reference FER0311833

a) site of townhouse development with access to Farm Lodge Road (amended concept); V/2000/02130/0, and

b) lands to the east of Farm Lodge Park, Greenisland and south of the proposes.

I request a hard copy of the minutes are supplied to me".

6. Part A of the complainant's request relates to information contained within planning application V/200/02130/O (file 'A'), part B of the request to information contained within planning application V/2004/0286/RM (file 'B').
7. The DoE responded to the complainant on 14 December 2009 advising that it did not hold any minutes of internal meetings in relation to either of the planning applications specified. The DoE told the complainant that it did hold a Development Control Officer's Professional Planning Report in relation to the first application (file A) and provided this to the complainant.
8. On 15 December 2009, the complainant wrote to the Commissioner to complain about the DoE's response and was advised by the Commissioner to request an internal review.
9. On 13 February 2010, the complainant wrote to the DoE seeking an internal review of its response to his request of 3 December 2009. The complainant did not accept that the DoE did not hold minutes of internal meetings in relation to planning applications.
10. On 6 April 2010 the complainant contacted the DoE to complain that he had not yet received either a response or an acknowledgement of his request for an internal review.
11. The complainant did not receive any further correspondence relating to his request for an internal review and on 24 April 2010, the complainant contacted the Commissioner to complain about the way the DoE had handled his information request.
12. The Commissioner conducted an investigation into the DoE's handling of the request and the 2010 DN was issued on 13 December 2010. The DN found that the DoE had failed to comply with the requirements of the regulations and was required to conduct an internal review of its response to the original information request.
13. On 25 January 2011, the DoE wrote to the complainant with the outcome of its internal review and maintained the position that it does not hold the information requested.

The Investigation

Scope of the case

14. On 27 January 2011, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant highlighted the fact that the planning application in question was carried out over a number of years and he believed it was subject to a "*very large number of objections*". As a result of this he was of the view that there were a considerable number of meetings held by the Planning Service (part of the DoE) in relation to the application. The complainant highlighted a meeting he had attended on 21 August 2003 during which he had observed a planning official taking notes of the meeting and that objectors had submitted "minutes" to the planning service – none of which had been disclosed to him.
15. The Commissioner is aware that the complainant has made a number of requests over many years surrounding the information subject to this request. The Commissioner's decision in this case relates solely to the DoE's handling of the request of 3 December 2009 as detailed in paragraph 5 above.

Chronology

16. On 17 March 2011, the Commissioner wrote to the DoE to advise it of the complaint and to request any withheld information. The DoE responded on 6 April 2011 advising the Commissioner that the information had first been requested on 23 October 2005 and that it had been in correspondence with the complainant on several occasions since that date. The DoE advised it had clearly stated to the complainant that the information requested was not held. The DoE also advised it had met with the Commissioner in June 2010 to discuss the issue of minutes and that the position was explained clearly at that time (paragraph 4 refers).
17. The complaint was allocated to a case officer, and on 14 April 2011, the Commissioner wrote to the DoE and asked a number of detailed questions about the management of the information request. The DoE failed to respond to the Commissioner's request and the matter was expedited both on 12 and 20 May 2011.
18. On 25 May 2011, the DoE provided its response to the questions raised in the Commissioner's letter of 14 April 2011.

Analysis

Substantive Procedural Matters

Is the requested information held by the DoE?

Regulation 5

19. Regulation 5(1) provides:

"A Public Authority that holds environmental information shall make it available on request."

20. The Commissioner has considered whether the DoE has complied with regulation 5(1) of the EIR.

21. The request in this case relates to two planning application files, File A (Planning reference number V/2000/02130/O) and File B (Planning reference number V/2004/0286/RM). The complainant has advised that only one document has been disclosed to him in relation to this request which he has advised has *"spanned many years"*. The complainant does not accept that the DoE does not hold any further information relevant to his request and has expressed concern at what he sees as the *"quite pedantic comments of the Department who appear to be relying on the strict definition of minutes to allow them to hide relevant documents"*.

22. The standard of proof that the Commissioner has applied in determining whether the DoE does hold information relevant to the complainant's request is the civil standard of the balance of probabilities as outlined by what was then the Information Tribunal in the case of Linda Bromley v Information Commissioner & the Environment Agency (EA/2006/0072). In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as the reasons offered by the public authority to explain why the information is not held.

23. Where the public authority has stated correctly that it does not hold information falling within the scope of the request, the Commissioner will conclude that the public authority has complied with the requirement of regulation 5(1).

24. The Commissioner is also conscious of the case of Ames v the Information Commissioner and the Cabinet Office (EA/2007/0110), in which case the complainant expected that the information would be held as it was extremely important, however the Tribunal concluded

that it was not held. Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that the information is held.

