

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

Decision Notice

Date: 31 January 2011

Public Authority: City of Bradford Metropolitan District Council
Address: City Hall
Centenary Square
Bradford
West Yorkshire
BD1 1HY

Summary

The complainant requested copies of all correspondence between the council and a developer, Westfield, regarding a city centre development in Bradford during the last twelve months. The council provided some information but withheld one document on the basis that section 43 of the Act applied. The Commissioner's decision is that the information is environmental information and that the council should have considered the information under the Regulations. The council stated that the information should therefore be exempt under Regulation 12(5)(e). The Commissioner's decision is that Regulation 12(5)(e) is engaged however the public interest in disclosing the information outweighs that of maintaining the exception. He therefore finds the public authority in breach of Regulations 5(1), 5(2) and 14(3).

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.

The Request

3. On 25 November 2009 the complainant requested from the council:

"I would like copies of all correspondence between the local authority and the Westfield corporation regarding the city centre development during the last twelve months."
4. The council responded to the complainant on 23 December 2009. It provided some information but stated it was withholding one document on the basis that section 43 applied. Section 43 relates to information which is commercially sensitive.
5. On 4 January 2010 the complainant asked the council to review its decision.
6. The council provided a substantive response on 5 February 2010. It stated that there was only one withheld document and that it had been correct to apply section 43 to that document.

The Investigation

Scope of the case

7. On 16 February 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 whether the information he requested should have been disclosed to him.

Chronology

8. On 22 March 2010 the Commissioner wrote to the authority and informed it that he had received a complaint.
9. On 5 May 2010 the Commissioner wrote to the council stating that he was preparing to investigate the case. He asked the council to provide the withheld information and any arguments it wished to submit in support of its position.

10. On 2 July 2010 the council responded. It provided a copy of the withheld information together with further arguments in support of its position. It also stated that it had found further information which it believed fell within the scope of the request and that it was happy to disclose this information to the complainant if the Commissioner agreed for it to do so.
11. On 3 September 2010 the Commissioner wrote to the council. He asked it to reconsider whether the withheld information was in fact environmental information. He also asked it to provide further argument in support of its view that the information was exempt from disclosure. He asked the council to provide the additional information it had found to the complainant.
12. The council responded on 30 September 2010. It confirmed that it had now disclosed the additional information to the complainant and responded to the Commissioner's questions. It provided a substantive response from the developer's legal advisors arguing that a) the information was not environmental information and should rightly be considered under the Act, and b) that the information should be withheld. It also argued, in the alternative, that the information should be considered exempt under Regulation 12(5)(e) should the Commissioner disagree with its findings that the information was not environmental information.
13. On 12 October 2010 the Commissioner wrote to the council asking it for clarification on 2 further points. The council responded to those points on 26 October 2010.

Analysis

Substantive Procedural Matters

Is the information environmental information?

14. The council argues that the information is not environmental information and that it was correct to consider it under the Act.
15. The Commissioner has considered the information concerned. He is unable to fully explain his consideration of the nature of the information or the arguments submitted by the council in favour of the information not being environmental within this Decision Notice. Doing so would reveal the nature or content of the withheld information

which would effectively prejudice the public authority's right to maintain its position that the information should be withheld at appeal. The Commissioner has therefore provided the council with a separate confidential schedule to this Decision Notice which explains his decision in greater detail and includes a detailed analysis of his findings.

16. The Commissioner's decision is that the information is environmental information and that it should therefore have considered the information under the Regulations.
17. Given this finding, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.
18. The Commissioner also notes that the council found relevant information subsequent to its refusal notice to the complainant, and after it had reviewed its decision to refuse the request. The Commissioner considers that this is a breach of Regulations 5(1) and 5(2) of the Act in that the council did not confirm to the complainant that it held the information and did not provide it to him.

Exemptions

Regulation 12(5)(e)

19. The council applied regulation 12(5)(e) to the information. Regulation 12(5)(e) states:

'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest...'

20. The criteria for section 12(5)(e) to be engaged are:
 - i) Is the information commercial or industrial in nature?
 - ii) Is the information subject to a duty of confidence which is provided by law?
 - iii) Is confidentiality required to protect a legitimate economic interest?
 - iv) Would that confidentiality be adversely affected by disclosure?

