

Environmental Information Regulations 2004 (EIR)

Decision Notice

Date: 27 August 2014

Public Authority: Department of the Environment
Address: 10-18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

1. The complainant requested an un-redacted copy of a letter. The Department claimed that it did not hold the requested information at the time the complainant made his request. The Commissioner's decision is that the Department did not hold the requested information at the time of the request and was therefore entitled to rely on the exception at regulation 12(4)(a) of the EIR.

Request and response

2. This complaint stems from a planning application submitted by the complainant to the Planning Service, part of the Department of the Environment. For clarity this decision notice refers to the Department throughout, as it is the public authority for the purposes of the EIR.
3. The complainant has advised the Commissioner that he inspected a redacted letter, relating to his planning application, on the Department's Planning Portal on 17 October 2013. The complainant says that a member of staff told him that the un-redacted letter contained defamatory comments about him. Subsequently the complainant made verbal requests to the Department for a copy of the un-redacted letter on 17 and 18 October 2013.
4. On 13 November 2013 the Department acknowledged the complainant's verbal requests. The Department advised that the un-redacted letter had been destroyed before the request was made, "in line with normal

practice". The Department therefore confirmed that it did not hold the requested information, although it did not cite any exceptions under the EIR.

5. The complainant wrote to the Commissioner on 14 November 2013 as he did not accept that the Department did not hold the requested information. Furthermore the complainant said that he had reported the letter to the local police who had asked him to obtain a copy of it as evidence. The complainant was concerned that the Department had accepted the letter as a valid objection to his planning application, even though it had been redacted before being published.
6. The Commissioner asked the complainant to request an internal review before he would accept the complaint as valid. The complainant duly requested an internal review on 18 December 2013, and the Department acknowledged this on 19 December 2013.

Scope of the case

7. The complainant wrote to the Commissioner on 12 March 2014 to advise that he had not yet received the outcome of the internal review. The Commissioner wrote to the Department on 14 May 2014 asking that it complete the internal review and advise the complainant of the outcome.
8. The Department responded to the Commissioner on 25 June 2014. The Department advised that it had completed the internal review in February 2014 but had inadvertently failed to communicate the outcome to the complainant. The Department said it would reissue this letter to the complainant. However the complainant advised the Commissioner on 22 August 2014 that he had still not received anything from the Department.
9. The complainant remains dissatisfied with the Department's handling of his request and has asked that the Commissioner issue a decision notice. The Commissioner would normally expect complainants to have exhausted the public authority's internal review procedure before making a complaint under the EIR. However, given the time taken to date the Commissioner considered it appropriate to waive this requirement. In addition the Commissioner considers that the information provided to him by the Department has enabled him to complete his investigation in this case.

10. Therefore the scope of this case was to determine whether the Department did in fact hold the requested information at the time of the complainant's request.

Reasons for decision

Regulation 12(4)(a): information not held

11. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to provide the requested information to the extent that it does not hold that information when the request is received.
12. The key question in this case is whether the Department held the requested information, i.e. the un-redacted letter, at the time of the request. The Commissioner can only consider whether recorded information is in fact held (or was at the time of the request), he cannot consider whether information ought to be held.
13. The complainant accepts that the un-redacted letter has now been destroyed but remains of the view that it ought to have been provided to him at the time of his request. When considering whether information is held, the Commissioner uses the civil standard of proof, i.e. whether it is likely or unlikely on the balance of probabilities. This approach has been supported by the Information Rights Tribunal in a number of previous judgments.
14. The Commissioner has had sight of the redacted letter and notes that it contains a number of departmental stamps. These indicate that the un-redacted letter was received by the Department on 10 October 2013, logged on 14 October and scanned to ePIC, the Planning Service electronic records management system, on 15 October. The complainant made his request two days later, ie on 17 October 2013, so the Commissioner asked the Department to explain how long it usually takes for a letter to be logged, scanned, redacted and un-redacted versions destroyed.
15. The complainant was also concerned that, even though the un-redacted letter had apparently been destroyed by 17 October, the member of staff had been able to describe, albeit in broad terms, its content. The Commissioner understood that this had led the complainant to suspect that the letter had either not been destroyed or its content had been circulated, and he asked the Department to comment on this aspect of the complaint.