25. The DoE has advised that the information in this case was first requested by the complainant on 23 October 2005. The DoE told the complainant at that time that *"records of internal meetings were not minutes... but rather summaries of decisions taken by the Planning Service officials"*. Furthermore, the DoE advised that in response to this particular request, it had clearly stated to the complainant that the *"information requested was not held as it did not exist"* and that this was reinforced in its internal review of 25 January 2011.
26. The DoE also advised that it had previously discussed the non-existence of minutes with the Commissioner at a meeting on 9 June 2010 and was at a *"complete loss to understand what more the Department can do to assure you [the Commissioner] that no minutes of meetings on these matters exist, and therefore that the information requested is not being withheld"*.
27. The Commissioner put a number of questions to the DoE to investigate how the DoE has ascertained that it does not hold the requested information. The DoE told the Commissioner that neither planning file remains active; the file requested in part A of the request closed on 4 March 2003 and the file requested in part B of the request closed on 12 January 2006.
28. The Commissioner asked how many meetings were held for each planning file and was advised that for file A, two internal meetings of the Development Control Group were held. When questioned on the purpose of these meetings, the DoE told the Commissioner that the meetings were to allow the DoE to reach a corporate decision in relation to the application. The DoE advised that other meetings can be held for any reason to facilitate either the applicant or objectors, or to assist the DoE in determining the application. The DoE has advised the Commissioner that a record of the two Development Control Group meetings (as discussed in paragraph 7) had already been provided to the complainant. One further meeting was held which was attended by the complainant and others, however, the DoE does not consider this was an internal meeting and as such, was considered to be outside the scope of the complainant's request.
29. In relation to file B, the DoE has advised that no internal meetings were held. Two meetings were held, both of which were attended by the complainant. As these meetings were not internal the DoE considers them to be outside the scope of the complainant's request.

30. When asked how internal meetings were documented, the DoE told the Commissioner that it considers that the records of internal meetings are not minutes in the formal sense but rather summaries of decisions following discussions. These summaries are held in the relevant file with notes of other meetings held in the planning application file.
31. The Commissioner pointed out to the DoE that it had been nearly six years since the complainant's original request and asked what searches had been carried out for information falling within the scope of his information request. The DoE confirmed to the Commissioner that no other searches had been carried out as it is the DoE's practice to record the internal meetings for planning applications as they have been in this case i.e. summaries of decisions following discussions. The DoE has told the Commissioner that no other records of internal meetings are or have been held apart from the record of the two Development Control Group meetings previously disclosed to the complainant.
32. The DoE advised the Commissioner that it retains all information on a planning application file for ten years following a [planning] decision notice. Subsequent to this, the Planning (NI) Order 1991 specifies a number of documents which should be retained permanently.
33. The Commissioner would point out that whilst a public authority has a duty to read a request objectively, this does not mean that it is not permitted to seek clarification under regulation 9 of the EIR, in circumstances where it thinks that an applicant may in fact be looking for something other than what has been asked for. In this case the complainant's request is specific in that he has requested the minutes of internal meetings.
34. Having reviewed the evidence in this case (in particular, the explanations provided by the DoE), the Commissioner is satisfied that the DoE has provided sufficient information to establish that it does not hold the minutes of internal meetings in respect of the planning applications in question.
35. The Commissioner is therefore satisfied that, on the balance of probabilities, no recorded information is held in relation to the minutes of internal meetings of the planning applications in question and therefore Regulation 12(4)(a) applies to this case.

Regulation 12(4)(e)

36. When environmental information is requested an exception to the EIR duty to disclose environmental information may be engaged. Where information is not held, the relevant exception is provided by Regulation 12(4)(a) so that under the EIR informing an applicant that

information is not held is a refusal to disclose. It follows that the provisions of Regulation 14 (Refusal to disclose information) apply. In its refusal notice dated 14 December 2009 the DoE informed the complainant that the requested information was not held, but was technically in breach of regulation 14(3)(a) as it failed to specify the exception it relied upon. The DoE had a chance to correct this breach at internal review but failed to do so.

Public Interest Test

37. The Commissioner appreciates that the wording of Regulation 12(1)(b) specifies that 12(4)(a) is a qualified exception. It would therefore imply that a public interest test would need to be conducted when information is not held. The Commissioner considers that a public interest test in situations where the information is not held is not possible. This is because even if the public interest test favoured disclosure the Department would still not hold the information to enable it to be released.

The Decision

38. The Commissioner's decision is that the following elements of the request were not dealt with in accordance with the Act:
- Regulation 14(3)(a) in that the DoE failed to specify the exception it relied on to refuse the request.
39. The Commissioner also finds that, on the balance of probabilities, no recorded information falling within the scope of the complainant's request is held by the DoE.

Steps Required

40. The Commissioner requires no steps to be taken.

Right of Appeal

41. 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

42. 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.
43. 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 1st day of August 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Environmental Information Regulations 2004

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 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;

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).