21. The Commissioner has therefore considered the council's submissions and the withheld information in relation to these criteria. Once again he cannot provide a full explanation behind his considerations within the body of this notice. He has therefore included full arguments within the confidential schedule which will be provided to the public authority only.

Is the information commercial or industrial in nature?

22. The information in question is a single piece of correspondence between the council and the developers. The information relates to the ongoing commercial relationship between the parties. The Commissioner is therefore satisfied that the information is commercial in nature.

Is the information subject to a duty of confidence which is provided by law?

23. The council argues that the information relates to its ongoing commercial relationship with the developer and that it is commercially confidential. The Commissioner has considered whether the information meets the criteria for a common law duty of confidence to exist. He is satisfied that the information was created or provided in circumstances giving rise to an obligation of confidence. He is further satisfied that the information is not trivial and that it is not widely known or in the public domain and therefore considers that the information has the necessary quality of confidence. The Commissioner is unable to elaborate further on the arguments submitted by the council in this respect in the main body of the Decision Notice. However his decision is that the information is confidential for the purposes of Regulation 12(5)(e), for the reasons specified in the confidential annex to this Notice.

Is confidentiality required to protect a legitimate economic interest?

24. In the confidential schedule the Commissioner considers arguments submitted by the council and the developer that the information is commercially sensitive to the developer and that its disclosure would have an adverse effect on its legitimate economic interests. For the reasons given previously he is unable to elaborate on these arguments in the main body of the Decision Notice, However, his decision is that the argued adverse effect would result from disclosure of the withheld information in this case.

Public interest arguments in favour of disclosing the requested information

25. The Commissioner has considered the following public interest arguments in favour of disclosing the requested information:

- The public interest in public authorities being transparent about their use of public resources (i.e. public money and/or land).
- The public interest in creating confidence in the decisions (including financial decisions) taken by authorities.
- The public interest in allowing the scrutiny of agreements entered into by public authorities that will have a marked effect on the community and the economy of the area local to the development.
- The public interest in environmental information being disclosed, particularly where the results of the agreement have had significant detrimental impact on businesses and individual within central Bradford.
- The public interest in allowing greater public participation in decisions affecting the environment. This is a strong public interest argument in favour of disclosure, particularly taking into account the aims of EU Directive the EIR are derived from and the Aarhus Convention that the Directive stems from. Both stress the importance of access to information to support public participation in environmental decision making.

Public interest arguments in favour of maintaining the exception

26. The central public interest in favour of maintaining the exception revolves around the potential for any disclosure of the information to harm the prospects for the development to proceed in a timely manner. The Commissioner recognises that this would be detrimental to the commercial interests of the developer.

27. There is also a public interest in allowing commercial agreements of a sensitive nature to be carried out outside of the public eye whilst circumstances can still be influenced by negative press coverage. The Commissioner however notes that this directly clashes with the intention of the Aarhus agreement to allow greater public participation in decision making.

28. The Commissioner has included other, more specific arguments within the confidential annex to this Decision Notice.

Balance of the public interest arguments

29. The Commissioner has considered the above, together with other more specific arguments which are contained within the confidential annex to this Decision Notice.
30. His decision is that the public interest in this case rests with the disclosure of the information.

The Decision

31. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- The council incorrectly considered the information under the provisions of the Freedom of Information Act rather than the Environmental Information Regulations 2004.
 - In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations the council breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information nor its reasons for relying upon that exception.
 - The council correctly applied Regulation 12(5)(e) to the information. However the public interest in maintaining the exception does not outweigh the public interest in the information being disclosed. Therefore the council breached regulation 5(1) in not providing the requested information to the complainant.
 - The authority failed to make the information available to the complainant within 20 working days. This is a breach of Regulation 5(2).
 - The council incorrectly withheld information which it subsequently provided to the applicant as outlined in paragraph 18 above. This was a breach of Regulation 5(1) and 5(2).

Steps Required

32. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose the information to the complainant.

33. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

34. 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.

Right of Appeal

35. 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

36. 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.
37. 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 31st day of January 2011

Signed

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

Legal Annex

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 5 - Duty to make available environmental information on request

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 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) 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 12(2) A public authority shall apply a presumption in favour of disclosure.

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) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;