16. The Department provided the Commissioner with a copy of its policy and procedure that explains how it handles information held in ePIC and published online. The DOE has also explained how the letter in question was handled before and after it was redacted.
17. The Commissioner understands that the un-redacted letter was received by the Department on 10 October 2013. The Department has confirmed to the Commissioner that the un-redacted letter indicated that the writer wished to make a comment on the complainant's planning application. However, the letter did not in fact contain any information relevant to the planning application.
18. The Department has clarified that in hindsight it ought to have destroyed the entire letter, as it is only required to retain information relevant to a particular planning application. However the Department accepts that the letter was redacted and published in error on 15 October 2013.
19. The Department provided the Commissioner with a copy of ePIC Advice Notice 14, which says that:

"If the Case Officer determines that removal of specific information is required, they will delete the specified information with a black marker, ensuring it can no longer be read. A photocopy of the documents should then be taken to ensure that the information can still not be read, especially if held up to the light. The document should also be signed and dated by the Case Officer before passing it to the Admin Staff for scanning. The original document should be shredded and the photocopy held within the working file".
20. The Department was unable to confirm exactly when the un-redacted letter was destroyed, but stressed that it was destroyed in line with Advice Notice 14. However, the Commissioner considers it reasonable to accept that the un-redacted letter was read and redacted, and the un-redacted version destroyed, within two days of being received, i.e. before the complainant made his request on 17 October 2013.
21. The Department clarified that the staff member referred to by the complainant was a case officer, and as such would have read the un-redacted letter when it was received. Thus the staff member was able to describe the general contents of the un-redacted letter to the complainant after it had been destroyed. The Commissioner accepts as reasonable the Department's explanation for the staff member being able to describe the un-redacted letter to the complainant.

22. The Commissioner has also considered whether, if he were to uphold the complaint, he could specify any steps that the Department could be required to take. For example, the Commissioner could instruct the Department to undertake a more thorough search if he found that the initial search was inadequate. However in this case a further search is not necessary since all parties accept, albeit with some dissatisfaction, that the Department does not hold the information.
23. The Commissioner appreciates the complainant's frustration, but is of the view that there is nothing more he can oblige the Department to do in relation to the request. For the reasons set out above the Commissioner finds, on the balance of probabilities, that the Department did not hold the un-redacted letter at the time of the complainant's request.

Procedural requirements

Refusal notice

24. If a public authority refuses a request for environmental information it is obliged under regulation 14 of the EIR to issue a refusal notice. Regulation 14(3) provides that this notice must specify the reasons not to disclose the requested information, including any exception relied on.
25. In this case the Department refused the request on the grounds that it did not hold the requested information at the time of the request. Therefore the Department's letter of 13 November 2013 ought to have cited the exception at regulation 12(4)(a) of the EIR. The Department did state that the requested information was not held, but the failure to cite the appropriate exception constitutes a failure to comply with regulation 14(3) of the EIR.

Internal review

26. Regulation 11 of the EIR provides that a public authority must conduct an internal review if requested by an applicant. Regulation 11(4) provides that the review must be completed within 40 working days.
27. The complainant wrote to the Department on 18 December 2013 to request an internal review. As set out at paragraph 8 above, the Department accepted that it had failed to communicate the outcome of the internal review to the complainant within the time for compliance. On 25 June 2014 the Department advised the Commissioner that it would now write to the complainant, but at the time of drafting this decision notice the complainant had yet to receive any further correspondence from the Department. As the Commissioner has been

able to complete his investigation and make a finding in this case he does not require the Department to take any further action with regard to the internal review. Nevertheless the Commissioner must also find that the Department failed to comply with regulation 11(4) of the EIR.

Right of appeal

28. 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
LEICESTER
LE1 8DJ

Tel: 0300 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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